EXTREMELY BROAD LAWS

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Extremely broad laws offend due process. Although the problem has not been lost on courts, their solution to date has been haphazard: casting breadth as a species of uncertainty—ambiguity or vagueness—and repurposing uncertainty-focused doctrine accordingly. The trouble is, breadth and uncertainty are not the same. They have different analytic features and raise distinct concerns, making the tools designed to resolve uncertainty ill-suited to reining in breadth. Vague and ambiguous laws deprive people of notice about what the law requires. They evoke the Star Chamber and Kafka stories—the dread of inhabiting an incomprehensible legal order. With broad laws, the issue is not notice but reach. Broad statutes can be plenty clear about what they require. The problem is they sweep in too much everyday conduct, arousing worry about outsized power and arbitrary enforcement. Here, the literary specter is not Kafka, but Orwell, and the nightmare is not an opaque legal system; it is a police state. Extremely broad laws, in this sense, are problematic for the same basic reason as general warrants: they afford state officials practically boundless justification to interfere with private life. After expounding the problem abstractly, I close by exploring how courts might tackle the breadth problem in practice—and I ultimately suggest that judges should be empowered to hold statutes "void-for-breadth."

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INTRODUCTION

Law must announce its demands. If ordinary people do not understand what is required of them—if consulting statute books and case reporters would not inform a reasonable person of her legal duties—the rule of law falters. And constitutionally, due-process limits on legislative and executive power come into effect.[1]

That much is axiomatic. More controversial are laws that clearly announce their demands yet seem to demand too much—sweeping so broadly that ordinary people, despite being able to understand their duties, cannot hope to conform their behavior or predict law's operation in practice. How do rule of law principles bear on statutes that, as Justice Kagan recently put it, are "very broad [but] also very clear"?[2] Can a law subvert due process simply by reaching *too much* conduct, by implicating too large a swath of everyday life?

Yes, I will argue—and courts appear to agree. The trouble is that constitutional doctrine offers few tools, at present, for curtailing statutory breadth head on.[3] So judges have adopted a second-best solution: recharacterizing breadth

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1. *See, e.g.*, Kolender v. Lawson, 461 U.S. 352, 357 (1983) (explaining that due process is denied when "ordinary people [do not] understand what conduct is prohibited . . . ."); Coates v. City of Cincinnati, 402 U.S. 611, 614 (1971) (stating that the Due Process Clause forbids "unascertainable standards" that leave "[people] of common intelligence [to] guess at [the law's] meaning . . . .").

2. Yates v. United States, 135 S. Ct. 1074, 1098 (2015) (Kagan, J., dissenting).

3. A notable exception is the "overbreadth" rule in First Amendment law, which allows "a litigant . . . to bring a facial challenge to a statute despite the fact that the application of the statute to the litigant under the facts of the case does not violate the Constitution," by "argu[ing] that the entire statute should be struck down because the statute could be applied unconstitutionally in certain hypothetical fact patterns." Luke Meier, *A Broad Attack on Overbreadth*, 40 VAL. U. L. REV. 113, 113 (2005). On reflection, however, the overbreadth rule is not about breadth per se; it does not support the proposition—as I explore here—that a statute can be unconstitutional *because of* its breadth. *See* Massachusetts v. Oakes, 491 U.S. 576, 581 (1989) (explaining that overbreadth is "predicated on the danger that an overly broad

as a species of linguistic uncertainty—vagueness or ambiguity—and repurposing tools designed for those problems, the void-for-vagueness doctrine and the rule of lenity, to constrain the reach of broad laws.

Functionally, the results have been acceptable, if sometimes unsatisfying. But conceptually, the results verge on incoherent because breadth simply *is not* uncertainty. Both problems relate to due process, but they differ fundamentally and call for distinct forms of relief. Uncertainty is about notice. The key principle is that people cannot be expected to abide by impenetrable demands. The fictional touchstone is Kafka, and the historical analogue, the Star Chamber.

Breadth, on the other hand, is about governmental overreach. Extremely broad laws can be (and often are) plenty clear about what they demand. The problem is they demand too much; their demands are oppressive. Here, the dystopian resonance is not to Kafka, but to Orwell. And the paradigm case, historically speaking, is not the Star Chamber, but general warrants—those scraps of parchment that, foreshadowing twentieth-century police states, conferred virtually limitless power to agents of the Crown.

With these historical and literary parallels in view, this Essay aims to trace the analytic distinction between breadth and uncertainty, and to explore the normative worry each calls forth. Having done so, I conclude with some thoughts about how courts can identify, and in practice push back against, constitutionally troubling forms of statutory breadth. Ultimately, I argue that judges should be empowered to hold statutes "void-for-breadth" as a means of both reining in enforcement and disciplining the legislative process.

Before jumping into the analysis, it will be useful to describe a few cases—to get a flavor both for what I mean by "extreme breadth," and how courts (mistakenly) conflate breadth with uncertainty.

I. SOME RECENT EXAMPLES

Cases involving the conflation of breadth and uncertainty follow a simple pattern. First, the court observes that, naturally construed, Statute *X* reaches Fact-Pattern *Y*—an individual instance of conduct, or a category of conduct, which many people would find too minor, or too out of sync with the apparent regulatory purpose, to be sensibly regulated by Statute *X*. Second, the court deems Statute *X* some combination of "ambiguous" or "vague" because it reaches Fact-Pattern *Y*. Third, the court either: (1) imposes an out-of-thin-air limiting principle on Statute *X*, designed to cordon off Fact-Pattern *Y* from its scope; or (2) declares Statute *X* unconstitutionally vague in light of its application to Fact-Pattern *Y*.

Besides this three-step shuffle, breadth cases typically share another commonality as well: dissenting opinions that highlight the problem. In other words,

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statute, if left in place, may cause persons *whose expression is constitutionally protected* to refrain from exercising their rights for fear of criminal sanctions. . . .") (emphasis added). Rather, the overbreadth rule is, in effect, a relaxed jurisdictional doctrine—one that permits courts to ask whether a statute is consistent with the First Amendment in the abstract, without having to wait for a plausibly unconstitutional application to arise.

and not surprisingly, the conflation of breadth and uncertainty is a controversial practice. It often inspires judges outside the majority to cry foul—censuring their colleagues for refusing to acknowledge that dismay about the law's *sweep*, not uncertainty about its *content*, is the actual source of consternation.[4] Behold a few recent examples.[5]

The first is *Marinello v. United States*, which involved § 7212(a)—the "Omnibus Clause"—of the Internal Revenue Code.[6] Section 7212(a) criminalizes the act of "corruptly or by force or threat of force . . . obstruct[ing] or imped[ing], or endeavor[ing] to obstruct or impede, the due administration of [taxes]." The question in *Marinello* was which kinds of "obstruction" or "impediment" qualify as predicate acts under the Omnibus Clause. In terms of actus reus, how far does the statute reach?

According to the government, the answer was simple: the Omnibus Clause reaches all noncompliance with tax rules. "Impediment," after all, means "a thing that impedes," and there can be no doubt that deliberate acts of noncompliance *impede* the overall administration of taxes. Of course, as the Government acknowledged, acts of noncompliance come in many different guises, some quite serious, others relatively innocuous. But this, the Government argued, is where the mens rea prong comes in. To be convicted under the Omnibus Clause, it is not enough to intend to be noncompliant; one must do so "corruptly," a requirement that effectively renders the clause inert in garden-variety cases.[7]

The Court disagreed. Holding for Petitioner, Justice Breyer reasoned that "impediment" was ambiguous between: (1) the broad interpretation urged by the government; and (2) a narrower interpretation, bolstered by a (non-textual) "nexus requirement" between the act of impeding the "administration" of taxes and the specific type of administration in question. Specifically, Breyer held that for an act

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4. The pattern generalizes, but with respect to the cases discussed below, see *Marinello v. United States*, 138 S. Ct. 1101, 1116 (2018) (Thomas, J., dissenting); *Yates*, 135 S.Ct. at 1098–99 (2015) (Kagan, J., dissenting); and *City of Chicago v. Morales*, 527 U.S. 41, 90–92 (1999) (Scalia, J., dissenting).

5. These are not the only recent examples of the Court pushing back against extreme breadth. They are simply the clearest instances of the "breadth as uncertainty" logic. Other recent anti-breadth cases include, for instance, *Maslenjak v. United States*, 137 S. Ct. 1918, 1923–24 (2017), in which the government argued that any "false statement" made during the naturalization process, no matter how innocuous, and regardless of how many years (or decades) have elapsed since the statement occurred, is a sufficient basis to revoke someone's citizenship; and *Bond v. United States*, 572 U.S. 844, 852–53 (2014), in which the government argued that a jilted spouse who tried (unsuccessfully) to use a household toxin to give her husband's mistress an "uncomfortable rash" was guilty of "possessing and using a chemical weapon," as proscribed by international law. See also *Mellouli v. Lynch*, 135 S. Ct. 1980 (2015) and *Moncrieffe v. Holder*, 569 U.S. 184 (2013), both of which concern a similar but slightly distinct dynamic in the immigration context—i.e., whether extremely minor conduct reflected in state-level convictions can, consistent with the Court's "categorical approach," trigger deportation (and other immigration penalties).

6. 138 S. Ct. 1101 (2018).

7. *See id.* at 1108.

of noncompliance to qualify as "impeding" a tax proceeding, the "Government must [point to a] proceeding" that is both more specific than the general, year-over-year collection of taxes, and "pending at the time the defendant engaged in the obstructive conduct or, at the least, was . . . reasonably foreseeable by the defendant."[8] Adopting the other construction, Breyer reasoned, would cause too many cases of minor wrongdoing to come within the statute's reach. "Interpreted broadly," wrote Breyer, "the provision could apply to a person who pays a babysitter $41 per week in cash without withholding taxes, leaves a large cash tip in a restaurant, fails to keep donation receipts from every charity to which he or she contributes, or fails to provide every record to an accountant."[9]

I share the majority's dismay at this implication. But the problem, ultimately, is not one of uncertainty. All noncompliance with tax law is, *ipso facto*, an "impediment" of the "administration of [taxes]." The problem is that, taken seriously, the Omnibus Clause would convert even the most minute instances of shoddy record-keeping into obstruction of justice offenses carrying up to three years of incarceration. In other words, the problem—as Justice Kagan suggested during oral argument—is the law's "ungodly br[eadth]."[10]

Another, similar example—also involving obstruction of justice—is *Yates v. United States*, which concerned § 1519 of the Sarbanes-Oxley Act, a law passed post-Enron to stave off corporate fraud.[11] Section 1519 criminalizes, in relevant part, "destroy[ing] . . . any record, document, or tangible object with the intent to impede, obstruct, or influence" a federal investigation.[12] Mr. Yates was a less-than-righteous boat captain in the business of, among other things, catching undersized snapper. Realizing that the fishing and wildlife authorities were on his tail, Yates instructed his crewmembers to throw a number of too-small fish back into the ocean, leading to a § 1519 prosecution—on the grounds that fish are "tangible objects," and Yates had disposed of them with the explicit purpose of evading federal law enforcement.

Yates appealed, and the Court eventually agreed with him: destroying a few fish, while hardly virtuous, is not the sort of thing that warrants up to 20 years in federal prison. To reach this conclusion, Justice Ginsburg explicitly leaned on the uncertainty analogy. Although fish are definitely objects—and although it would be hard, abiding the normal parameters of English, to call them intangible—Congress's intent, Ginsburg reasoned, was ambiguous. And "ambiguity . . . should be resolved in favor of lenity," not "reading [§ 1519] expansively to create a coverall spoliation-

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8. *Id.* at 1110.

9. *Id.* at 1108. For background on the babysitter example, in particular, see 26 C.F.R. § 31.3102–1(a) (2017); INTERNAL REVENUE SERVICE, PUB. NO. 926, HOUSEHOLD EMPLOYER'S TAX GUIDE FOR USE IN 2019 5–6 (2018), https://www.irs.gov/pub/irs-pdf/p926.pdf.

10. *See* Transcript of Oral Argument at 22, Marinello v. United States, 138 S. Ct. 1101 (2018) (No. 16-1144) ("KAGAN: . . .This statute, taken on its face, is . . . ungodly broad").

11. For background on the Sarbanes-Oxley Act, see *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 484–87 (2010).

12. 18 U.S.C. § 1519 (2019).

of-evidence statute."[13] As in *Marinello*, the *Yates* Court viewed the statute as uncertain between two readings: (1) a literal construction of "tangible objects" that includes—gasp—all tangible objects; and (2) a finessed construction that includes only tangible objects "used to record or preserve information."[14]

Once again, I share in the majority's dismay; but once again, the problem seems *not* to be one of genuine uncertainty. Section 1519 may or may not be wise—I do not know—but its pitch is undeniably broad, and the phrase "tangible objects" most certainly encompasses all tangible objects related to an ongoing investigation. To quote Justice Kagan in dissent: "[e]ven in its most robust form, [the] rule [of lenity] only kicks in when, after all legitimate tools of interpretation have been exhausted, a reasonable doubt persists regarding whether Congress has made the defendant's conduct a federal crime," but here, "[n]o such doubt lingers."[15] And although:

> the [Court] points to the breadth of [§ 1519] as [if] breadth were equivalent to ambiguity, . . . [i]t is not. Section 1519 *is* very broad. It is also very clear. Every traditional tool of statutory interpretation points in the same direction, toward 'object' meaning object [and including fish]. Lenity offers no proper refuge from that straightforward (even though capacious) construction.[16]

The final example, at least for the moment, is *City of Chicago v. Morales*, in which the Court struck down a Chicago ordinance that effectively criminalized "loitering" by any group of people that included at least one "criminal street gang member."[17] To underscore the issue with this law, Justice Stevens conjured the following hypothetical. Imagine, he wrote, "a gang member and his father" hanging out near Wrigley Field,[18] and then ask: are the two there because they wish (or one of them wishes) "to rob an unsuspecting fan," or are there they "just [trying] to get a glimpse of Sammy Sosa leaving the ballpark"?[19] There is, Stevens argued, no way to know. And that was just the problem—by flattening any distinction between cases like an impending robbery and the Sammy Sosa example, the ordinance deprived

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13. Yates v. United States, 135 S. Ct. 1074, 1088 (2015) (quoting Cleveland v. United States, 531 U.S. 12, 25 (2000)).

14. *Id.* at 1089.

15. *Id.* at 1098–99 (Kagan, J., dissenting) (quoting Abramski v. United States, 573 U.S. 169, 204 (2014) (Scalia, J., dissenting)) (internal quotation marks omitted).

16. *Id.*

17. 527 U.S. 41, 45–46, 64 (1999). To be precise, the ordinance criminalized the refusal to comply with a dispersal order from a police officer *in the event* that one was loitering with any group of people that seemed to the officer to include at least one gang member. Whether this is meaningfully distinct from an ordinance that directly prohibits loitering—or whether it is best conceptualized as a direct anti-loitering statute that happens to carry no direct penalty (but still makes loitering illegal, for how else would police be justified in issuing the dispersal order?)—may be an interesting metaphysical question. But it makes little difference in practice, since the record contained ample evidence of the ordinance being used, in effect, to criminalize loitering. *See id.* at 49–51, 58.

18. *Id.* at 60.

19. *Id.*

people of a meaningful opportunity to "conform[] [their] conduct to the law,"[20] because either way, "if [the] purpose [of the gang member and his father] is not apparent to a nearby police officer, she may—indeed, she 'shall'—order them to disperse."[21]

Morales is styled as a vagueness case; the plurality opinion invalidated the ordinance on that basis. But how so? In truth, the ordinance was direct and lucid. It simply reached—as spotlighted in the Sammy Sosa example—a wide array of conduct that no one would reasonably regard as forbidden, let alone *malum in se*. Little surprise then, that halfway through the opinion, Justice Stevens performed an about-face: abandoning the pretense that uncertainty, in the usual sense, was the problem. Rather,

> [s]ince the city cannot conceivably have meant to criminalize each instance a citizen stands in public with a gang member, the vagueness that dooms this ordinance is not the product of uncertainty about the normal meaning of 'loitering,' but rather about *what loitering is covered by the ordinance and what is not*.[22]

The issue, in other words, was not lack of clarity. It was that the ordinance clearly swept in "a substantial amount of innocent conduct,"[23] leaving ordinary people to guess at "what was [actually] forbidden" in practice.[24]

II. DISENTANGLING BREADTH AND UNCERTAINTY

With these examples in tow, we are now in a position to trace the analytic distinction between breadth and uncertainty more precisely. Although scholars have been quick to criticize the Court's interpretive gymnastics in cases like *Yates* and *Marinello*,[25] the deeper point—the category error—has proven elusive. Although

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20. *Id.* at 58.
21. *Id.* at 60.
22. *Id.* at 57 (emphasis added).
23. *Id.* at 60.
24. *See* Dickerson v. Napolitano, 604 F.3d 732, 746 (2d Cir. 2010) (describing the *Morales* opinion as holding "that an anti-loitering statute that prohibited standing in public with a gang member provided insufficient notice to a reasonable person of what was forbidden *despite the fact that the literal meaning of the statute was clear*.") (emphasis added).
25. *See, e.g.*, Shon Hopwood, *Clarity in Criminal Law*, 54 AM. CRIM. L. REV. 695, 726–27 (2017) (using *Bond* and *Yates* to warn against the judicial "impulse to create law" and "rewrite . . . statutes" in the face of over criminalization); Neal Kumar Katyal & Thomas P. Schmidt, *Active Avoidance: The Modern Supreme Court and Legal Change*, 128 HARV. L. REV. 2109, 2112 (2015) (describing opinions like *Bond* as "tortured constructions" that "bear little resemblance to [the] laws actually passed"); Robert J. Pushaw, Jr., *Talking Textualism, Practicing Pragmatism: Rethinking the Supreme Court's Approach to Statutory Interpretation*, 51 GA. L. REV. 121, 177 (2016) ("The [*Bond*] majority purported to take a textualist approach, but instead made up an ambiguity in the phrase 'chemical weapon' and resolved it by considering non-textual factors. . . . Indeed, it is hard to imagine a more unambiguous expression of Congress's intent than an explicit statutory definition," as was present in *Bond*); *Id.* at 183 ("In *Yates*, the [interpretive] canons were deployed as window dressing to rationalize an interpretation reached on other grounds."); *cf.* Ryan Doeffler, *High-Stakes Interpretation*, 116 MICH. L. REV. 523, 539 (2018) (arguing that the Court's approach

breadth and uncertainty often travel together, if nothing else because both can be the byproduct of legislative laziness,[26] the distinction between them is categorical, and on inspection, fairly easy to see.

The distinction is best understood by comparing how breadth and uncertainty operate abstractly versus contextually. In the case of uncertainty, the problem exists in the abstract, and contextualization is potentially curative.[27] Consider three examples:

A. Queens are powerful.

B. Don't bring your queen out too early in the game.

C. Kings are safest when their knights stay close.

All three of these sentences are uncertain. Sentence *A* is ambiguous because it could refer to human royalty or, equally, to chess. Sentence *B* is vague because, while clearly referring to chess, it produces a set of hard-to-parse middle cases—reasonable minds may disagree about what qualifies as "too early." And sentence *C* is both ambiguous and vague. Not only is it unclear if the advice is directed to heads of state or to chess players, it is also unclear (on either construction) how "close" is close enough to ensure safety.[28]

By the same token, all three sentences become more certain the more one knows about the context. In the case of Sentence *A*, this is obvious; one hardly needs to know anything, just a few background facts, to determine if the speaker of the phrase is talking about monarchy or about a board game. Things are slightly more complicated with Sentences *B* and *C*—but only slightly. An experienced player (who agreed with the advice of Sentence *B*) would have little difficulty, in the context of a particular game, deciding whether it was "too early" to bring out her queen. The same goes for Sentence *C*. It is *only* in the abstract that keeping one's knights "close" to one's king is a vague mandate. In actual play, the vagueness evaporates.

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to interpretive questions changes in "higher-stakes" contexts, leading to diagnoses of "ambiguity" where the Court might otherwise view language as unambiguous). *But see* Richard M. Re, *The New Holy Trinity*, 18 GREENBAG 2d 407, 409–13 (2015) (describing *Bond* and *Yates* as examples of a newly-revived purposivist trend in statutory interpretation).

26. *See* David Kwok, *Is Vagueness Choking the White Collar Statute?*, 53 GA. L. REV. 495, 504–08 (2018) (offering a preliminary account of the distinction between vagueness and breadth, while also arguing that the two problems tend to travel together).

27. This does not necessarily mean, of course, that all indeterminacy can be eliminated through contextualization. Certain forms of vagueness, especially, are fated to persist—since vagueness is an affirmative tool of language.

28. For further background on the vagueness-ambiguity distinction, see KEES VAN DEEMTER, NOT EXACTLY: IN PRAISE OF VAGUENESS 110–15 (2010); Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. CMT. 95, 97–98 (2010) (discussing the distinction in the context of legal interpretation). *See also* Jill C. Anderson, *Misreading Like A Lawyer: Cognitive Bias in Statutory Interpretation*, 127 HARV. L. REV. 1521 (2014) (exploring different sources of ambiguity in language and in law).

When it comes to breadth, on the other hand, contextualization does not solve the problem—it creates it. What makes a rule or heuristic seem overly broad is not its abstract meaning but its operation in context: the implausible-seeming *results* to which it leads.

In this vein, consider a fourth sentence:

D. In chess, never exchange your queen for a bishop.[29]

This sentence is certain; it furnishes clear advice. If an expert chess player (let's call him Magnus) were to express doubt about the "certainty" of Sentence *D*, he would not be talking about the rule's abstract meaning. Rather, he would be pointing to its operation in context. Imagine, for example, a circumstance in which trading one's queen for a bishop immediately enables checkmate. Surely—we can imagine Magnus saying—it would be ludicrous to follow the advice in *that* case! The whole point of the advice is to maximize one's odds of winning the game. If the advice comes manifestly into collision with that goal, clearly it is the goal, not the advice, that should triumph. However plain the meaning of Sentence *D* might be, it would be silly to follow the rule in a case where flouting it, instead, enables victory.

The key point, however, is what *kind* of objection this represents. Were Magnus to conclude that Sentence *D* should not apply across the board,[30] he would not be making a descriptive claim about the rule's content. He would be making a normative claim about the rule's wisdom. More precisely, Magnus would be suggesting that the rule, as formulated, is *context-insensitive*; that is, he (and we) can imagine a different version of the rule—call it Sentence D^1—that delivers the same substantive command but narrows its reach by distinguishing the set of cases (*Set X*) in which the command makes normative sense from the set of cases (*Set Y*) in which it does not. So, for instance, Sentence D^1 might read (per the example above): "Never let your queen be captured by a bishop, unless doing so forces checkmate." Or it might read: "Never let your queen be captured by a bishop, unless you stand to capture four of your opponent's pieces in response." And so on; the variations are infinite. The point is that Sentence D^1, *whatever* its content, would not be an interpretation of Sentence *D*. It would be a different claim—a more context-sensitive version of the rule, attending, in a way the original rule does not, to the normative differences between *Set X* and *Set Y*.

The same is not true of Sentences *A*, *B*, or *C*. In those cases, the problem is linguistic, not normative, which makes it possible to imagine counterfactual

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29. At first, I formulated this example as "Never let your queen be captured by a bishop," and then as "Never exchange your queen for a bishop." But one commentator pointed out that a human monarch could, in principle, be detained by a ranking member of the clergy, and likewise, there *could* be situations (involving hostages, say) in which the exchange of a queen for a bishop, though inadvisable generally, might prove efficacious—rendering the original sentence ambiguous in addition to broad. Chastened, and with newfound appreciation for the difficulties faced by lawmakers, I decided to modify the example.

30. Note that I am assuming, arguendo, that Magnus believes the rule should apply in *some* cases; in other words, he does not think the rule is completely void of merit. This assumption is harmless for my purposes because in practice, courts will rarely, if ever, deal with rules that have no valid applications. But it still makes a conceptual difference. If the rule applied to no cases whatsoever, a different analysis might follow.

versions—Sentence A^1, Sentence B^1, and Sentence C^1—that solve the problem by clarifying the content of the relevant sentence without pronouncing on (or even inquiring into) its wisdom. So, for example, Sentence A^1 might read: "In the game of chess, queens are powerful." Or, more convolutedly: "Queens are powerful, and when I say 'queen,' I mean a chess piece." Likewise, Sentence B^1 might read (perhaps based on data from a poll of grandmasters): "Don't bring your queen out until move seven or eight." And Sentence C^1—with apologies to the English language—might read: "Kings, that is, the most vulnerable of chess pieces, are safest when their knights stay close, by which I mean no more than three columns or rows away."

With modifications like these, Sentences *A*, *B*, and *C* would become certain; the linguistic infirmity would disappear. The resulting claims may be true or false, and the advice they furnish—for example, to maintain a relatively small distance on the board between one's knight(s) and one's king—may be wise or foolish. Regardless, Sentences A^1, B^1, and C^1 dissolve the uncertainty by further specifying the content of the original claims. This again stands in contrast to Sentence D^1, which did not specify the content of Sentence *D* so much as transform it. The original rule was plenty clear. The problem was that following it, in some cases, would lead to crazy results. In other words, the problem was inescapably normative; it reflected an intuition about how granular a rule *ought* to be, not an interpretive judgment about how granular the rule, as drafted, actually is.

So, pulling everything together, the four sentences coalesce into a taxonomy of indeterminacy and breadth:

A. Queens are powerful.

B. Don't bring your queen out too early in the game.

C. Kings are safest when their knights stay close.

D. In chess, never trade your queen for a bishop.

Sentence	Indeterminate or Broad?	Specific Problem	Source of Problem
A	Indeterminate	Ambiguity	Linguistic
B	Indeterminate	Vagueness	Linguistic
C	Indeterminate	Ambiguity & Vagueness	Linguistic
D	Broad	Context-Insensitivity	Normative

To put this back into conversation with the case law, recall *Yates*, which held that fish do not qualify (for purposes of Sarbanes-Oxley) as "tangible objects." In so holding, the plurality was able to circumvent the larger issue at the heart of the

case. It had no occasion to ask whether a statute that treats the destruction of fish as equivalent to a systematic corporate cover-up—and imposes a penalty of up to 20 years in federal prison for both—is coarse in a manner that offends due process. The question was, so to speak, moot. By reading "fish" out of the statutory scheme entirely, the plurality reserved the breadth issue for another day.

A clever fix—but reserving the issue for another day is not the same as resolving it.[31] Even assuming, arguendo, that the plurality's gambit can dispose of the specific facts of *Yates*, there are certainly *some* facts that would continue to raise alarm about context-insensitivity, even after the application of narrowing canons. Suppose, for instance, that Mr. (Captain?) Yates, having realized the authorities were on his trail, ordered his crew to destroy photos of noncompliant fish rather than actual fish.[32] In that case, the plurality's logic would falter. The very same canons of construction that Justice Ginsburg marshaled to limit "tangible objects" to those "used to record or preserve information"[33] would, when applied to photos, yield an inculpatory rather than lenient result. So too, for example, with respect to an executive's decision to discard a financially *de minimis* but embarrassing receipt (say, for pornography purchased in a hotel room using a company credit card during an SEC investigation)—or a homeowner's decision, on the eve of an IRS audit, to delete emails that indicate ongoing-but-unrecorded cash payments to a gardener.[34]

All of these examples, like *Yates* itself, involve very minor conduct, relative both to the culpability on display in the statute's paradigm case— systematic corporate fraud—and to the severity of the attendant penalty. But unlike *Yates*, there is no obvious linguistic fix to the fish-photos case, the pornography-receipt case, or the gardener-email case. They cannot be resolved with interpretive canons. The problem of context-insensitivity persists, forcing us to confront the constitutional issue head-on: that when Congress enacted § 1519, its "evident purpose . . . [was] to punish those who alter or destroy physical evidence—any physical evidence—with the intent of thwarting federal law enforcement."[35] The question is whether that sort of purpose, as expressed in the vastness of the resulting law, harmonizes with the requirements of due process. And the answer, at least in extreme cases, is no.

III. THE INSUFFICIENCY OF NOTICE

Fair enough—one might say—but so what? The *Yates* Court had no trouble finding something amiss about applying Sarbanes-Oxley to snapper-destruction; likewise with the other cases from Part I. What does it matter if courts adopt the labels of "ambiguity" and "vagueness," or if they apply (modified) versions of the

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31. *See, e.g.*, Katyal & Schmidt, *supra* note 25 (unpacking this distinction in the context of avoidance); Anita Krishnakumar, *Passive Avoidance*, 71 STAN. L. REV. (forthcoming 2019) (connecting this point explicitly to *Bond* and *Yates*).

32. *See* Transcript of Oral Argument at 20–22, Yates v. United States, 135 S. Ct. 1074 (2015) (No. 13-7451) (analyzing different variations of this hypothetical).

33. Yates v. United States, 135 S. Ct. 1074, 1089 (2015).

34. *See* Transcript of Oral Argument at 4–5, 11–13, Marinello v. United States, 138 S.Ct. 1101 (2018) (No. 16-1144) (discussing numerous versions of the gardener hypothetical).

35. *Yates*, 135 S. Ct. at 1091 (Kagan, J., dissenting).

rule of lenity and void-for-vagueness doctrine? The important thing, functionally speaking, is that the problem found a cure.

I do not mean to conjure a strawman here, for the rejoinder points to something important: there *is* a good deal of overlap between breadth and uncertainty. Notwithstanding the distinction traced in the last Part, both phenomena hail from the same conceptual and doctrinal "family": that of due process. Yet as we will see, the two phenomena also pull apart at a normative level, raising distinct concerns and calling for different modes of judicial intervention.

A. From Kafka to Orwell

With uncertainty, the problem is notice. Even on the (highly indulgent) assumption that members of the public actually read statutes and regulations,[36] ambiguity and vagueness frustrate their ability to make *sense* of those materials. This worry spans to the early days of common law,[37] and its institutional specter is the Star Chamber: a system of adjudication that, whatever its merits, operates behind closed doors, leaving subjects to guess after its operation—and causing the risk of abuse to loom large. As Justice Gorsuch recently argued, when people are "[left] in the dark about what the law demands," it "invites the exercise of arbitrary power" by "allowing prosecutors and courts" to simply "make [the law] up."[38]

The literary touchstone here is Kafka. Although he is certainly not the only writer to warn of the oppression—and absurdity—that can result from opaque legal systems, his work remains the most vivid. Particularly so *The Trial*,[39] which follows the well-meaning but hapless Josef K, who finds himself caught up in a prosecution for an unknown crime within an elusive and alienating judicial system. The book is an elaborate, and bitterly funny, cautionary tale about what can happen when "faceless bureaucrac[ies] . . . make . . . consequential decisions" for parties with "no understanding" of, or "no input" in, the process.[40]

The Trial is fiction, obviously, and hyperbolic fiction at that. But it illustrates an important point about actual legal systems. When people "lack . . . any meaningful form of participation" over their legal fates, feelings of "powerlessness

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36. *See, e.g.*, Hopwood, *supra* note 25, at 731 ("People who commit crimes *malum in se* do so knowing that what they are doing is wrong, and likely illegal, without consulting the U.S. Code. As Justice Holmes has acknowledged, it is something of a fiction to believe that criminals will carefully consider a statute's text before they murder or steal."); *see also* Zachary Price, *The Rule of Lenity as a Rule of Structure*, 72 FORDHAM L. REV. 885, 886 (2004) (pointing out that people rarely read laws, which puts strain on the notice argument against ambiguity).

37. *See, e.g.*, Hopwood, *supra* note 25, at 715–18 (tracing the history of the "fair notice" principle).

38. Sessions v. Dimaya, 138 S. Ct. 1204, 1223–24 (2018) (Gorsuch, J., concurring in judgment).

39. FRANZ KAFKA, THE TRIAL (1925).

40. Andrew D. Selbst & Solon Barocas, *The Intuitive Appeal of Explainable Machines*, 87 FORDHAM L. REV. 1085, 1118 (2019).

and vulnerability" are quick to follow.[41] As David Luban, Alan Strudler, and David Wasserman put it, one of the central purposes of law is securing "what we might call the *moral intelligibility* of our lives," and the "horror of the bureaucratic process," depicted with such lurid panache by Kafka, is not so much "officials' mechanical adherence to duty" as "individual[s'] ignorance" of what is permitted, prohibited, and required of them as citizens.[42]

Breadth gestures toward a very different concern. Extremely broad statutes are not worrisome for being opaque; they are worrisome for being oppressive. The issue is not one of unclear legal commands. In fact, the commands of a broad law are often quite clear. The problem is that they are draconian. They invite too much interference with everyday life. Indeed, broad laws often show their power—and become fearsome—precisely *through* clarity. There is a particular kind of dread, a "Sword of Damocles" dynamic,[43] that accompanies an enforcement system which may come swooping into private life at any moment; but then again, which may not.

Here, the literary echo is not Kafka, but Orwell.[44] As Winston Smith makes his way in Oceania, the state apparatus he encounters is not secret or arbitrary. Its requirements, stark as they are, sit perfectly out in the open—so much so that Winston spends a large quantity of his time and energy trying to comply, and worrying about whether Party leaders have noticed his lapses. Winston's world, in this respect, is quite different from Josef K's. It is the intelligible but nightmarish world of a police state.[45]

B. Broad Laws as General Warrants

Orwell was not just indulging his imagination; of course, he was capturing a real-world problem, one that too many populations, both past and present, have had to endure as a condition of everyday life. Our nation has largely managed to avoid collapsing into a police state. Yet the core danger—of a world in which the power of law enforcement officials is limited only by their whim and discretion—is hardly foreign to our constitutional history. In fact, the Fourth Amendment was ratified explicitly in response to the "Crown's practice of using general warrants and

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41. Daniel J. Solove, *Privacy and Power: Computer Databases and Metaphors for Information Privacy*, 53 STAN. L. REV. 1393, 1423 (2001).

42. David Luban, Alan Strudler & David Wasserman, *Moral Responsibility in the Age of Bureaucracy*, 90 MICH. L. REV. 2348, 2354 (1992).

43. On this theme, Kiel Brennan-Marquez & Stephen Henderson, *Fourth Amendment Anxiety*, 55 AM. CRIM. L. REV. 1, 26–28 (2018) (arguing that the Constitution protects us not only from certain exercises of state power, but also certain *threats* of the exercise of state power—e.g., in the double jeopardy context—and this tells us something about the normative stakes of due process).

44. *See* GEORGE ORWELL, 1984 (1949).

45. For background on the resonance of *1984* to U.S. constitutional law—especially criminal procedure—see Margaret Hu, *Orwell's 1984 and a Fourth Amendment Cybersurveillance Nonintrusion Test*, 92 WASH. & LEE L. REV. 1819, 1860–75 (2017) (describing, among other things, judicial invocation of *1984* as a normative anchor for search and seizure analysis).

writs of assistance,"[46] royal decrees that gave British soldiers and other agents of the Crown boundless authority to perform searches across entire townships.[47] The colonists despised this practice, and the Founders crafted a particularized warrant requirement precisely to banish the practice of unfettered police surveillance—in other words, precisely to hedge against what, by the twentieth century, we would come to call a police state.[48]

The iniquities of general warrants are manifold. For one thing, they permit ongoing disruption of everyday life.[49] For another, they render officials unaccountable by alleviating the burden of giving reasons for specific targeting decisions, a dynamic that leads both to more hassle of innocent people and to a significant risk of biased or discriminatory policing.[50] Most importantly however, the threat of boundless discretion makes it impossible to participate fully in social and political life. For the same reason that privacy intrusions have long been

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46. Messerschmidt v. Millender, 565 U.S. 535, 560 (2012) (Sotomayor, J., dissenting) (internal citations omitted); *see also* Maryland v. King, 569 U.S. 435, 466–68 (2013) (Scalia, J., dissenting) (documenting copious authority for the proposition that general warrants were the Fourth Amendment's specific target during the Founding Era); Paul Ohm, *Massive Hard Drives, General Warrants, and the Power of Magistrate Judges*, 97 VA. L. REV. IN BRIEF 1, 10 n.37 (2011) (compiling sources to the same effect); Scott Sundby, *Protecting the Citizen "Whilst He is Quiet": Suspicionless Searches, "Special Needs" and General Warrants*, 74 MISS. L. J. 501, 509 (2004) (suggesting that the "concern over general warrants . . . suppl[ies] a theoretical and historical underpinning" for Fourth Amendment law).

47. For an excellent historical background, see Thomas Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 655–60 (1999). *See also* Akhil R. Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 771–781 (1994) (exploring the Amendment's historical foundations—as a response to general warrants—through the prism of *Wilkes v. Woods*).

48. *Id.*; *see also* Maryland v. Garrison, 480 U.S. 79, 84 (1987) ("The . . . purpose of [the Amendment's] particularity requirement was to prevent general searches. By limiting the authorization to search to the specific areas and things for which there is probable cause to search, the requirement ensures that the search will be carefully tailored to its justifications, and will not take on the character of the wide-ranging exploratory searches the [f]ramers intended to prohibit."); Thomas P. Crocker, *The Political Fourth Amendment*, 88 WASH. U. L. REV. 303, 308 (2010) ("Privacy is no doubt an important constitutional value . . . . But privacy exclusiveness ignores a 'more majestic conception' of the Fourth Amendment that protects a political 'right of the people' to organize community life free from pervasive government surveillance and interference.") (citing Herring v. United States, 555 U.S. 135, 151 (2009) (Ginsburg, J., dissenting)).

49. *See* Jane Bambauer, *Hassle*, 113 MICH. L. REV. 461, 487–90 (2014) (arguing that "hassle"—everyday disruption and intrusion—should be the focal point of Fourth Amendment harm); *see also* Kiel Brennan-Marquez, *The Constitutional Limits of Private Surveillance*, 66 KAN. L. REV. 485, 492–95 (2018) (tracing this dynamic).

50. *See* Kiel Brennan-Marquez, *"Plausible Cause": Explanatory Standards in the Age of Powerful Machines*, 70 VAND. L. REV. 1249 (2017) (arguing that the Fourth Amendment is primarily about requiring police to give reasons for wielding intrusive power); *see also* Christopher Slobogin, *Government Dragnets*, 73 LAW & CONT. PROB. 107, 124–25 (2010) (detailing the discriminatory potential of dragnet surveillance).

understood to hobble individual autonomy,[51] they also limit *collective* autonomy; they frustrate the ability of affected communities to engage in meaningful self-rule.[52] It is hardly accidental that the general warrants which so enraged the founding generation were those aimed at investigating "seditious" activity. The contemporary synonym for seditious is, of course, democratic.

Extremely broad laws pose a similar threat. Like general warrants, they equip enforcement officials with a tool—a piece of paper—that provides automatic legal justification for widespread, and potentially discriminatory, intrusion into private life. Consider, for example, the anti-gang ordinance at issue in *City of Chicago v. Morales* (discussed in more detail above in Part I), which criminalized the act of congregating in public, for any purpose and any length of time, with any group of people that contained at least one known gang member. In certain neighborhoods, this ordinance operated, in effect, as blanket license for police to harass (or not—at their whim) virtually any group of people convened in public. As with a general warrant, the problem was not that affected parties did not *know* they might be hassled. They did know; the law was on the books, and perfectly clear about its (strict) demands. The problem was that the form of power resulting from the law was inadequately particularized and, functionally, almost unbounded.[53]

In this sense, the similarity between broad laws and general warrants lays bare the insufficiency of "notice" to fully vindicate due-process values. Notice is clearly important; for the reasons elaborated above, lack of notice leads to opacity

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51. *See, e.g.*, Neil Richards, *The Dangers of Surveillance*, 126 HARV. L. REV. 1934, 1935 (2013) (arguing that state surveillance "chill[s] the exercise of . . . civil liberties," especially related to expression and association, and that, when watched, people tend to avoid "experiment[ing] with new, controversial, or deviant ideas"); *see also* Kathy J. Strandburg, *Home, Home on the Web and Other Fourth Amendment Implications of Technosocial Change*, 70 MD. L. REV. 614, 626–34 (2011) (exploring the breakdown in social life that surveillance can occasion). For a classic account of this dynamic, see MICHEL FOUCAULT, DISCIPLINE AND PUNISH 77, 213–24 (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1977).

52. *See, e.g.*, Julie Cohen, *What Privacy Is For*, 126 HARV. L. REV. 1904, 1912 (2013) ("A society that permits the unchecked ascendancy of surveillance infrastructures cannot hope to remain a liberal democracy," but instead will be "replaced, gradually but surely, by a different form of government that [we could] call modulated democracy"—modulated, that is, "by powerful commercial and political interests" that shut down "meaningful agendas for human flourishing"); *see also* Hassan v. City of New York, 804 F.3d 277, 289–92, 295 (2015) (holding that allegations of religiously targeted surveillance are sufficient to establish an injury-in-fact, due to the chilling effect on association that such surveillance can have); NAACP v. Alabama *ex rel.*, 357 U.S. 449, 466 (1958) (barring Alabama from demanding access to NAACP membership rolls as a condition of continuing to operate in the state, insofar as the demand curtailed "the right of [the NAACP's] members to pursue their lawful private interests privately and to associate freely with others"); FRANK PASQUALE, THE BLACK BOX SOCIETY: THE SECRET ALGORITHMS THAT CONTROL MONEY AND INFORMATION 189–90 (2015).

53. *See* City of Chicago v. Morales, 527 U.S. 41, 49–51 (1999) (canvassing the sheer breadth of—and police omnipresence resulting from—the anti-loitering ordinance, including the fact that during just three years of enforcement, the Chicago PD issued almost 90,000 dispersal orders and performed more than 40,000 arrests pursuant to the ordinance).

and unpredictability, culminating in the horror of the Star Chamber and the absurdity of Kafka. For good reason do courts entertain challenges to statutory uncertainty, particularly in the criminal setting.

By itself, however, notice is not enough.[54] General warrants, after all, are *instruments* of notice. The point of a general warrant—by contrast to a regime in which law enforcement officials simply perform searches without any *ex ante* authorization—was to warn people that they should expect intrusion whenever, and however often, such officials decide to pursue it. This hardly seems like the vaunted sort of "notice" that due-process principles evoke. But that is just the point. To be told, in advance, that the state may intrude on your life is certainly important, but also cold comfort when the message becomes, in effect, that intrusion could come at any time. When law enforcement has the quality of a lightning strike—casting a pall of dread over everyday life, even if specific enforcement actions remain rare as a statistical matter—something has gone wrong.

IV. CONSTRAINING BREADTH IN PRACTICE

So what is to be done? If, following the Supreme Court, we take seriously that extreme breadth is inconsistent with due process, but we also acknowledge that breadth is different from uncertainty—making tools designed for the latter a poor fit for the former—what is the best path forward?

Generally speaking, judges have two options when confronting extremely broad statutes. The first, and currently favored approach, is to adopt limiting constructions; to address the issue at the layer of *enforcement*, by reconfiguring how officials wield a given statute. The second, more promising option, is to address the problem at the layer of *enactment*—by dismantling extremely broad statutes in their entirety.

A. Reading Narrowly

The first means of reining in extreme breadth is narrow reading. The idea is simple, and its appeal is plain. Namely, the application of broad statutes can be cleaned on the back end; by waiting until enforcement authorities actually try to *wield* broad laws—and by pushing back against such efforts when they prove excessive—courts can limit the damage, so to speak, of extreme statutory breadth. And they can do so without undoing the relevant legislature's handiwork. Narrow reading was the Court's preferred strategy in both *Marinello* and *Yates* when it determined, respectively, that not *all* "impediments" count as impeding under the Omnibus Clause of the IRC, and not *all* "tangible objects" take the right worldly form for criminal liability under § 1519 of Sarbanes–Oxley.

The narrow strategy also enjoys favor among scholars. For some, the idea traces to fairness. Courts, the reasoning goes, should counteract overzealous enforcement by shielding minor instances of wrongdoing from criminal liability, no

54. *See* William Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 559–61 (2001) (explaining that legislative "specificity" in no way guarantees reasonableness of scope).

matter the literal bounds of the relevant statute[55]—a proposition that finds some support in recent jurisprudence.[56] For others, the issue is not one of fairness, but delegation. If enforcement officials are conceptualized as *agents* of lawmakers, the goal of courts, in fashioning limiting principles, should be to tether executive power to legislative authorization. Mila Sohoni has dubbed this the "faithful enforcement" view of statutory interpretation: the idea that officials are "not merely required to 'take care' that the laws be executed, but also to do so *faithfully*," by channeling the wishes of the relevant legislative body.[57] Take this mandate seriously, and prosecutions like those in *Yates* become untenable—clearly beyond the scope of enforcement authority that Congress plausibly meant to vest. Indeed, this is part what makes the cases feel so absurd.[58]

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55. *See, e.g.*, Anna Roberts, *Dismissals as Justice*, 69 ALA. L. REV. 327, 330 (2017) (arguing that judges in their supervisory capacity over prosecutors and other law enforcement officials should—and in many states, do—have the authority to dismiss criminal charges on grounds of fundamental fairness); Joshua Kleinfeld, *Equitable Arguments and Criminal Statutes* (unpublished manuscript) (on file with author) (discussing and defending an equitably driven "narrow reading" strategy); *see also* RONALD DWORKIN, LAW'S EMPIRE 46–48 (1986) (providing a philosophical argument in favor of equitable interpretation).

56. One recent example is *Maslenjak v. United States*, 137 S. Ct. 1918, 1923–24 (2017), in which the Court rejected the government's claim that a statute (1) forbidding non-citizens from "procur[ing] naturalization" in a manner "contrary to law," and (2) penalizing the offense by revoking the offender's citizenship, reaches *any* omission or misrepresentation made during the naturalization process, no matter how innocuous, and regardless of how many years (or even decades) have elapsed since the statement occurred. It would be unfair, the Court reasoned, to strip the citizenship of a successful applicant who simply, say, neglected to disclose every violation of traffic laws, or who "fill[ed] out the necessary paperwork in a government office with a knife tucked away in her handbag (but never mentioned or used)," thus violating "[laws] criminalizing the possession of a weapon in a federal building"—even though both offenses arguably fall within the statute's literal scope. *Id.* at 1926; *see* Transcript of Oral Argument at 27–30, Maslenjak v. United States, 137 S. Ct. 1918 (No. 16-309) ("[C.J.] ROBERTS: I looked at . . . the naturalization form, [and] there is a question. It's Number 22. 'Have you ever . . . committed, assisted in committing, or attempted to commit a crime or offense for which you were not arrested?' Some time ago, outside of the statute of limitations, I drove 60 miles an hour in a 55-mile-an-hour zone [but] I was not arrested. Now, you say that if I answer [question 22] no, 20 years after I was naturalized as a citizen, you can knock on my door and say, guess what, you're not an American citizen after all. [COUNSEL]: Well — [C.J.] ROBERTS: Is that right? [COUNSEL]: [W]ell, I would say two things. First, that is how the government would interpret that [question], that it would require you to disclose those sorts of offenses. [C.J.] ROBERTS: Oh, come on. You're saying that on this form, you expect everyone to list every time in which they drove over the speed limit . . . . [or] we can take away your citizenship").

57. Mila Sohoni, *Crackdowns*, 103 VA. L. REV. 31, 89–91 (2017); *see also* Price, *supra* note 36, at 886 (discussing the "legislative supremacy" rationale for the rule of lenity, which imagines courts—resolving ambiguities in favor of defendants—as enforcers of legislative will). For a judicial elaboration of the same idea, see *United States v. Bass*, 404 U.S. 336, 347–48 (1971).

58. *See* Kleinfeld, *supra* note 55, at 7 (describing the prosecution's theory in *Bond* as "just . . . sort of *odd*").

Yet narrow reading has two important drawbacks: one pragmatic, the other more conceptual. The pragmatic drawback is that it provides quite little, if anything, by the way of proactive relief; for people who (1) are potentially subject to an extremely broad statutory scheme, but (2) have not been prosecuted—or, having been prosecuted, are not willing or able to challenge the scheme on the back end—narrow reading in *other* cases accomplishes little. In other words, the strategy is case-specific. It tackles the problem at the layer of enforcement, by waiting for officials to wield broad statutes in especially aggressive or egregious ways. Valuable as this may be for individual defendants (or arrestees), it hardly addresses the problem across cases.

This brings us to the conceptual drawback of narrow reading: namely, it rests on an implausible theory of legislative behavior, and of the resultant relationship between legislative and executive power. In a world where lawmakers tended to draft well-tailored, proportional statutes, and the "breadth problem" was really just an issue of (all too common) executive overreach, narrow reading might have been sufficient; for it would essentially involve judges reining in prosecutors—by holding them accountable to legislative will. Indeed, this is exactly what the delegation model, discussed a moment ago, would counsel.

The problem, put simply, is that ours is *not* a world where lawmakers tend to draft well-tailored, proportional statutes. Particularly in the realm of criminal law, the tendency is just the opposite, because lawmakers have a two-fold incentive to enact extremely broad laws. First and foremost, breadth is a powerful regulatory tool.[59] It is a useful means of capturing hard-to-formalize crimes, like fraud,[60] and of combatting entrepreneurial wrongdoing.[61] Second, broad laws allow lawmakers to pass the buck: reaping the benefits of discretion without having to answer for its externalities. When laws are enforced to the public's liking, legislatures typically receive credit,[62] but when laws are enforced overzealously (or otherwise unreasonably), blame can easily be deflected to prosecutors.[63] If anything,

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59. *See* Samuel Buell, *The Upside of Overbreadth*, 83 N.Y.U. L. REV. 1491, 1492–94 (2007) (exploring the regulatory benefits of extremely broad laws).

60. *See, e.g.*, Dan M. Kahan, *Lenity and Federal Common Law Crimes*, 1994 SUP. CT. REV. 345, 373–78 (exploring the ways in which fraud evolves and, accordingly, defies formalization).

61. *See id.*; *see also* Kwok, *supra* note 26, at 507–15.

62. *See, e.g.*, Einer Elhauge, *Preference-Eliciting Statutory Default Rules*, 102 COLUM. L. REV. 2162, 2193 (2002) ("Most legislatures and their polities are hostile to criminal defendants . . . . [I]f one had to make an educated estimate (and given the premise of ambiguity, one must), one might perhaps even conclude that in ambiguous cases the legislature would likely prefer a 'rule of severity'—the greater punishment for the criminal defendant."); *see also* Jeff Love, Comment, *Fair Notice About Fair Notice*, 121 YALE L. J. 2395, 2395–97 (2012) (explaining that many state legislatures have explicitly barred their own courts from applying the rule of lenity, or its equivalent).

63. *See, e.g.*, Kim Forde-Mazrui, *Ruling Out the Rule of Law*, 60 VAND. L. REV. 1497, 1516–30 (2007) (tracing these delegation dynamics in greater detail); Hopwood, *supra* note 25, at 702–09; Price, *supra* note 36, at 911 ("Legislators face intense pressure to expand the reach of criminal law. Not only do criminal statutes score political points with a 'tough on crime' electorate; they also help avert the political risk that serious misconduct will go

lawmakers face penalties for failing to be sufficiently *harsh* on crime.[64] This only compounds the temptation among legislatures to err in favor of inclusion rather than exclusion, when it comes to the formulation of criminal statutes.

Taking these dynamics seriously makes it clear why narrow reading is an insufficient answer to the problem of statutory breadth. Put simply, it attacks the symptom—individual instances of excess—instead of the underlying cause. In fact, narrow reading actually stands to *exacerbate* the problem, compounding rather than counteracting the legislative tendency toward broad drafting. If legislators can rely on judges to clean up messes on the backend, what incentive is there to refine the drafting process up front?

B. Holding Statutes "Void-for-Breadth"

There is a better way. Rather than curtailing the application of extremely broad laws case by case, courts can limit legislative authority to enact such laws in the first place. Call it the "void-for-breadth" rule. And as far as its practical operation is concerned, lower-court jurisprudence provides some clues. Consider a few recent examples:

> 1. In 2003, the Fourth Circuit invalidated (as applied) a law prohibiting "loitering on bridges," which was being used to, among other things, target protestors.[65] The problem, the court argued, was not "uncertainty about the normal meaning of 'loitering,'" but rather, uncertainty about "what specific conduct is covered by the statute and what is not," since the latter—no less than the former—fails to "give plaintiffs [i.e., protestors] proper notice that the core political speech . . . in which they were engaged was prohibited by law."[66]
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> 2. In 2007, Judge Magnuson of the District of Minnesota invalidated a garden-variety traffic ordinance that forbade trucks from "idling" but "provide[d] no reference to determine how long a . . . vehicle may

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unpunished because prosecutors lack the tools to attack it . . . . The result is a sort of hydraulic pressure pushing criminal legislation towards unreasonable extremes. In the absence of any political force to check the incentives to criminalize, legislatures have steadily expanded the domain of liability, sweeping ever broader ranges of unremarkable conduct within criminal law's bounds."); *see also* Orin Kerr, *Vagueness Challenges to the Computer Fraud and Abuse Act*, 94 MINN. L. REV. 1561, 1561–62 (2010) (using computer crimes as an illustrative study to highlight the structural benefits of vagueness challenges); Kahan, *supra* note 60, at 347 (arguing against the rule of lenity on the grounds that its sole purpose is to enforce a structural boundary, so it should be replaced by an anti-delegation principle that directly advances that purpose).

64. *See, e.g.*, Hopwood, *supra* note 25, at 727 ("Congress generally has no incentive to craft criminal legislation narrowly because, if a noteworthy crime occurs and federal statutes do not adequately cover the conduct, then Congress is viewed as having failed to do its job. Nor is there an effective lobbying group for the crafting of careful and narrow criminal legislation. As a result, Congress pushes the bounds of statutory vagueness and ambiguity"—and, I would add, statutory breadth).

65. Lytle v. Doyle, 326 F.3d 463, 466 (4th Cir. 2003).

66. *Id.* at 469 (quoting City of Chicago v. Morales, 527 U.S. 41, 57 (1999)).

idle"—as they are wont to do—"before [a] violat[ion] [occurs]."[67] The problem was that truck drivers were left simply to guess "[which] idling is covered by the ordinance" and which is not: an unacceptable result under the Due Process Clause.[68]

3. In 2008, Judge Moore of the Southern District of Florida struck down a "school safety zone" ordinance that prohibited "person[s] who [do] not have legitimate [school-related] business" from coming within 500 feet of a school.[69] Once again, the problem was not the ordinance's language per se; school-related business may not be a perfectly sharp category, but it conveys a recognizable cluster of activities. Instead, the problem was that lots of spaces—"sidewalks, residential houses and streets, businesses, and parking lots"—formally within the school safety zone were also, in practice, spaces in which non-school-related business was likely to occur.[70] In light of this, Judge Moore concluded that the legislature had taken too blunderbuss of an approach. Although the ordinance had many valid applications, and was likely motivated by important policy goals, the result was dramatically over-inclusive; it flouted the minimal requirements of due process.

These are not isolated examples; similar patterns have emerged in numerous state jurisdictions as well.[71] In all three cases, however, the lower courts—constrained by vertical stare decisis—followed in the Supreme Court's footsteps by treating breadth as a species of uncertainty to square the doctrinal circle. In the anti-loitering case, for example, the Fourth Circuit spoke of "fair warning," and of "notice that . . . enable[s] citizens to conform their behavior to [the] law."[72] But notice was not actually an issue in the case because the statute was perfectly clear about what it prohibited: any loitering on bridges. As the State of Virginia argued in

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67. Metro Producer Distribs., Inc. v. City of Minneapolis, 473 F. Supp. 2d 955, 962 (D. Minn. 2007).

68. *Id.*

69. Gray v. Kohl, 568 F. Supp. 2d 1378, 1383, 1395 (S.D. Fla. 2008).

70. *See id.* at 1388.

71. *See, e.g.*, Brown v. Municipality of Anchorage, 584 P.2d 35, 37 (Alaska 1978) (invalidating an anti-solicitation statute on the grounds that, taken literally, it would reach so far as to criminalize "window shopping, or standing on a street corner to wait for a bus," if carried out by "a formerly convicted prostitute or panderer"); City of Seattle v. Drew, 423 P.2d 522, 525 (Wash. 1967) (holding that a Seattle anti-loitering ordinance that "imposes sanctions on conduct that [is] not . . . unlawful" runs afoul of due process—or in other words, that the "language of the ordinance is too broad; it is vague"). Another recent example, from the Supreme Court of Guam, was the invalidation of a family law statute that criminalizes, among other things, "placing a family [member] or household member in fear of bodily injury." People v. Shimizu, No. CRA15-034, 2017 WL 4390303, at *2 (Guam Sept. 5, 2017). While the phrase was "not vague in the sense that it does not have a common and accepted meaning," the court held that the "legislature cannot conceivably have meant to criminalize *each instance* in which a citizen places a family or household member in fear of bodily injury," leaving "too much uncertainty about what conduct is covered by the statute and what is not." *Id.* at *7 (emphasis added).

72. Lytle v. Doyle, 326 F.3d 463, 468 (4th Cir. 2003).

defense of the statute, it "plainly prohibits loitering"—*all* loitering—"on designated bridges, and . . . a person of ordinary intelligence [would] understand[] perfectly well what [that] means."[73] True enough; but the actual problem, as in *Marinello*, *Yates*, and *Morales*, was the breadth of the law's demands, not its failure to make those demands clear.

Likewise with the anti-idling and school-safety-zone ordinances, there, too, the respective courts invoked uncertainty principles—specifically, the finessed notion of "vagueness" from *Morales*—to justify their holdings. But they were also remarkably candid about the nature of the problem. In the anti-idling case, for example, Judge Magnuson acknowledged forthrightly that the problem was not lack of clarity about what "idling" means.[74] Rather, it was that:

> the ordinance fails to provide quantitative parameters that define the duration of prohibited idling or the amount of time between when the vehicle stops and when idling becomes prohibited. This vagueness provides city officials unfettered discretion to apply the ordinance in an arbitrary manner. For example, an official could cite one motor vehicle for remaining stationary one minute and pass over another motor vehicle that remained stationary for thirty minutes.[75]

Yes, save for one caveat: the problem, *pace* Judge Magnuson, is not actually "vagueness." It is breadth. The better argument, therefore—the argument that is both more exact conceptually and truer to the normative concerns traced in the last Part—would be as follows:

> the ordinance fails to provide quantitative parameters that define the duration of prohibited idling or the amount of time between when the vehicle stops and when idling becomes prohibited. *This breadth* provides city officials unfettered discretion to apply the ordinance in an arbitrary manner . . . .

The same is true, moreover, of *Morales* itself—the Supreme Court case that propelled these lower-court opinions. In *Morales*, the plurality's central argument was that city officials in Chicago could not "conceivably have meant to criminalize each instance a citizen stands in public with a gang member," leaving ordinary people to guess "what loitering is covered by the ordinance and what is not."[76] There is, however, a minor but important sleight-of-hand here. It is hardly inconceivable that the Chicago City Council meant to criminalize every instance of standing in public with a gang member. In fact, the record suggested an epidemic of gang

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73. *Id.* at 469.

74. Metro Produce Distribs. v. City of Minneapolis, 473 F. Supp. 2d 955, 961 (D. Minn. 2007) ("Because the ordinary meaning of "idling" may be applied to interpret the ordinance, the lack of an express definition is not a constitutional flaw") (citing St. Croix Waterway Ass'n v. Meyer, 178 F.3d 515, 520 (8th Cir.1999) ("The requirement of reasonable certainty does not preclude the use of ordinary terms to express ideas which find adequate interpretation in common usage and understanding.")).

75. *Id.*

76. City of Chicago v. Morales, 527 U.S. 41, 57 (1999).

violence, and the City's lawyers defended the law largely on the grounds of its necessity—*because of*, not in spite of, its extreme breadth.[77]

By calling the law inconceivable, then, the Court must be making a normative claim, not a descriptive one; what is inconceivable is that so broad a law would be consistent with due process principles, *not* that a legislature might see fit to enact it. And that is a perfectly sound conclusion. Indeed, I find the holding in *Morales* unassailable. But let us be clear: the holding must claim strength, ultimately, from the proposition that the Constitution places limits on statutory breadth.

To summarize: a "void-for-breadth" rule is already operative, below the surface, in existing law. It simply needs to be excavated and theorized—and molded into a consistently applicable tool, rather than a makeshift one.

The "void-for-breadth" rule is strong medicine, of course, and it is so by design. In practice, some of its uses—perhaps a great many—will end up dismantling legal regimes (or parts of legal regimes) that serve important policy goals. While we certainly should not celebrate this outcome, we also should not shy away from it. The reason we need a "void-for-breadth" rule, ultimately, is the same reason due-process values limit the ability of legislatures to enact broad laws in the first place: because it is tempting. It solves a problem, often a very pressing one, and if it happens to yield externalities—well, perhaps that is simply the cost of doing business.

As an institutional ideal, due process stands against this kind of "good enough" mentality. Due-process protections aim, explicitly and on purpose, to make governance more difficult—to hold state officials to a higher standard, facing the exigencies of everyday governance, than they might be inclined to embody themselves. Put bluntly, it is *easier* to proscribe virtually everything than to write narrow laws, especially when penalties are relatively minor and politically powerful constituencies are unlikely to shoulder much, if any, of the practical enforcement

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77. On this front, the opinion below (from the Illinois Supreme Court) is instructive. *See* City of Chicago v. Morales, 687 N.E.2d 53, 58–59 (Ill. 1997), *aff'd*, 527 U.S. 41 (1999) (describing the policy genesis of the ordinance, and indicating that it was broadly drafted in part to ensure "discretion [for] police" working in gang units). As is the City's merits brief before the Supreme Court. *See* Brief of Petitioner at 44, City of Chicago v. Morales, 527 U.S. 41 (1998) (No. 97-1121) ("[W]e do not contend that the ordinance could never be applied to persons whose conduct may be in fact innocuous or inoffensive. But the benefits from removing a visibly lawless element of loiterers from the public ways—because loitering by gang members and those who join them destabilizes communities, facilitates criminal activity and gang recruitment, intimidates law-abiding residents, lowers property values, and places both gang members and those loitering with them at risk if rival gangs come along—surely could reasonably be thought to justify whatever burden is imposed on persons engaged in 'innocent' activity who are directed to move along as a result of this ordinance."). Note the scare quotes.

burden. Which is precisely why courts need to intervene—and why the right tool is sometimes a sledgehammer, not a scalpel.[78]

Of course, for a tool to be effective, its use need not be frequent—and here, as with the void-for-vagueness doctrine, the mere *possibility* that courts might swoop in to counteract extreme breadth would likely go far, on its own, in disciplining the legislative process.[79] The point is not to invalidate a huge quantity of laws, or to pursue full-blown micromanagement of the legislative process. The point is to create an overall atmosphere of judicial supervision and corresponding self-regulation by lawmakers.[80] Accomplishing this, moreover, will not be a matter of setting out exact criteria of overbreadth; in fact, some degree of "fog" may be salutary, encouraging legislators to act precautionarily rather than toeing the line.[81] The goal, at bottom, is to equip courts with a mechanism for saying, "no; not good

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78. I leave for another day whether, and in what sense, this logic also applies to *groups* of laws—or entire portions of a criminal code. One could imagine arguing, for example, that traffic regulations provoke breadth-based due-process concerns *when combined*, even if no specific rule would be independently infirm. At bottom, the question would be: can a legislature cure the problem associated with shotgun statutes—the "criminalization of everyday life" problem—by enacting discrete prohibitions that work, in tandem, to the same effect? The intuition is no, but a full analysis of the question would likely require an article (at minimum) unto itself, in part because the question of how courts should approach groups of laws that, by interoperating function like a unified law, is undertheorized across the board. For the beginnings of such an analysis in the context of vagueness challenges, see, Carissa Byrne Hessick, *Vagueness Principles*, 48 ARIZ. ST. L.J. 1137, 1145–51 (2016).

79. *See, e.g.*, Forde-Mazrui, *supra* note 63, at 1501–02 (describing the ways in which the void-for-vagueness doctrine, as a background constraint on legislators and enforcement officials, has changed behavior—and compiling sources). For more general background on the salutary effects of judicial oversight, even when sparingly applied, see, Joanna C. Schwartz, *Myths and Mechanics of Deterrence: The Role of Lawsuits in Law Enforcement Decisionmaking*, 57 UCLA L. REV. 1023, 1086 (2010) (discussing the effect of lawsuits as a deterrent on law enforcement actions and arguing that "more robust and effective information policies and practices can increase the impact of lawsuits on law enforcement behavior"); Brennan-Marquez, *supra* note 50, at 1295 ("[W]hen officials know they may have to account for decisions later on, the decisions look different. Officials take greater care; they think twice. In other words, the goal of [judicial review] is not simply to enable oversight. It is also to make judicial supervision largely superfluous—by encouraging officials to take account of constitutional and rule-of-law values in the process of decisionmaking. A perfect system of oversight, after all, is one that never has to be mobilized, because its deterrent effect is that strong.").

80. *See* FOUCAULT, *supra* note 51, at 195–228 (describing Bentham's panopticon as the perfect instrument of surveillance, because it does not even require surveillance to occur—the threat of surveillance is enough).

81. *See* Seanna Valentine Shiffrin, *Inducing Moral Deliberation: On the Occasional Virtues of Fog*, 123 HARV. L. REV. 1214 (2010) (arguing that public officials should be subject to some degree of uncertainty in constitutional rules, in order to induce "moral deliberation"—the same argument applies, *mutatis mutandis*, to lawmakers).

enough; due process requires more," while maintaining a conceptually stable division between legislative and judicial power.[82]

C. How Broad is Too Broad?

With that goal in mind—empowering judges to discipline the legislative process by intervening at the extrema of statutory breadth—I want to close with a few remarks about which kinds of breadth are most worrisome on due-process grounds. In other words, how broad is "too broad"? Or better put, in what *sense* might a statute be held, consistent with the due-process principles explored above, too broad, and thus "void-for-breadth"?

These questions are of major practical importance, for without an answer—stated or unstated, well-theorized or not—courts would have nowhere to begin. But the questions are also of great *conceptual* importance, because, simply put, not all breadth is troubling. Homicide statutes, for example, are often extraordinarily broad, in the sense that: (1) they encapsulate, by design, many different means of committing the underlying offense and (2) they flatten away significant gradation in terms of underlying moral culpability. There is, however, a deep sense in which these forms of breadth—in the context of something like homicide—are acceptable insofar as *anything* that fits into the umbrella category has passed the threshold of "meriting significant punitive action," even if the legal regime exhibits, as any legal regime at some level must exhibit, greater coarseness than the underlying reality it aims to regulate.

With that in mind, there are three ways that broad statutes can be troubling on due-process grounds. All three involve porous criteria—but then, of course they do. That is simply to say their application requires judgment. Fortunately, we have, ready-at-hand, a class of public servants who have made judgment their craft.

First, broad statutes are troubling if they occasion highly disproportionate results. If relatively minor wrongdoing can lead to draconian consequences, it subverts the expectation, central to the rule of law, of a predictable link between inputs and outputs.[83] For this to be true, moreover, perpetrators need not lack notice entirely about the wrongness of the predicate act; in other words, the problem does not hinge on the possibility that a reasonable person could reasonably have been unaware that the underlying act carried *some* kind of legal penalty. The point, rather, is about the severity of the penalty relative to the culpability of the crime. After all, the premise of the Court's analysis in both *Marinello* and *Yates* was that anyone

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82. *See* Jane Bambauer & Toni Massaro, *Outrageous and Irrational*, 100 MINN. L. REV. 281, 283 (2015) (observing a similar pattern with the "outrageous government conduct" and "rational basis" tests in constitutional law—though rarely used, they loom large).

83. *See generally* Kiel Brennan-Marquez, *"Fair Notice" in the Age of Big Data*, *in* THE OXFORD HANDBOOK OF AI & ETHICS (Dubber & Pasquale eds., forthcoming 2020). For a conceptual argument against this kind of result, see, Adam J. Kolber, *Smooth and Bumpy Laws*, 102 CALIF. L. REV. 655, 683–85 (2014). *See also* John S. Wiley, Jr., *Not Guilty by Reason of Blamelessness: Culpability in Federal Criminal Interpretation*, 85 VA. L. REV. 1021, 1023 (1999) (arguing—in a similar spirit to the proportionality claim—that minimally or nonculpable violations should be excused on that ground alone).

would have known—or at any rate, should have known—that purposely thwarting the administration of taxes or getting rid of evidence was a criminal act *of some sort*. But that did not stop the Court from recognizing the clear breadth issue.[84]

Second, broad statutes are troubling insofar as they effect a "shotgun approach" to social regulation—one that ends up, in effect, criminalizing large swaths of everyday life. On this front, the key Supreme Court case is *Morales*, and many lower-court opinions follow suit. The idea, at bottom, is that legislatures need to try harder. Past a certain threshold, it becomes impermissible to pursue regulatory goals—even legitimate ones—by criminalizing large swaths of normal activity. Doing so turns virtually everyone into a criminal, at least on paper; and it leaves ordinary people without a meaningful understanding, *ex ante*, of the legal risks our actions invite. Hence the *Morales* Court's focus on the "Sammy Sosa" hypothetical: the image of an apparent gang member and his father waiting outside Wrigley Field, only to be commanded by law enforcement to disband, disturbed the plurality since, in its words, a case like that demonstrates the "substantial amount of innocent conduct" reached by the ordinance.[85] This, however, is not quite right. The hypothetical is not troubling because the imagined conduct *is* innocent—the ordinance itself renders the conduct criminal—but because the conduct *ought* to be innocent. In this sense, the "criminalizing everyday life" variant of breadth is, by necessity, a species of substantive due process: a claim, at bottom, about the unenumerated limits of how far state power may legitimately reach, consistent with a system of constitutional democracy. And rightly so.

Third, broad statutes are troubling when they shade into other constitutional rights. At some level, this risks hovers in the background of every case analyzed in this Essay, as well as the overall argument—for the more broadly a statute reaches, the more likely it is, *ceteris paribus*, that conduct falling under that statute's scope will *also* involve the exercise of an independently enumerated right. Here, the Fourth Circuit case discussed above, *Lytle v. Doyle*, is instructive. Although the court analyzed the "no loitering on bridges" statute in terms of due process—and saw fit, on that basis, to partially strike the statute down—it was also worried, indeed quite explicitly, about the First Amendment implications of leaving the law intact.[86] Yet the problem is not limited to statutes, like the one in *Lytle*, with an obvious connection to protest or other political expression. It is potentially true of *any* law that relates to the occupation and traversal of public space, insofar as that often serves as a precondition (if not always an instance) of First Amendment activity.

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84. *See, e.g.*, Marinello v. United States, 138 S. Ct. 1101, 1108 (2018) (explicitly acknowledging that someone who pays a babysitter without withholdings "may . . . believe that, in doing so, he is running the risk of having violated an IRS rule," but still would have no way of intuiting that "he [could] fac[e] a potential felony prosecution for tax obstruction.").

85. City of Chicago v. Morales, 527 U.S. 41, 60–61 (1999).

86. Lytle v. Doyle, 326 F.3d 463, 469 (4th Cir. 2003) (tethering the due-process problem to the fact that, at the time of their arrest, "[t]he Lytles were exercising their First Amendment right to speak out peacefully against a practice with which they disagreed").

CONCLUSION

At a moment in history when bipartisanship has all but vanished from our politics, overcriminalization remains a flashpoint for progressives, libertarians, and small-government conservatives alike.[87] Breadth is one facet of overcriminalization. But it is an especially important one, because it yields, in a manner less true of many of overcriminalization's other facets, to doctrinal intervention—and what is more, doctrinal intervention with roots in existing law.

No panacea is promised here, for the roots of overcriminalization burrow deep. The hope is that, by using the tools of due process to intervene on the margins, judges will not only do justice in particular cases but also counteract some of the broader pathologies that plague law enforcement today. A lasting solution to overcriminalization is going to require political will, and lots of it. That may not arrive for some time. It may never arrive. But in the interim, we have courts, and we have a Constitution—and while these tools can hardly be trusted to perfect our legal world, they can still make headway on some of its more glaring blemishes.

87. *Compare* Glenn Reynolds, *Ham Sandwich Nation: Due Process When Everything Is A Crime*, 113 COLUM. L. REV. SIDEBAR 102 (2013), *with* Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703, 712 (2005).