Second Thoughts about First Principles: A Critique of the Contemporary Conception of the Principle of Legality

John Hasnas[1]*

Abstract

The principle of legality is currently understood as a ban on criminal punishment unless one's conduct violates a criminal statute–that is, as a ban on common law crime. Because the principle prevents judges from imposing criminal punishment at their whim, it is seen as an obvious good. This article argues that this is far from obvious. I show that the common law of crime was, in fact, much more limited that the current regime of statutory crime, and that the loosening of the restrictions imposed by the common law is partially responsible for the contemporary crisis of overcriminaliztion.

Introduction X
I. The Principle of Legality X
II. The Comparative Assessment X
A. Avoiding the Nirvana Fallacy X
B. *Some Necessary Background: Mens Rea—Old and New* X
C. Notice X
D. Democracy X
E. Separation of Powers X
F. Rule of Law X
III. Liberalism X
Conclusion X

Introduction

Early in their first year Criminal Law course, most law students encounter the Principle of Legality. De rigueur, this is introduced with the Latin phrase *nullum crimin sine lege, nulla poena sine lege* followed immediately with its English translation as "no crime without law, no

[1]* J.D., PhD., LLM., Professor of Ethics, McDonough School of Business, Georgetown University and Professor of Law (by courtesy) at Georgetown Law Center. The author wishes to thank Ann C. Tunstall of Woolsey Pharmaceuticals for her comments on a draft of this article, Kelly Mwaamba for her invaluable research help, and Annette and Ava Hasnas for causing him to understand the importance of taking a second look at things he assumed to be true.

punishment without law." Criminal law casebooks illustrate the significance of this principle with cases that appear to violate it, typically either *Shaw v. Director of Public Prosecutions*[2] or *Commonwealth v. Mochan*.[3] *Shaw* is a British case in which the defendant was convicted of conspiracy to corrupt the public morals. Shaw's offense was to publish a "Ladies' Directory" containing the names, addresses, telephone numbers, and photographs of prostitutes that would facilitate their illegal activity. *Mochan* is a Pennsylvania case in which the defendant was convicted of debauching and corrupting the morals and manners of the citizens of Pennsylvania. Mochan's offense consisted of "wickedly and maliciously" making a series of telephone calls to a woman accusing her of being "a lewd, immoral, and lascivious woman" using "scurrilous opprobrious, filthy, disgusting and indecent language."[4]

[2] Shaw v. Dir. Pub. Prosecutions [1962] AC 220 (HL).
[3] Pennsylvania v. Mochan, 110 A.2d 788 (Pa. 1955).
[4] *Id.* at 789–90.

What is notable about both cases is that neither defendant had violated any criminal statute. Each was convicted of a common law crime. In upholding Shaw's conviction, Viscount Simonds stated, "In the sphere of criminal law, I entertain no doubt that there remains in the courts of law a residual power to enforce the supreme and fundamental power of the law, to conserve not only the safety and order but also the moral welfare of the State . . ."[5] Similarly, in upholding Mochan's conviction the court stated,

> The common law is sufficiently broad to punish as a misdemeanor . . . any act which directly injures or tends to injure the public to such an extent as to require the state to interfere and punish the wrongdoer, as in the case of acts which injuriously affect public morality, or obstruct, or pervert public justice, or the administration of government.[6]

I have a clear memory of the indignation I felt when encountering these cases as a new law student. I entered law school imbued with the certainty that "you cannot enforce morality" and the naive belief that the law consisted entirely of statutes. This led me to conclude that these cases must be wrongly decided. What could be more tyrannical than punishing individuals for what the court found to be immoral conduct even though it did not violate any criminal statute? Such cases must be a vestige of the bad old days that the law had thankfully outgrown. Wasn't it obvious that the principle of legality was an essential protection for individual liberty that lies at the heart of the liberal society?

The answer to this question is "No." But I could not see that at the time because I had managed to make it through college without ever taking an economics course. As a result, I had not learned that proper normative decision-making always requires one to ask, "Compared to what?"

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[5] [1962] AC 220, 267.
[6] Mochan, 110 A.2d at 790.

In this article, I argue that the principle of legality, as presently understood, is not only not essential for the protection of individual liberty, but that it is partially responsible for the contemporary crisis of overcriminalization. For, to the extent that the principle of legality sounded the death knell for common law crime, it undermined the inherent limitations on what could constitute a crime and opened the door to political agents to criminalize any aspect of human activity they wished.

I. The Principle of Legality

What is the principle of legality? Its contemporary interpretation is captured nicely by Joshua Dressler who defines it as a ban on criminal punishment unless one's conduct is defined as criminal by statute before the individual acted "rather than the result of judicial crime-creation."[7] He holds that this principle entails three corollaries: 1) criminal statutes must be intelligible to reasonable law-abiding persons, 2) criminal statutes must not empower police, judges, and juries to arrest and punish individuals on an ad hoc and subjective basis, and 3) ambiguous criminal statutes must be interpreted narrowly in favor of the accused.[8]

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[7] Joshua Dressler, Understanding Criminal Law 39 (1987); *see also* Jerry E. Norton, *The Principle of Legality, the Rule of Lenity, and a Wooden Debate: An Ancient Law in a New World of Originalism*, 62 Washburn L.J. 327, 330 (2023) ("The law defining the crime must exist when the act is committed; it cannot be ex post facto. It also means that the crime must be defined by the legislative power, not by the court."); Josh Bowers, *Probable Cause, Constitutional Reasonableness, and the Unrecognized Point of a "Pointless Indignity"*, 66 Stan. L. Rev. 978, 997 (2014) ("At a minimum, the legality principle is taken to require that legislators codify offenses ex ante . . . ."); Stanislaw Pomorski, American Common Law and the Principle Nullum Crimen Sine Lege 24 (Elzbieta Chodakowska trans., De Gruyter 2d ed. 1975) ("[T]he legislative act is the only force determining the elements which constitute a punishable act.").

[8] *Id.* at 40. An important terminological caveat. Dressler's three corollaries play an important role in guiding the judicial interpretation of criminal statutes, and the principle of legality is often identified with these corollaries. To the extent that the principle of legality is understood as a limitation on the scope of criminal legislation, this article raises no objection to it. Indeed, if we are to be governed by a system of politically-created criminal laws, these three limitations are essential. This article is critical of the principle of legality only to the extent that it is understood as a ban on common law crime.

This conception of the principle of legality is introduced at the beginning of criminal law courses because it appears to be such an unalloyed good. Preventing common law judges from creating new crimes by investing the power to determine the substance of the criminal law exclusively in the legislature is said to advance several important societal interests. It appears to provide more notice to citizens about how they must behave, guarantee democratic accountability, maintain the necessary separation of powers, and support the rule of law.[9]

This makes perfect sense under the assumption that we are comparing a world of unrestrained judicial discretion with a properly limited realm of legislative choice. It is obviously preferable for the criminal law to be made by democratically accountable representatives of the people rather than by judges who have plenary power to create new criminal offenses. But this assumption is based on a radically inaccurate description of the functioning of both the common law and the legislative processes, as I intend to demonstrate.

[9] *See* Carissa B. Hessick, *The Myth of Common Law Crimes*, 105 VA. L. REV. 965, 968 (2019); *see also* Shahram Dana, *Beyond Retroactivity to Realizing Justice: A Theory on the Principle of Legality in International Criminal Law Sentencing*, 99 J. CRIM. L. & CRIMINOLOGY 857, 862 (2009) ("In a trias politica system, the principle of legality places obligations and limitations on the powers of all three branches of the government . . . They place on the judiciary the obligation to limit sanctions to those explicitly provided for by the legislature and prohibit judges from applying penalties retroactively . . . it protects an individual's interest in being free from abuse of power leading to loss of life, liberty, or property . . ."); Paul H. Robinson, *Fair Notice and Fair Adjudication: Two Kinds of Legality*, 154 U. PA. L. REV. 335, 398 (2005) ("Several rationales are offered in support of the traditional legality principle: providing fair notice; gaining compliance with criminal law rules, including effective deterrence and avoiding overdeterrence (the chilling effect); reserving the criminalization authority to the legislature; increasing uniformity in application; and reducing the potential for abuse of discretion.").

Before doing so, however, I would like to note the inherent absurdity in identifying the principle of legality with the statutory creation of criminal offenses. If the principle of legality is derived from the ancient tenet *nullum crimin sine lege, nulla poena sine lege* that was recognized during the entire common law period, how could it stand for the proposition that there could be no crime without criminal legislation? "No crime without law" can mean no crime without criminal legislation only under the assumption that common law is not law.

The contemporary interpretation of the principle of legality cannot literally mean that there is no crime without criminal legislation. It must mean that there *should be* no crime without criminal legislation. But this requires a comparative assessment. It cannot be established merely by citing an ancient Latin dictum.

II. The Comparative Assessment

A. Avoiding the Nirvana Fallacy

Criminal law casebooks introduce the principle of legality with cases such as *Shaw* and *Mochan* to show the defects of the common law of crime. These cases illustrate the fact that under common law, judges can permit the state to punish individuals who defy conventional standards of morality. The cases act as neon signs directing our attention toward the illiberal aspects of the common law. We are supposed to conclude that this is obviously unacceptable and should be rejected in favor of the more definite, clearly articulated standards produced by democratically elected representatives functioning in accordance with our constitutional system of guaranteed rights.

But to think this way is to commit the Nirvana fallacy—to compare the imperfect, real-world functioning of the common law with the ideal, abstract functioning of the legislative

process. In the real world, however, legislation is often indefinite or obscure, and can need just as much specification by the courts as the common law does.[10] Decades of public choice economics suggests that legislation does not necessarily represent the will of the populace,[11] and by the end of the first year criminal law course, most of us have learned of the relative futility of appealing to constitutional protections.

What is required is a comparison of the real with the real. How does the common law of crime *as it actually existed* compare to statutory crime *as it actually exists*. Which provides citizens with more notice about how they should behave, provides more democratic accountability, and is more consistent with the separation of powers and the rule of law?

B. Some Necessary Background: Mens Rea—Old and New

Today, mens rea refers to the particular mental state an actor must have with respect to each material element of the offense. The Model Penal Code conveniently divides the potential mental states into purpose, knowledge, recklessness, and negligence. Contemporary criminal analysis begins by identifying the elements of the actus reus of an offense—act, consequences, and circumstances—and then determining whether the defendant has the necessary state of mind with regard to each element.

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[10] *See* Hessick, *supra* note 8, at 968.
[11] *See, e.g.,* Martin Gilens & Benjamin I. Page, *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens*, 12 PERSPS. ON POLS. 564, 575 (2014).

But this was not always so. At common law, mens rea meant moral blameworthiness. Early in its development, the criminal law came

> [u]nder the dominating influence of the canon law and the penitential books [such that] the underlying objective of criminal justice gradually came to be punishment of evil-doing; as a result the mental factors necessary for criminality were based upon a mind bent on evil-doing in the sense of moral wrong.[12]

For example, homicide evolved into murder and manslaughter on the basis of whether the defendant acted with "malice aforethought," understood as "general malevolence or cold-blooded desire to injure."[13] Similarly, because the "conception of blameworthiness or moral guilt is necessarily based upon a free mind voluntarily choosing evil rather than good,"[14] defenses such as self-defense, mistake of fact, duress, necessity, insanity, and infancy evolved.

Thus, during the formative period of the common law of crime, the mens rea requirement was understood to require moral blameworthiness for criminal punishment.[15] This is reflected in the "writings of the eighteenth century's foremost criminal law scholars—Hawkins, Foster, and Blackstone—[that] demonstrate that the connection between crime and moral guilt was enshrined in the common law. "[16] Hence, "the doctrine that a defendant was not criminally liable if she was free from moral fault was universally recognized and accepted during the latter half of the eighteenth century."[17]

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[12] Francis B, Sayre, *Mens Rea*, 45 HARV. L. REV. 974, 1016–17 (1932).
[13] *Id.* at 997.
[14] *Id.* at 1004.
[15] *See* PETER BRETT, AN INQUIRY INTO CRIMINAL GUILT 37–41 (1963); Ann Hopkins, *Mens Rea and the Right to Trial by Jury*, 76 CALIF. L. REV. 391, 394 (1988).
[16] Hopkins, *supra* note 14, at 394.
[17] *Id. See also* Richard Singer, *The Resurgence of Mens Rea: I – Provocation, Emotional Disturbance, and the Model Penal Code*, 27 B.C. L. REV. 243, 243 (1986) ("Prior to the nineteenth century, the criminal law of England and this country took seriously the requirement that a defendant could not be found guilty of an offense unless he had truly acted in a malicious and malevolent way — that he had not only "the" mental state for the crime, but that, more generally, he manifested a full-blown mens rea: an "evil mind.""); Andrew Ingram, *Out of Sight and Out of Mind: Criminal Laws Disguised Moral Culpability Requirement*, 56 U. RICH. L. REV. 491, 530 (2022)("No less an authority than Dressler tell us of the older definition of "mens rea," "defined as 'a general immorality of motive,'

At the time of the American revolution, the law of the states was the common law of England, which incorporated the common law of crime as it had developed up until that time.[18] Following the revolution, the states continued the common law development of criminal offenses through the end of the nineteenth century.[19] At the end of the nineteenth century and into the twentieth, states gradually enacted criminal codes that reduced the common law of crime to statutory form. As they did, criminal statutes became the primary source of new criminal offenses in the states.[20] And because the Supreme Court had ruled that there was no federal common law——that the exercise of "criminal jurisdiction in common law cases . . . is not within [the federal government's] implied powers"—all federal criminal offenses were necessarily a result of legislation.[21] Over the course of the twentieth century, the majority of the states gradually deprived the courts of the power to create new common law crimes either through legislation or by judicial implication.[22]

'vicious will,' or an 'evil-meaning mind.'").

[18] United States v. Worrall, 2 U.S. 384, 394 (1798) ("When the American Colonies were first settled by our ancestors it was held, as well by the settlers, as by the judges and lawyers of England, that they brought hither as a birthright and inheritance so much of the common law as was applicable to their local situation, and change of circumstances.").

[19] *See* Hessick, *supra* note 8, at 967 ("For more than half of our country's history, judges played a central role in determining the substance of criminal law, just as they did for property law, torts, contracts, and essentially every other area of law in early America. They used the common law method to determine what conduct qualified as criminal and to identify facts that could serve as a defense to prosecution.").

[20] *Id.*

[21] United States v. Hudson & Goodwin, 11 U.S. (7 Cranch) 32, 34 (1812).

[22] By 1947, eighteen states had abolished common law crime and thirty-one had restricted it to misdemeanors. *Common Law Crimes in the United States*, 47 COLUM. L. REV. 1332, 1333 (1947). Following the development of the Model Penal Code in 1962, twenty additional states followed suit. WAYNE R. LAFAVE, CRIMINAL LAW (5th ed. 2010).

As legislatures took over the creation of criminal offenses, the focus of the criminal law shifted from the punishment of moral wrongdoing to the protection of social and public interests as determined by the legislature.[23] This required a corresponding shift in the understanding of mens rea. Hence, mens rea no longer required moral wrongdoing, merely a particular state of mind with regard to the material elements of the offense. This is essentially a shift in focus from motive to intent.[24] Thus, the common law concept of malice became assimilated into intentional or reckless conduct. Willfulness became assimilated into intentional conduct;[25] wantonness into reckless conduct. And once mens rea was severed from moral blameworthiness, there could be criminal punishment for negligence, and before long, for entirely innocent action–for example, the so-called public welfare offenses.[26]

The transition from common law crime to statutory crime entailed a transition from a moralized mens rea—the requirement that criminal punishment required moral wrongdoing—to a morally-neutral mens rea—the requirement that one act with a state of mind prescribed by statute whether or not one's conduct is morally blameworthy.

C. Notice

One of the primary rationales offered in support of the principle of legality is the need to provide advanced notice of what conduct can expose an individual to criminal prosecution. Thus,

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[23] Sayre, *supra* note 11, at 994.See also *Common Law Crimes in the United* States, supra note 21, at 1337 ("Absent a statute, only that conduct was criminal at common law which the courts deemed *malum in se*–offensive to the law of nature–inherently and essentially evil. The modern attitude, on the other hand, demands a logical rather than a theological approach, with the emphasis not on the intrinsic quality of conduct but rather on its social consequences.").

[24] Sayre, *supra* note 11, at 1019.

[25] And, in certain contexts, acting with the knowledge that one is violating the law.

[26] Public welfare offenses include police offenses and criminal nuissances, both of which are punishable regardless of the actor's state of mind. Glen V. Bore, *Public Welfare Offenses: A New Approach*, 52 J. CRIM. L. & CRIMINOLOGY 418, 418 n.1 (1961).

the hornbook on criminal law states that,

> [t]he principal argument against common law crimes is expressed in the maxim *nullum crimen sine lege*, the basis of which is that the criminal law ought to be certain, so that people can know in advance whether the conduct on which they are about to embark is criminal or not.[27]

This is usually treated as though it is obviously true. In listing the values served by the principle, a leading casebook states that "[p]erhaps the most obvious is the need to give individuals *fair warning* as to the conduct that could subject them to prosecution."[28] Similarly, Dressler defends the principle on the ground that "a person cannot be deterred from committing what is subsequently determined to be a socially unacceptable act unless she has fair notice at the time of her conduct of the line separating proper from improper behavior."[29]

The problem with this rationale is that, at common law, people did have notice of what behavior was improper. In fact, they had more notice than they do under the present statutory system.

At common law, the mens rea requirement—the requirement to find moral blameworthiness to impose criminal punishment—restrained judges' ability to create new criminal offenses. Courts might have had the power to criminalize moral wrongdoing, but it was the power to criminalize *only* moral wrongdoing.

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[27] WAYNE R. LEFAVE, CRIMINAL LAW 88 (4th ed. 2003)
[28] KADISH, SCHULHOFFER, ET. AL., CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS 192 (11th ed. 2022).
[29] DRESSLER, *supra* note 6, at 41.

This explains why notice was not a major issue under common law. When the criminal law punished only moral wrongdoing, everyone already had notice of how to behave. Regardless of our opinion of the tenets of a society's conventionally accepted morality, it is reasonable to assume that the members of that society are aware of them. One required no knowledge of the law to avoid criminal punishment. One could do so simply by conforming one's behavior to society's moral tenets. This explains the advent of the doctrine that ignorance of the law does not excuse. When the criminal law punished only morally blameworthy conduct, such a doctrine made perfect sense.[30] The reason why first year law students (including me, in my time) find *Shaw* and *Mochan* offensive is not because the defendants did not know that what they were doing was wrong, but because we believe that the criminal law should not intrude into such matters of personal morality.

[30] A well-known scene from an episode of the Seinfeld television show provides an apt analogy of one claiming lack of notice at common law. In that episode, George has sex with a cleaning lady on a desk at his work place. When confront with this by his boss, he responds, "Was that wrong?"

Compare this with the current system of statutory criminal law. Freed from the requirement to find moral blameworthiness, legislatures used the criminal law as a means of social engineering. Over the course of the 20th century, they enacted myriad regulatory *mala prohibitum* offenses—offenses that are wrong only because they are prohibited by statute. Under our current system of criminal law, citizens are on notice of what conduct is criminal only if they make a study of the statute books. On the federal level alone, there are more than 5000 criminal provisions in the United States Code and more than 300,000 federal regulations that carry criminal penalties, making it virtually impossible for citizens to have notice of what is criminally prohibited.[31] And this ignores the state level criminal statutes and regulations that carry criminal sanctions.

Further, notice requires that citizens be able to understand the law in the books. Even a glance at the Code of Federal Regulations suggests that they would not be. Given that studies have shown that many IRS representatives are unable to interpret its provisions correctly, what hope does the ordinary citizen have?[32] In fact, the federal criminal code is so "redundant [and] internally inconsistent [that] these statutes may be 'public' in the sense of being available in print or on-line, but the 'code' is not by any stretch 'accessible' to the average citizen."[33]

United States v. Durary instructs that to determine the range of application of an ambiguous criminal statute, one must first consider the plain meaning of the statutory language,

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[31] *E.g.*, Julie R. O'Sullivan, *The Federal Criminal Code Is a Disgrace: Obstruction Statutes as Case Study*, 96 J. CRIM. L. & CRIMINOLOGY 643, 643 (2006) ("Readers should be cautioned, then, that my use of the term "federal criminal code" within this Article is simply a shorthand for an "incomprehensible," random and incoherent, "duplicative, ambiguous, incomplete, and organizationally nonsensical" mass of federal legislation that carries criminal penalties.").

[32] Curt Anderson, *IRS Advice Isn't Always Right*, CBS NEWS (Mar. 9, 1999), https://www.cbsnews.com/news/irs-advice-isnt-always-right/ ("[T]he [IRS] admits that 15 percent of the answers given on its help line are wrong.").

[33] O'Sullivan, *supra* note 30, at 665.

then the canons of statutory interpretation, then the legislative history of the statute, and only then, if any ambiguity remains, apply the rule of lenity to resolve the matter in favor of the defendant.[34] Very few ordinary citizens can make such determinations.[35] But as we all learn in our first year criminal course, mistake of law is not a defense—ignorance of the law does not excuse.[36]

[34] United States v. Dauray, 215 F.3d 257, 264 (2d Cir. 2000).
[35] Indeed, very few lawyers can either.
[36] Unless the statute is a complex regulatory one that requires willful violation.

Under common law, when all crimes were *mala in se*, the doctrine that ignorance of the law does not excuse was perfectly reasonable. Under our current system of statutory criminal law, it is a cruel joke. Punishing those who do not know that their conduct violates the law

> reduces the moral authority of our system of criminal law. If we use prison to achieve social goals regardless of the moral innocence of those we incarcerate, then imprisonment loses its moral opprobrium and our criminal law becomes morally arbitrary. We have now made felons of a large number of innocent people doing socially valuable work.[37]

[37] United States v. Weitzenhoff, 35 F.3d 1275, 1293 (9th Cir. 1993) (Kleinfeld, J., dissenting).

Furthermore, statutory criminal law is just as dependent on judicial interpretation as criminal common law. Legislatures regularly enact statutes that establish a worthy goal and leave the specific application to be filled in by the courts. The Sherman Anti-Trust Act criminalizes making contracts or forming trusts in restraint of trade,[38] but it is up to the courts to tell us which contracts or trusts restrain trade.[39] The federal mail fraud statute prohibits any scheme or artifice to defraud,[40] but it is up to the courts to tells us whether this requires the deceptive practice to be material,[41] or for anyone to rely on it,[42] or whether it applies to an effort to deprive another of his or her intangible right to one's honest services,[43] or even what this means.[44] The Securities and Exchange Act bans "any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security,"[45] but it required the courts to tell us what insider trading is.[46] Statutes that employ terms like "unreasonable," "substantial," and "unconscionable" have no definite meaning until appellate

[38] Sherman Anti-Trust Act, 15 U.S.C. § 1.
[39] *See, e.g.*, United States v Socony-Vacuum Oil Co., 310 U.S 150, 218 (1940) (introducing the parameters of per se anti-trust violations under the Sherman Act); Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 49 (1977) (limiting violations of the Act to unreasonable restraints on competition); Fed. Trade Comm'n v. Indiana Fed'n of Dentists, 476 U.S. 447, 459 (1986) (allowing plaintiff to proceed upon the mere showing of any market injury).
[40] Mail Fraud and Other Fraud Offenses, 18 U.S.C. § 1341.
[41] Neder v. United States, 527 U.S. 1, 21–25 (1999).
[42] Durland v. United States, 161 U.S. 306, 313–15 (1896). *Durland* was the first case to interpret the mail fraud statute that later became Section 1341. John S. Slosson, *Neder v. United States Materiality in Bank Fraud Prosecutions*, 4 N.C. Banking Inst. 655, 661–62 (2000).
[43] United States v. McNally, 483 U.S. 350, 360–61 (1987).
[44] O'Sullivan, *supra* note 30, at 665 ("For example, the words of § 1346 say very little, and the prosecutorial theories expanding the reach of the statute are certainly not clear on the statute's face. Thus, to secure anything close to "fair notice," citizens would have to wade through a confusing welter of courts of appeals decisions. Section 1346 is perhaps the most obvious example of this phenomenon, but it is assuredly not alone among commonly-used federal criminal statutes.").
[45] Employment of Manipulative and Deceptive Devices, 17 C.F.R. § 240.10b-5 (2017).
[46] Kelly Strader, *White Collar Crime and Punishment: Reflections on Michael, Martha, and Milberg Weiss*, 15 Geo. Mason L. Rev. 45, 67 (2007). *Compare* Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164, 175–76 (1994) (presenting narrow interpretation of securities laws) *with* United States v. O'Hagan, 521 U.S. 642, 667–78 (1997) (providing broad definition of securities laws. *See generally* Mark J. Loewenstein, *The Supreme Court, Rule 10b-5, and the Federalization of Corporate Law*, 39 Ind. L. Rev. 17 (2005) (highlighting contradictions in Supreme Court-provided definitions of insider trading).

courts rule on the matter. Price gouging laws ban the sale of "any necessary goods or services at an unconscionable price" during a disaster.[47] Just how different is this from *Machon's* criminalization of "any act which directly injures or tends to injure the public to such an extent as to require the state to interfere and punish the wrongdoer"?

At common law, citizens who were engaged in moral wrongdoing could be convicted of a crime without knowing that they were violating the criminal law. Under our present system of statutory criminal law, citizens are even more likely to be convicted of a crime without knowing that they were violating the law *whether they were engaged in moral wrongdoing or not*. To the extent that the principle of legality is understood as abolishing common law crime, it cannot be justified by the need to provide fair notice to the citizenry.

D. Democracy

[47] VA. CODE ANN. § 59.1527 (2004).

The principle of legality is often defended on the grounds that it is necessary to ensure democratic accountability.[48] Requiring that all criminal offenses be defined by the legislature keeps the law responsive to the will of the people. Unlike the common law of crime where law can be created by the unrestrained will of individual judges, the statutory system guarantees that the law is derived from the sentiments and moral beliefs of the populace and directed toward the public interest.

Democratic theorists say things like this all the time, despite it being the embodiment of the Nirvana fallacy. In the ideal democracy, representatives adhere to the views of the majority of their constituents and impartially craft legislation for the common good. But, of course, the ideal common law judge only recognizes new offenses that prohibit immoral, harmful conduct and advance the security and well-being of the society. The comparison that is needed is between the reality of the common law and the reality of legislation.

At common law, the mens rea requirement limited the scope of the criminal law to actions that transgressed conventionally-accepted morality. But conventionally-accepted morality is a reasonable approximation of what the public believes to be punishable conduct. Further, appellate judges do not have the opportunity to recognize new criminal offenses unless the defendant has been convicted by a jury. That means that any new common law offense has had the unanimous support of twelve ordinary citizens. This is, again, a reasonable proxy for general public sentiment. It is true that the common law process can produce new offenses that reflect the biases and prejudices of the citizenry, but the objection to this cannot be that it is undemocratic.

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[48] Michael S. Moore, Act and Crime: The Philosophy of Action and Its Implications for Criminal Law 240 (1993); Hessick, *supra* note 8, at 976.

Even today, ninety percent of state judges in the United States are elected.[49] They are just as responsive (or unresponsive) to the will of the people as the members of the legislature. In fact, with regard to matters of law, they are more so because their legal rulings are the basis for their electoral popularity or unpopularity.

The need for a jury conviction before a new common law offense can be recognized affords citizens more direct input into shaping the law than they have in the legislative process. Citizens rarely get to vote directly on whether there should be a new criminal offense, much less on the configuration of the criminal law in general.[50] And, of course, legislators are notoriously responsive to political considerations, rather than careful evaluations of what criminal laws command majority support. Criminal legislation often "can be traced largely to the political desire to react to a given scandal,"[51] and arises because "[a]s a rule, lawmakers have a strong incentive to add new offenses and enhanced penalties, which offer ready-made publicity stunts, but face no countervailing political pressure to scale back the criminal justice system."[52] And to the extent that the common law can reflect the prejudices of the citizenry, the legislature is likely to do so to an even greater extent. The Jim Crow legislation in the Southern states was a reaction of the common law's failure to segregate the races.

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[49] Adam Crepelle, *An Intertribal Business Court*, 60 Am. Bus. L.J. 61, 92 (2023); Lincoln Caplan, *A Blueprint for a Safer, Saner Society*, The American Scholar (Apr 18, 2019).

[50] *See Statewide Ballot Measures Database*, Nat'l Conference of State Legislatures (Nov. 13, 2024), https://app.powerbi.com/view?r=eyJrIjoiYjEwNDI2NTctZDFkMy00ZGM4LWFkMTItNTcwYTdkZmMxMGIxIiwidCI6IjM4MmZiOGIwLTRkYzMtNDEwNy04MGJkLTM1OTViMjQzMmZhZSIsImMiOjZ9 (illustrating the rarity of criminal law-related ballot measures).

[51] O'Sullivan, *supra* note 30, at 654.

[52] Erik Luna, *The Overcriminalization Phenomenon*, 54 Am. U. L. Rev. 703, 718 (2005); *See also* Hessick, *supra* note 8, at 993 ("But for criminal laws . . . all of the powerful interest groups favor broader criminal laws and harsher punishments. Even without the prompting of interest groups, legislators will sometimes propose legislation to expand the scope of criminal laws in order to respond to a news story. Those legislators who vote against increasing the scope of criminal laws risk being labeled 'soft on crime.'")

E. Separation of Powers

The principle of legality is sometimes defended on the ground that it is inherent in doctrine of the separation of powers; the venerable principle of political philosophy that holds that the legislative, executive, and judicial powers of government must be in different hands to guard against tyranny—that "dividing governmental powers between different branches helps to check governmental power and preserve liberty."[53] The claim is that the separation of powers requires law-making power to reside exclusively in the legislature. This implies that courts should be barred from creating new law through common law adjudication, and that common law crime must therefore be eschewed.[54]

I confess that the logic of this reasoning escapes me. The purpose of the separation of powers is to prevent government oppression. This purpose is well-served by separating the executive power from both the legislative and judicial powers. It is obviously too dangerous to allow the party with control of the instruments of coercion to make the law. That would give the government carte blanche to run roughshod over the rights of its citizens. But even shorn of the legislative power, it is still too dangerous to allow the executive to interpret the law. For that would allow it to evade any legislative restrictions on its power by interpreting them out of existence.

[53] Hessick, *supra* note 8, at 977.
[54] This was essentially the argument of the dissenting judge in *Mochan*, who stated that "[u]nder the division of powers in our constitution it is for the legislature to determine what 'injures or tends to injure the public.'" *See also* Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 19 (1985).

But, where is the danger in allowing the judiciary to participate in the law-making process? There is no apparent objection to its doing so with regard to civil matters where common law evolution continues. And with regard to criminal law, 1) the judiciary can expand the law only on the basis of cases that are brought to it and that have given rise to conviction by a jury, 2) it has no power to enforce its legal innovations on its own, and 3) the legislature can override any such judicial innovations at will. I am at a loss to see how the lack of a strict separation of the legislative and judicial powers poses a risk of tyranny.

Our 17th century forebearers employed the concept of the separation of powers in crafting the state and federal governments. They did so well-aware that the criminal offenses of their time were created and defined by the courts through the common law process. Apparently, they, like me, did not perceive the danger of judicial participation in law-making. As long as the creation and interpretation of the law is kept out of the hands of those with enforcement power, the source of the law has little relevance.

Historically, legislation was not designed to replace the common law, but to deal with matters that could not be or were not adequately addressed by the common law. Anglo-American law was always seen as a mix of common law rules and consciously created legislation. Hence, it is not surprising that our forebearers did not view the doctrine of the separation of powers as requiring a strict separation between the legislature and judiciary. The same holds true today.

F. Rule of Law

The rule of law can refer to many things, but in the present context, it can only mean that citizens should be governed by objectively defined laws rather than the discretion of individual government officials. Advocates of the principle of legality argue that in the absence of a

criminal statute, a citizens' fate is left in the hands of individual judges who can decide whether to impose criminal punishment at their own discretion. They argue that such discretion is obviously incompatible with the rule of law and that criminal statutes are necessary to ensure uniformity in the application of the law.[55] But this, too, is a classic example of the Nirvana fallacy, and the obviousness of the observation disappears when one compares the discretion permitted by the common law with that permitted by actual criminal legislation.

[55] DESSLER, *supra* note 6, at 40 ("(E)nforcment of the principle is designed to serve fundamental justice by preventing the government from tyrannizing its enemies by enacting vindictive, retroactive criminal legislation."); RICHARD G. SINGER & JOHN Q. LAFOND, CRIMINAL LAW 7 (2010) ("Second, under a common law system the limits on governmental authority are not clear. . . Unless the law draws a clear boundary between permissible and impermissible behavior, the government can more easily use the awesome power of the criminal law to convict and incarcerate individuals it considers its enemies for behavior that may have actually been innocent."); John Jefferies, *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 201, 212 (1985) ("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.").

To begin with, judges in the statutory system have just as much discretion to expand the scope of the criminal law as do common law judges. As noted in Section II(C) above, political considerations drive legislatures to pass overly broad, ill-defined criminal statutes.[56] Congress can outlaw "a scheme or artifice to deprive another of the intangible right of honest services,"[57] but courts must determine whether that is limited to the violation of a fiduciary duty or includes an employee using a sick day to go to a ball game.[58] A court that interprets the statute to include the latter is exercising as much discretion to create criminal law as the *Machon* and *Shaw* courts were. Similarly, there is no explanation for the punishment of insider trading other than judicial crime creation.[59]

But the major difference between common law and the statutory system is the amount of discretion wielded by prosecutors. The same factors that produce broad and vaguely defined criminal legislation endow prosecutors with a vast amount of individual discretion. Focusing only on the federal level for the moment, "Congress' penchant for speaking only in very broad and vague terms in criminal legislation"[60] means that

> Federal prosecutors exercise a very broad—and for the most part unreviewable—discretion in selecting cases and charges. They can also fundamentally change the content of a vaguely worded criminal statute by pursuing novel theories of prosecution . . . Prosecutors make law, then, by exercising their discretion to make enforcement decisions that functionally determine the real shape of the federal code and to formulate theories of prosecution that expand the accepted understandings of the reach of certain criminal statutes. . . . [The] simple truth [is] that the outcome in most cases is

[56] See Hessick, *supra* note 8, at 993; O'Sullivan, *supra* note 30, at 655.
[57] Definition of "Scheme or Artifice to Defraud", 18 U.S.C. §1346.
[58] See Sorich v. United States, 555 U.S. 1204, 1309–10 (2009) (Scalia, J., dissenting).
[59] See Hessick, *supra* note 8, at 982 ("Even in those jurisdictions that explicitly prohibit judicial crime creation, we nonetheless see convictions that cannot possibly be explained as anything else. Take, for example, the scores of federal convictions for insider trading.").
[60] O'Sullivan, *supra* note 30, at 655.

determined not by a court or a jury but by the prosecutor.[61]

[61] *Id.* at 671–73. See also Hessick, *supra* note 8, at 996 ("But it is entirely up to prosecutors to decide how broadly or narrowly to enforce those laws. In other words, prosecutors are free to decide which conduct to treat as illegal and which to treat as permissible.")

The idea that criminal statutes are necessary to ensure uniformity in the application of the law is belied by the fact that "[w]ith legislation covering virtually any crime they might plausibly wish to prosecute, federal prosecutors pick their targets and marshal their resources, not in response to the limitations of the substantive law but according to their own priorities and agendas."[62] And the situation is essentially the same with regard to state level legislation and prosecution.

The common law of crime left prosecutors and judges with a modicum of discretion that is not consistent with a strict interpretation of the rule of law. But this discretion pales in comparison to the large range of judicial discretion and virtually unchecked prosecutorial discretion in the statutory system. A comparative assessment of the actual functioning of the common law of crime with the actual functioning of our statutory system strongly suggests that the former is more consistent with the rule of law than the latter.

III. Liberalism

A comparative assessment suggests that a system of purely statutory criminal law does not necessarily promote the political values of notice, democratic accountability, the separation of powers, and the rule of law more than a system of common law crime. These are the values of a liberal society—one in which there is a protected realm of individual choice and action. They are instrumental values designed to preserve the more ultimate political value of individual liberty and freedom from an oppressive government.

[62] John C. Jeffries, Jr. & Hon. John Gleeson, *The Federalization of Organized Crime: Advantages of Federal Prosecution*, 46 Hastings L.J. 1095, 1125 (1995). Indeed, the Supreme Court has recognized that "[t]here is no doubt that the breadth of discretion that our country's legal system vests in prosecuting attorneys carries with it the potential for both individual and institutional abuse." Bordenkircher v. Hayes, 434 U.S. 357, 365 (1978).

The observation that the transition from common law crime to statutory crime does not advance any of these instrumental values should not be surprising. This is because the transition does not advance the ultimate goal of a liberal society. Rather than preserving the freedom of citizens from oppressive government, the transition puts that freedom at risk. Criminal law circumscribes individual liberty. That is its purpose. It authorizes the government to employ coercion to prevent individuals from engaging in specified behavior. To be consistent with a liberal society, its reach must be limited.

The factors that limit the reach of the common law are structural—they are internal to the process by which the rules of the common law of crime evolve. Courts can only decide cases that are brought to them. A common law judge can hear a case alleging a new criminal offense only if a prosecutor first brings such a charge. For there to be an appellate decision recognizing a new offense, there must first have been a prosecution, a conviction, and an appeal. This means that a common law judge can create new crimes only in cases of conduct that is socially disruptive enough to generate both a prosecution and a conviction by a jury of ordinary citizens. Further, the common law mens rea requirement limits the scope of crime creation to actions that are regarded as morally blameworthy under contemporary moral standards.

The factors that limit the reach of statutory law are constitutional–they are external to process by which criminal statutes are created. Legislators have carte blanche to criminalize any behavior they deem socially undesirable. They do not have to wait until actions provoke prosecution to outlaw them, and they are not limited to prohibiting only moral wrongdoing. They are free to utilize the criminal law to engage in social engineering, and they do so with gusto. The only checks on the scope or content of criminal legislation are those that can be derived

from the state or federal constitutions.

In short, common law crime arises from the gradual accretion of rules that are created as new causes of action develop from the prosecutions that are brought and affirmed by juries. Statutory crime arises from the political forces that shape legislation.

There is no doubt that the common law process can produce illiberal results. Common law judges have the discretion to recognize new offenses and impose criminal punishment on those who violate society's conventionally accepted moral beliefs. Common law crime can result in the legal enforcement of morality exemplified by the *Shaw* and *Machon* cases that my young-1L-self found so repugnant. This is certainly an illiberal aspect of common law crime. The common law will not produce the liberal ideal of justice.

But this is irrelevant. Ideal justice is not an option. What matters is which of the possible alternatives comes closest to the ideal. And there can be little doubt that our statutory system of criminal law has produced far more illiberal results than the common law system.

The common law, limited by the requirement to find moral blame to impose criminal punishment, gave us the crimes of homicide, rape, assault, arson, theft, and fraud. It also gave us the morals offenses illustrated by *Shaw* and *Machon*. The shift to statutory criminal law codified the pre-existing common law offenses and expanded the scope of the morals offenses, yielding criminal statutes prohibiting prostitution and a variety of other sexual practices, personal alcohol and drug use, gambling, doing business on Sunday (blue laws), and failure to maintain racial segregation (Jim Crow). But much more significantly, it freed the criminal law from the need to find moral wrongdoing to restrain citizens' liberty and opened it to the political forces that shape legislation.

Those forces produced what has come to be known as the overcriminalization crisis.[63] As previously noted,[64] the political forces that influence legislators almost always favor increased criminal legislation.

> Cognitive errors and biases tend to support a one way ratchet toward the enactment of additional crimes and harsher penalties. These include overgeneralization, availability, overconfidence, and biased processing of information. These errors and biases lead people to recall media accounts of serious crimes, to overestimate their frequency, and to jump to the conclusion that additional harsher laws are needed. These flames are fanned by the news media, which has an economic incentive to portray violent crime in news programming as well as entertainment programming. In short, there is a "fear factor" affecting criminal justice policy.[65]

Shorn of the common law mens rea requirement,

> immorality in the philosophical sense (as compared to immorality from a purely religious or personal perspective) is no longer viewed by government as a prerequisite to invoke the criminal sanction. In other words, behaviors need not be wrongful and harmful in any meaningful way and individuals need not be culpable before new crimes are enacted and their offenders punished. Rather, a legislator only has to point to some alleged need or hardship, no matter how minor or implausible, in order to rally his fellow lawmakers behind an otherwise unjustifiable penal statute. In the past few decades, easily exploited tropes like "corporate greed" have offered bumper sticker-style expressions that make even the most fanatical and foolish proposals impossible to stop. . . . The end result has been the proliferation of an entire body of morally neutral criminal law . . . including certain business and regulatory offenses that lack harmful wrongdoing as well as the doctrines of vicarious and strict liability, which dispense with individual culpability altogether.[66]

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[63] Please forgive the extensive use of direct quotations in what follows. The overcriminalization phenomenon is so well known, *see, e.g*, O'Sullivan, *supra* note 30, at 644–45, and so frequently discussed in the literature, *see, e.g.*, SYMPOSIUM: OVERCRIMINALIZATION: THE POLITICS OF CRIME 54 AM. U. L. REV. 541,820 (2005), that I can do no better than using the actual words of the leading criminal law scholars who address it.

[64] *See supra* Part §II(D) above.

[65] Sara S. Beale, *The Many Faces of Overcriminalization: From Morals and Mattress Tags to Overfederalization*, 54 AM. U. L. REV. 747, 773 (2005).

[66] Luna, *supra* note 51, at 722–23.

William Stuntz concisely summed up the nature of contemporary criminal legislation as follows: "American criminal law's historical development has borne no relation to any plausible normative theory — unless "more" counts as a normative theory."[67]

Perhaps the strongest evidence for the illiberal effects of the principle of legality is that Dressler feels compelled to attach his three corollaries to the principle. The fact that the shift to statutory criminal law requires a warning that the statutes must be intelligible to ordinary people, must not invest the government with arbitrary power, and must be interpreted narrowly tells us much about what to expect when politicians are empowered to create criminal law unchecked by a mens rea requirement limiting it to acts of moral wrongdoing. Indeed, the contemporary overcriminalization crisis is a testament to the ineffectiveness of the external control of government power through constitutional provisions and abstract philosophical requirements such as Dressler's corollaries.

In sum, the overcriminalization crisis is the strongest argument against interpreting the principle of legality as a ban on common law crime. Focusing exclusively on the illiberal aspect of common law crime exemplified by *Shaw* and *Machon*, as I did in my law school days, blinds us to the vastly more illiberal result of allowing politicians to manufacture the rules of criminal law. The import of this blindness is concisely summed up by Erik Luna, who notes that

> one of the major deficiencies in existing analysis is the failure to see overcriminalization precisely for what it is: a broad phenomenon encompassing a multiplicity of concerns but always involving the unjustifiable use of the criminal justice system. By viewing the issues in isolation—the passage of silly crimes or the misapplication of vicarious liability or the imposition of disproportionate punishment, and so on—the bigger picture becomes lost, how government abuses its immense power in each situation as part of an alarming readiness to apply the criminal justice system without limitation throughout the entirety of American

[67] William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 508 (2001).

life.[68]

[68] Luna, *supra* note 51, at 718–19.

Conclusion

The principle of legality is said to embody the ancient maxim, *nullum crimin sine lege, nulla poena sine lege*. If so, there are many ways that it may be interpreted. In our contemporary criminal law hornbooks and casebooks, it is understood as a ban on criminal punishment in the absence of a previously enacted criminal statute—that is, as the abolition of common law crime.

This Article argues that the near universal support and praise for this understanding of the principle of legality is a clear example of the Nirvana fallacy. Like me, first year law students can clearly see the injustice in cases like *Shaw* and *Machon*. But, perhaps because the principle of legality is almost always introduced at the beginning of the course, we never think to ask whether investing politicians with the power to make criminal law would result in even greater injustice. These questions come later in the course when we encounter unjust and often racist outcomes that generate as much indignation as *Shaw* and *Machon*, if not more. But by then, the principle of legality is forgotten and a comparative assessment of common law and statutory crime is never made.

Common law crime is not coming back. However, we can still learn valuable lessons from our long-delayed comparative assessment. Preeminent among these is that structural limitations on the scope of the criminal law are more effective at restraining government overreach than constitutional or philosophical ones. If we are forever saddled with criminal legislation—criminal law created by politicians—the least we should do is incorporate some of the structural limitations of the common law into the statutory process. The most effective of these is a return to the common law conception of mens rea.

The simple expedient of requiring a finding of moral wrongdoing to sustain a criminal

conviction would go a long way toward ending the overcriminalization crisis. Retranslating mens rea elements such as malice, willfulness, and wantonness back into their morally-laden common law meanings would require the prosecution to demonstrate ill-will in order to obtain a conviction. Requiring knowledge not just of what one is doing, but that what one is doing is morally wrong would breathe life back into the doctrine that ignorance of the law does not excuse. Such a change would shift the focus of criminal prosecutions from intent back to motive.

This would, of course, leave a defendant's fate in the hands of a jury's idea of what morality requires. While this could result in inconsistent or illiberal results, the point of trial by jury is to place ordinary citizens' sense of morality between the individual and the state. The calculation is that leaving decisions about who the state can punish in the hands of ordinary citizens will produce less inconsistent and illiberal results than relying on the good faith of government officials.

Avoiding the Nirvana fallacy requires us to compare the way the common law of crime *actually* functioned with the way criminal legislation *actually* functions. Doing so suggests that requiring a jury to find that one has acted in defiance of the society's standards of morality before the state can punish him or her is, with all its flaws, a more effective mechanism for preserving a liberal society than merely applying constitutional and philosophical constraints to criminal legislation. Despite the almost universal opprobrium in which common law crime is currently held, when it is compared with the past century and a half of criminal legislation, I think it looks pretty good.