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PROCESS, THE CONSTITUTION, AND SUBSTANTIVE CRIMINAL LAW

Louis D. Bilionis*

Criminal law scholars have pined for a substantive constitutional criminal law ever since Henry Hart and Herbert Packer first embraced the notion in the late 1950s and early 1960s.¹ To this day, scholars continue to search for a theory that gives content to, in Hart's words, "the unmistakable indications that the Constitution means something definite and something serious when it speaks of 'crime.'"² To their dismay, the Supreme Court has — with two exceptions — seemingly resisted the notion.

The two exceptions are familiar. First came the 1957 case of *Lambert v. California*,³ in which the Court came as close as it ever has to constitutionalizing a mens rea requirement as fundamental to the just imposition of a criminal sanction. *Lambert* was followed in 1962 by *Robinson v. California*,⁴ in which the Court came as close as it ever has to constitutionalizing criminal law's other Latin half, the element of actus reus. Both cases were certifiable breakthroughs that found previously unrecognized content in the Due Process Clause and the Eighth Amendment, respectively, to limit the power of American legislatures to define criminal laws.⁵ Both

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1. See Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401 (1958); Herbert L. Packer, *Mens Rea and the Supreme Court*, 1962 SUP. CT. REV. 107 [hereinafter Packer, *Mens Rea*]; see also Herbert L. Packer, *The Aims of the Criminal Law Revisited: A Plea for a New Look at "Substantive Due Process,"* 44 S. CAL. L. REV. 490 (1971) [hereinafter Packer, *Aims Revisited*].

2. Hart, *supra* note 1, at 431. For a discussion of the "unmistakable indications" that Henry Hart had in mind, see *infra* text accompanying notes 54-63. For a discussion of the related work of other criminal law scholars, see *infra* notes 106-12 and accompanying text (discussing the work of Herbert Packer) and *infra* notes 113-19 and accompanying text (discussing the work of more recent scholars).

3. 355 U.S. 225 (1957) (reversing a conviction where the defendant had failed to comply with a state law requiring her to register as a convicted felon and holding that due process requires some consideration at trial of a defendant's claimed unawareness of the duty imposed by the law). For an interesting account of the Court's deliberations in *Lambert*, see A.F. Brooke II, Note, *When Ignorance of the Law Became an Excuse: Lambert & Its Progeny*, 19 AM. J. CRIM. L. 279 (1992).

4. 370 U.S. 660 (1962) (holding that the Eighth Amendment bars the conviction of an individual merely for his status as a drug addict).

5. It may interest some to learn that *Lambert* and *Robinson* were argued and won by the same attorney, a little-known Southern California lawyer by the name of Samuel C.

decisions were tantalizing symbols as well. They held out hope for a vibrant relationship between the Constitution and the criminal law, one that might develop new principles to help bring about a more humane, moral, and altogether more sound substantive penal law.

Yet what followed from *Lambert* and *Robinson*, the received wisdom holds, is a story of unfulfilled potential, the unexciting tale of an exciting substantive constitutional criminal law that never came to be. The curse that Justice Frankfurter cast upon the majority in his dissent in *Lambert* appears to have stuck, for the case indeed "turn[ed] out to be an isolated deviation from the strong current of precedents — a derelict on the waters of the law."⁶ *Robinson*, meanwhile, was consigned to a fate only slightly less forlorn, relegated to the outermost fringe of the criminal law by the narrow reading placed upon it six years later by the Court in *Powell v. Texas*.⁷ Nor has a substantive constitutional criminal law sprung, as some have hoped, from robust interpretations of the presumption of innocence and the requirement that guilt be established by proof beyond a reasonable doubt.⁸ The Court stiffened its back toward such interpretations in *Patterson v. New York*,⁹ and its posture

McMorris, who apparently never argued another case before the Supreme Court. Although McMorris had no co-counsel in either case, his cause in *Lambert* benefitted immeasurably from the work of Warren E. Christopher. Christopher, a former law clerk to Justice William O. Douglas and destined to have an illustrious career in the national government, was invited by the Court to appear as *amicus curiae* for Lambert when the case was restored to the docket after an initial, and evidently unsatisfactory, submission of the case during October Term, 1956. See *Lambert v. California*, 353 U.S. 979 (1957) (restoring the case to the docket and inviting the Attorney General of California to file a brief and to participate in oral argument); *Lambert v. California*, 354 U.S. 936 (1957) (inviting Christopher to appear and present oral argument as *amicus curiae* in support of the appellant). Christopher filed a brief that Herbert Packer later praised as a model of constitutional advocacy in the tradition of Louis D. Brandeis. See Packer, *Aims Revisited*, *supra* note 1, at 498 (noting that "[w]hile briefs are usually (and deservedly) lost to obscurity, this one occupies, in my view, a position of honor equal to that achieved by Mr. Louis V. [sic] Brandeis for his brief in *Muller v. Oregon* [208 U.S. 412 (1907)]"); Packer, *Mens Rea*, *supra* note 1, at 128-29 (noting that Christopher's brief "was one of those rare performances that must gladden the hearts of the Justices").

6. *Lambert*, 355 U.S. at 232 (Frankfurter, J., dissenting).

7. 392 U.S. 514, 532-36 (1968) (citing *Robinson* for the limited principle that mere status may not be criminalized, while upholding an alcoholic's conviction for public drunkenness although his condition compelled him to drink and his economic status may have compelled him to appear in public).

8. See, e.g., Donald A. Dripps, *The Constitutional Status of the Reasonable Doubt Rule*, 75 CAL. L. REV. 1665 (1987) (arguing for an interpretation of the reasonable doubt rule that would constrain legislative freedom to define crimes and defenses); Scott E. Sundby, *The Reasonable Doubt Rule and the Meaning of Innocence*, 40 HASTINGS L.J. 457 (1989) (arguing for an interpretation of the reasonable doubt rule and its embrace of the presumption of innocence that indirectly would constrain legislative freedom to define crimes and defenses).

9. 432 U.S. 197, 205-211 (1977) (asserting legislative primacy in the definition of crimes and defenses and refusing to interpret the reasonable doubt rule to impinge upon legislative

has shown no real signs of relaxation since. All in all, four decades have passed since Henry Hart lamented the Supreme Court's failure to forge a relationship between the Constitution and substantive criminal law,¹⁰ and not much seems to have changed. As an heir to Hart's frustration recently put it, "[t]here is no real substantive due process aimed specifically at criminal law."¹¹

That is the accepted story line anyway, the account to which law professors invariably subscribe and then pass on to succeeding classes of aspiring lawyers. It also happens to be a significantly incomplete account of our Constitution produced by a skewed set of expectations. As Part I of this article demonstrates, we are inclined to see no meaningful relationship between the Constitution and substantive criminal law because we expect the relationship to manifest itself only in the trappings of substance, in rights-based restraints on the criminal sanction that are grounded in some satisfactory substantive theory of crime, punishment, and individual liberty. That is our expectation, whether or not we are consciously aware of it, because that is exactly what forty years of legal scholarship devoted to the subject has taught us to expect. Ever since Henry Hart touched off the discussion, efforts to relate the Constitution and substantive criminal law have concentrated almost exclusively on constructing a theory of substantive justice, substantive rights, and substantive restraints — in short, on a substantive constitutional criminal law.

Starkly absent from the academic discussion to date is a theory of process — one that concentrates on the proper constitutional roles of judges and legislators and prosecutors and jurors in criminal law choices, on the relative strengths and weaknesses of the institutional players involved, on the function of political safeguards and institutional discretionary mechanisms, on the significance of federalism, and on the countermajoritarian difficulties attending judicial review under the capacious concept of due process. Scholars bent on substantive theorizing have ignored, sidestepped, or glossed over these process concerns, explained them away, or (if really pressed) simply tabled them. As we see in Part II, our understanding of constitutional practice suffers as a consequence. By refusing

freedom to reach compromises that shift burdens of proof). *Patterson* is discussed in detail *infra* sections II.A.3 and II.A.4.

10. See Hart, *supra* note 1, at 431 (noting that the Court "has hardly got to first base" on the issue).

11. William J. Stuntz, *Substance, Process, and the Civil-Criminal Line*, 7 J. CONTEMP. LEG. ISSUES 1, 6-7 (1996) (arguing for the development of substantive constitutional criminal law).

to squarely confront questions of process, we obscure the fact that process considerations have been shaping the Supreme Court's jurisprudence at the intersection of the Constitution and substantive criminal law for at least seventy-five years.

Contrary to the conventional account, the Constitution and substantive criminal law in fact are engaged in a serious, long-running relationship that is amply manifested in dozens of Supreme Court opinions, ranging from *Lambert* and *Robinson* to the burden of proof and presumption cases, the vagueness decisions, and the Eighth Amendment proportionality and capital punishment cases. It is a coherent relationship grounded in process, and it is high time we take account of it.

I. THE ASCENSION OF SUBSTANTIVE CONSTITUTIONAL CRIMINAL LAW

A. *The Origins of Substantive Constitutional Criminal Law Theory: The Academic Assault on Strict Liability*

Few American law students graduate these days without some exposure to the vigorous attack on strict liability crimes waged by Henry Hart and the criminal law *cognoscenti* in the 1950s and 1960s. Professors know that one sure-fire way to impress upon students the central place that *mens rea* holds in the structure of the criminal law is to draw their attention to a world without it — a world that imposes the criminal sanction without an individualized determination of the defendant's moral blameworthiness. One or two hypotheticals about an upstanding corporate executive¹² or bank director¹³ tangled in the net of a strict liability crime usually sparks the desired discussion, and by the end of the hour, the classic critique of strict liability that informed the American Law Institute's work on the Model Penal Code¹⁴ and that Hart authoritatively propounded in his influential *The Aims of the Criminal Law*¹⁵ echoes off the classroom walls.

12. See, e.g., *United States v. Dotterweich*, 320 U.S. 277 (1943) (upholding the conviction of a corporate officer for shipping adulterated and misbranded drugs in violation of the Food, Drug, and Cosmetic Act of 1938 and interpreting the statute to call for strict liability).

13. See, e.g., *State v. Lindberg*, 215 P. 41 (Wash. 1923) (upholding the conviction of a bank director for borrowing from his own bank in violation of a state statute and construing the statute to impose strict liability and to prohibit a defense of honest and reasonable mistake).

14. See MODEL PENAL CODE § 2.05 cmt. 1 (1985) (discussing the Model Penal Code's "frontal attack on absolute or strict liability").

15. Hart, *supra* note 1.

Today's students generally hit on all the salient points of the traditional argument, but one thing always seems to be missing. The idea that the criminal justice system might commit a few well-heeled elites to some undeserved jail time just does not send law students of the 1990s into the same high dudgeon that Hart and his contemporaries mustered. Perhaps it is a case of underdeveloped moral sensibilities, complicated by a propensity to discount injustices when they befall the socially fortunate, but I do not believe it is as simple as that. The hypotheticals, and the case against strict liability itself, appear to have lost a good bit of their urgency. Today, few people place the existence of strict liability high on the list of genuinely pressing problems facing the criminal law, whether as a source of particular injustice to individual defendants,¹⁶ as an incentive to excessive criminalization in the name of social control,¹⁷ or as a force that erodes societal respect for the criminal sanction.¹⁸ Society seems to have its appetite for strict liability under control,¹⁹ while new and different problems challenge the criminal law as it approaches the millennium. But for Hart and the generation that witnessed the rise of totalitarianism abroad and felt its reverbera-

16. In cases involving low levels of punishment, strict liability always has had difficulty sparking outrage. See, e.g., Francis B. Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55, 78-80 (1933) (accepting strict liability where "the penalty is really slight" but advocating a mens rea affirmative defense — with the burden of persuasion assigned to the defendant — for public welfare offenses involving a possible penalty of imprisonment or heavy fine and arguing that "[f]or true crimes it is imperative that courts should not relax the classic requirement of mens rea or guilty intent"); see also MODEL PENAL CODE § 2.05 (1985) (establishing as a general rule that strict liability may be used only in cases of "violations" that are punishable by fine, forfeiture, or other civil penalty). Cases involving more serious punishment are another matter in theory, but it is not just the class cynic who questions how serious the theoretical problem really is in practice. Ask yourself how likely it is that a person of stature and means will fail to get a fair shake in a serious case due to the presence of strict liability, suffering unjust punishment notwithstanding his or her individual blamelessness and efforts to persuade the police or prosecutor not to bring the charges in the first place, or to negotiate a workout short of conviction, or, if that fails, to finesse a jury nullification, hung jury, or otherwise lenient sentence.

17. But see Stuntz, *supra* note 11, at 31-34 (decrying perceived overcriminalization and arguing that a constitutional requirement of mens rea would have the virtue of discouraging it).

18. If anything, ebbing respect for the criminal law today seems to be more commonly attributed to perceived shortcomings and disparities in enforcement — phenomena that strict liability is often aimed at minimizing. See *infra* notes 49-50 and accompanying text.

19. To the extent that this is so, a debt of gratitude may be owed to the steady criticisms of strict liability put forward by scholars such as Sayre and Hart, and to the American Law Institute's expressed aversion to strict liability as manifested in the Model Penal Code, see MODEL PENAL CODE § 2.05 cmt. 1 (1985) (sharply criticizing strict liability and advocating severe limitations on it). The widespread adoption of a skeptical judicial posture toward strict liability in questions of statutory interpretation, see, e.g., *United States v. United States Gypsum Co.*, 438 U.S. 422, 436-38 (1978) (discussing the "interpretive presumption that mens rea is required"), may be credited to such critical efforts.

tions here at home,²⁰ legislative experimentation with strict liability presented very real concerns that it might escalate into a full-blown habit with tragic consequences. Society's capacity for generating temptations to employ strict liability "just this once" against the social danger of the month seemed limitless,²¹ while the affairs of the day did not inspire confidence that the "legislature's sense of justice"²² would know when to say "no" to the passionate urges of the moment. For Hart and his contemporaries, the need to hold the line against strict liability²³ assumed a political and moral imperative to save the people from themselves and to save the criminal law from a rampant utilitarianism unchecked by the limiting principle of retribution.

But if anxiety over strict liability is a thing of the past, why these reflections on it now? It is because the way we conceive of the Constitution's relation to substantive criminal law has been shaped — and significantly skewed — by that anxiety. Henry Hart could not have foreseen that his attack on strict liability might help send two generations' worth of academic thinking about criminal law and the Constitution into a single-mindedness about substance, inattentive to process concerns and to the complexities of institutional roles. But it did. That single-mindedness came to pass, at least in part because Hart himself, the acknowledged standard bearer of the legal process approach, fixated on substance.

B. *Pictures of Perfection: Henry Hart's Substantive Constitutional Criminal Law*

Hart started off *The Aims of the Criminal Law* true enough to his legal process commitments. The criminal law pursues multiple objectives and responds to multiple values, Hart emphasized at the outset, and "none may be thought of as wholly excluding the

20. See generally Richard Primus, Note, *A Brooding Omnipresence: Totalitarianism in Postwar Constitutional Thought*, 106 YALE L.J. 423 (1996) (discussing the impact of totalitarianism on constitutional discourse).

21. See Hart, *supra* note 1, at 422-23 (decrying the proliferation of strict liability offenses "ad almost infinitum" and deploring its corrosive effects). Writing before World War II, Francis Sayre saw the rise of strict liability as inevitable in modern society. See Sayre, *supra* note 16, at 55, 67 (noting that the "modern conception of criminality" features a "shifting from a basis of individual guilt to one of social danger" that is inevitable in a modern, urbanized, and industrialized society).

22. Hart, *supra* note 1, at 411.

23. This was to occur primarily by limiting strict liability to cases of nominal fine, as Sayre suggested before the Second World War. See Hart, *supra* note 1, at 425 n.62 (noting with approval the Model Penal Code's limitation of strict liability to "violations" that may not result in imprisonment); Sayre, *supra* note 16, at 78-80 (advocating such a limitation).

others.”²⁴ Society’s criminal law choices thus demand “multivalued rather than . . . single-valued thinking,”²⁵ a complex challenge made all the more complicated by the fact that the choices “do not present themselves . . . in an institutional vacuum.”²⁶ They arise in a wide array of institutional contexts, with each institution empowered and limited in ways unlike the others. “This means,” Hart stressed,

that each agency of decision must take account always of its own place in the institutional system and of what is necessary to maintain the integrity and workability of the system as a whole. A complex of institutional ends must be served, in other words, as well as a complex of substantive social ends.²⁷

What is surprising is how quickly what began as a measured legal process inquiry became a scrappy, substantive constitutional assault on legislative freedom to employ strict liability. To be sure, Hart acknowledged legislative primacy in the definition of crime,²⁸ admitting — as he had to — that American constitution-makers generally have refused to place “substantive limitations on the kinds of conduct that can be declared criminal,” but instead have chosen to rely “primarily on the legislature’s sense of justice.”²⁹ Hart was quick, however, to qualify that general rule. “Seconda-

24. Hart, *supra* note 1, at 401.

25. *Id.*

26. *Id.* at 402.

27. *Id.* As might be predicted, Hart dropped a footnote at the end of this passage citing the famous mimeographed teaching materials that he and Albert Sacks produced for the Legal Process course at Harvard Law School in the 1950s. *See id.* at 402 n.3. Thanks to the efforts of Professors Eskridge and Frickey, those materials are now available in published form. *See* HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994). Eskridge and Frickey describe the materials nicely:

The Legal Process is a striking synthesis and elaboration (with its own vocabulary) of . . . three pre-war traditions: law as policy, law as institutional relationships, and law as normative reason. The synthesis seeks the best of each tradition, without what the authors perceived to be its drawbacks. Thus, Hart and Sacks’ view of law as policy seeks to avoid the realists’ conclusion that law is nothing but politics and whimsy. They incorporate the idea of comparative institutional competence but eschew a conception which is bereft of substantive evaluation. And they view law in terms of reason, coherence, and rationality, without lapsing into natural law modes of thought. *The Legal Process* set forth for a fifties audience a familiar, attractive, yet strikingly original way of thinking about law and the legal system.

William N. Eskridge, Jr. & Philip P. Frickey, *An Historical and Critical Introduction to The Legal Process*, in HART & SACKS, *supra*, at xci.

28. *See* Hart, *supra* note 1, at 418 (noting that “[o]bviously . . . the legislature is an appropriate agency to settle debatable questions about the appropriate extent of growth [in the use of the criminal sanction], whether or not it is desirable for courts to have a share in the process”).

29. *Id.* at 411. In qualifying his observation about the lack of substantive constitutional limits, Hart made particular mention of the Ex Post Facto Clauses, U.S. CONST. art. I, § 9, cl. 3; U.S. CONST. art. I, § 10, cl. 1. *See* Hart, *supra* note 1, at 411 n.27.

rily," Hart asserted, the constitution-makers "have relied on the courts to understand what a crime is and, so, by appropriate invocation of the broad constitutional injunction of due process, to prevent an arbitrary application of the criminal sanction when the legislature's sense of justice has failed."³⁰ If Hart merely had meant to recognize the role of judicial intervention in cases of fundamental unfairness under then-prevailing due process doctrine,³¹ his secondary observation would not be so attention-grabbing. But Hart's matter-of-fact declaration actually belied a far more innovative and unprecedented proposition: because the legislature's sense of justice might fail, the Constitution should be construed to erect a substantive limitation on the legislature that courts may enforce. Even though the people, through their elected representatives, declare that social utility and public morality alike are best served by designating *X* a "crime," and even though they commit to observing every procedural safeguard when prosecuting *X* as a "crime," the judiciary — possessed of a special capacity "to understand what a crime is" *within the meaning of the Constitution* — nonetheless might declare that *X* is not wrong and therefore cannot be a "crime."³²

30. Hart, *supra* note 1, at 411.

31. See, e.g., *Speiser v. Randall*, 357 U.S. 513, 523 (1957) (noting that due process is violated when "some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental" is offended). See generally Sanford H. Kadish, *Methodology and Criteria in Due Process Adjudication — A Survey and Criticism*, 66 *YALE L.J.* 319 (1957) (taking measure of the due process jurisprudence of the time).

32. In addition to the retributive argument against strict liability sketched above, Hart also offered a separate, utility-based argument that there was "not, indeed, even a rational, amoral justification" for strict liability. See Hart, *supra* note 1, at 422. According to Hart, strict liability's questionable efficacy as a deterrent, the burden it places on law enforcement authorities, and the adverse impact it has on the criminal law's moral force all argue in favor of using a civil or administrative sanction instead. This by no means establishes, however, that a legislature that chooses to employ strict liability as part of its criminal law is irrational. It establishes only that such a legislature has alternatives that Hart preferred, but that others might not prefer. See *id.* at 422-25. Given that weakness in Hart's argument, as well as Hart's general failure to clarify just how much of a constitutional argument he intended to make, it seems fair to read Hart's utility claim as primarily a policy argument, directed at the legislature and the public, and not the naked call for judicial second-guessing of the legislature that his claim would become were it a constitutional argument. To the extent Hart spoke to judicial ears too, he might well have meant for his utility claim to soften judges toward his retributive "moral blameworthiness" argument that indubitably was forwarded under the Constitution, and toward his plea for more stringent statutory interpretation as well.

Herbert Packer, by contrast, pressed a utility-based argument against strict liability and unequivocally asserted it as a constitutional challenge. Citing Hart as his inspiration, Packer made an unabashed plea for heightened judicial scrutiny of legislative determinations of the utility of the criminal sanction. See Packer, *Aims Revisited*, *supra* note 1, at 490, 493; *infra* notes 111-12 and accompanying text.

The problem with all of this, as Hart well knew, is that the Constitution never defines "crime" as such and that few who have worn the judicial robes have sensed in themselves an individual capacity to trump forthright legislative decisions to attach the criminal stigma to *X* or to any other act or omission that is not privileged by virtue of a recognized constitutional right.³³ Although Hart did not say so explicitly, he really was pushing for recognition of a new constitutional right to be free from the criminal sanction absent an individualized determination of personal moral blameworthiness. And how, according to Hart, does the Constitution prohibit society from assigning the criminal sanction to conduct that, upon closer individualized scrutiny, is "morally neutral, both from the viewpoint of the actor and in actuality"?³⁴ Hart's argument offers an exercise in what might be called "perfectionist generalizing," by which I mean the kind of legal argument that claims to extract a fundamental principle from a milieu held relevant to constitutional law — the typical milieu being text, history and tradition, or precedent — but that cannot make the principle and milieu fit without generalizing the former and idealizing the latter.³⁵ This style of argument later came to dominate legal scholarship concerned with the relationship between the Constitution and the criminal sanction — and many

33. A different problem arises when the legislature seeks to accomplish all, or much, of what a criminal sanction typically accomplishes without playing by the various constitutional rules that constitute criminal procedure — when a legislature refuses to call a crime a crime. See generally *Kansas v. Hendricks*, 117 S. Ct. 2072 (1997) (upholding the constitutionality of a sexual-predator detention law against the claim that it constituted criminal punishment notwithstanding its civil trappings). A limited judicial authority to affix the "crime" label to a legislative measure and to thereby trigger the protections of the Constitution's criminal procedure safeguards, see generally *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963), is quite different from, and in no way compels recognition of, a much broader judicial authority to remove the "crime" label when it has already been affixed by the legislative process. This article addresses the latter case. For recent and illuminating discussions directed primarily to the former, see Mary M. Cheh, *Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction*, 42 HASTINGS L.J. 1325 (1991); John C. Coffee, Jr., *Paradigms Lost: The Blurring of the Criminal and Civil Law Models — and What Can Be Done About It*, 101 YALE L.J. 1875 (1992); Kenneth Mann, *Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law*, 101 YALE L.J. 1795 (1992); Paul H. Robinson, *Foreword: The Criminal-Civil Distinction and Dangerous Blameless Offenders*, 83 J. CRIM. L. & CRIMINOLOGY 693 (1993); Carol S. Steiker, *Foreword: Punishment and Procedure: Punishment Theory and the Criminal-Civil Procedural Divide*, 85 GEO. L.J. 775 (1997); Franklin E. Zimring, *The Multiple Middlegrounds Between Civil and Criminal Law*, 101 YALE L.J. 1901 (1992). See generally Symposium, *The Civil-Criminal Distinction*, 7 J. CONTEMP. LEG. ISSUES 1 (1996); Symposium, *The Intersection of Tort and Criminal Law*, 76 B.U. L. REV. 1 (1996).

34. Hart, *supra* note 1, at 421.

35. See generally Henry P. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353, 391 (1981) (discussing how those with "perfectionist" expectations of the Constitution may "extract[] . . . quite general political principles from the specific constitutional guarantees . . . [and] elaborat[e] . . . supplemental, nontextually grounded principles of political morality to fill in any gaps").

other fields of constitutional discourse as well. Hart's performance in *The Aims of the Criminal Law* was a tour de force in the genre that many were inspired to emulate. His constitutional argument follows three basic steps, and we examine them in turn.

1. *Mythicizing the Criminal Law*

The first step for Hart was to establish individualized moral blameworthiness as an unalterable fundamental of the criminal law. This evidently proved much easier said than done, for while Hart stated as much over and over, he did little to actually demonstrate it. Hart's picture of perfection has considerable prescriptive appeal: a criminal law faithful to the precept that "it is necessary to be able to say in good conscience in *each* instance in which a criminal sanction is imposed for a violation of law that the violation was blameworthy and, hence, deserving of the moral condemnation of the community."³⁶ Indeed, I am among the many who find it normatively attractive. But as a descriptive matter, Hart's picture resembles the evolving practice and experience of criminal law only if you set aside the countless occasions when the precept is not observed. That is precisely what Hart did. He mythicized a traditional criminal law ever true to the principle of individualized moral blameworthiness and dismissed as mere blunders the most glaring contraindications: more than a century of denial of the principle in cases of bigamy,³⁷ three-quarters of a century of its neglect in cases of statutory rape and similar offenses,³⁸ and nearly a century of ever-increasing legislative and judicial acceptance of strict liability in public welfare offenses to meet the needs of a rapidly changing and decreasingly homogeneous society.³⁹ Hart certainly was entitled to his own opinion about what best serves the public good, but

36. Hart, *supra* note 1, at 412.

37. See, e.g., *Commonwealth v. Mash*, 48 Mass. (7 Met.) 472 (1844) (criminalizing remarriage as bigamy even when the defendant had an honest and reasonable belief that the first, missing spouse was deceased).

38. See, e.g., *Regina v. Prince*, 2 L.R.-Cr. Cas. Res. 154 (1875) (refusing to recognize a defense of honest and reasonable mistake of fact as to the age of the female victim in a prosecution for conducting an improper relationship with an unmarried girl).

39. See Hart, *supra* note 1, at 417 (depicting strict liability as something that "neither the courts nor the legislature[s] of this country have yet succeeded in thinking through"). Hart assailed the immoral and unwise nature of strict liability, noting:

In its conventional and traditional applications, a criminal conviction carries with it an ineradicable connotation of moral condemnation and personal guilt. Society makes an essentially parasitic, and hence illegitimate, use of this instrument when it uses it as a means of deterrence (or compulsion) of conduct which is morally neutral.
Id. at 424; see also *id.* at 430 (treating *Prince* and *Mash* as products of inadequate statutory interpretation by judges and their "unimaginative and unintelligent use even of familiar common-law techniques").

the fact that the people, their legislatures, and their judges have begged to differ so frequently and for so long makes dubious Hart's claim to an accurate descriptive account of the criminal law and its fundamental essence. When you claim, as Hart did, that you have identified something so fundamental to the history and traditions of criminal law that it has attained the stature of an unwritten constitutional right, descriptive accuracy cannot be compromised.

The errancy in Hart's depiction runs even deeper. Notwithstanding the familiar judicial and academic pretensions about criminal law's supposed intolerance for error — those epigrams that it is "far worse to convict an innocent man than to let a guilty man go free"⁴⁰ — criminal law is not nearly the stickler for individualized moral blameworthiness that Hart mythicized, even apart from the historical contraindications just noted. The fact is, criminal law regularly chooses rules of decision with conscious acceptance of the risk that their application will lead to the conviction of defendants who otherwise would be cleared of blame in the General Court of Public Morality — if only we could create one. Consider that a jury may not entertain the defense of necessity in a case of homicide,⁴¹ but not because society feels that taking one human life to save several others in an emergency situation can never be morally blameless. The same homicide jury likely would not be instructed on a defense of duress,⁴² but this does not mean that society would adjudge every defendant in such circumstances morally blameworthy after finer individualized examination. Juries may consider the defense of involuntariness only in a limited number of defined cases, but not because those cases reach every conceivable instance of what society might label involuntary and hence blameless were it to wrestle with the particular nuances.⁴³ In most jurisdictions, a

40. *In re Winship*, 397 U.S. 358, 372 (1970) (Harlan, J., concurring). Hart relied on a similar platitude. See Hart, *supra* note 1, at 422-23 (noting that "nowhere else in the criminal law is the probable, or even the certain, guilt of nine men regarded as sufficient warrant for the conviction of the tenth").

41. See *Regina v. Dudley & Stephens*, 14 Q.B.D. 273, 288 (1884) (denying the defense of necessity while observing that "[i]t is not suggested that in this particular case the deeds were 'devilish,' but it is quite plain that such a principle once admitted might be made the legal cloak for unbridled passion and atrocious crime" and that "[w]e are often compelled to set up standards we cannot reach ourselves, and to lay down rules which we could not ourselves satisfy"). But see MODEL PENAL CODE § 3.02 cmt. 3 (1985) (arguing for the availability of a necessity defense in certain cases of homicide).

42. See, e.g., *Henry v. State*, 613 So. 2d 429, 432 n.6 (Fla. 1992) (stating and following the rule that duress is no defense to homicide); *State v. Finnell*, 688 P.2d 769 (N.M. 1984) (same). But see MODEL PENAL CODE § 2.09 (1985) (stating the duress defense in terms that would not preclude its availability in homicide cases).

43. See, e.g., MODEL PENAL CODE § 2.01(2) (1985) (categorizing involuntary acts). As Herbert Packer observed, the law in this area "is not affirming that some conduct is the

jury may acquit a defendant on insanity grounds only if the strictures of *M'Naghten's Case*⁴⁴ are satisfied, but this does not mean that every defendant who falls short of that showing is blameworthy by society's moral standards — particularly one who would qualify for acquittal under a more forgiving formulation of the defense in a neighboring jurisdiction.⁴⁵ Indeed, some jurisdictions now prohibit insanity acquittals altogether,⁴⁶ but it would be wrong to take that as a societal judgment that even *M'Naghten's* clearest cases of insanity are unequivocally deserving of moral condemnation. Some jurisdictions draw the self-defense doctrine's "imminence" requirement tighter than others, spelling the difference between conviction and acquittal for women who kill their abusive husbands in the quiet eye of the violent storm. Drawing the requirement tighter, however, does not signify that all who thereby are convicted are morally deficient by society's standards.⁴⁷

In all of the foregoing situations, criminal law commits the very sin that Hart imputed to strict liability. It sacrifices moral precision, putting the lie to Hart's claim that the principle of individualized moral blameworthiness is immovable criminal law bedrock. Moreover, when criminal law sacrifices moral precision, it is not for want

product of the free exercise of conscious volition; it is excluding, in a crude kind of way, conduct that in any view is not." HERBERT L. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 76 (1968).

44. 8 Eng. Rep. 718 (H.L. 1843).

45. See, e.g., *Commonwealth v. Sheehan*, 383 N.E.2d 1115 (Mass. 1978) (following the standard proposed by the Model Penal Code that permits acquittal by reason of insanity where, due to mental disease or defect, a defendant lacks substantial capacity either to appreciate the criminality or wrongfulness of his or her conduct, or to conform that conduct to the requirements of the law); *Davis v. Commonwealth*, 204 S.E.2d 272 (Va. 1974) (permitting acquittal by reason of insanity when mental disease prevents a defendant from controlling his conduct, the so-called "irresistible impulse" test).

46. See IDAHO CODE § 18-207 (1997); MONT. CODE ANN. § 46-14-102 (1997); UTAH CODE ANN. § 76-2-305(1) (1995). For a discussion of the experience in Montana, see Rita D. Buitendorp, Note, *A Statutory Lesson from "Big Sky Country" on Abolishing the Insanity Defense*, 30 VAL. U. L. REV. 965 (1996). For a discussion of the factors that might lead to abolition of the insanity defense, including factors other than moral blameworthiness, see GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* 845-46 (1978) (discussing the "procedural skepticism" to which some critics of the insanity defense subscribe — skepticism "that responds to the image of protracted trials, conflicting testimony by partisan experts, and the sheer burden of trying to assess whether a particular individual lacked capacity to be held accountable for a criminal act," as well as to "the claim that the defense is often 'abused'").

47. Compare *State v. Norman*, 378 S.E.2d 8 (N.C. 1989) (denying a battered spouse's claim of self-defense for lack of imminence, and observing that a less stringent formulation of the imminence requirement would dissuade general deterrence objectives and might invite erroneous acquittals) with *State v. Leidholm*, 334 N.W.2d 811 (N.D. 1983) (adopting a less stringent formulation of the imminence requirement and permitting a battered woman's claim of self-defense to reach the jury). See generally Richard A. Rosen, *On Self-Defense, Imminence, and Women Who Kill Their Batterers*, 71 N.C. L. REV. 371 (1993) (discussing competing formulations of the imminence requirement and advocating the more lenient one).

of an alternative. In each instance just noted, the law could give juries the freedom to make finer appraisals of blameworthiness under more general standards, or it could shift the margins of its rules to exclude from liability the close cases that just barely support conviction under the prevailing rules, or it could fashion a decisional structure that combines the two. Nor does the law make this sacrifice of moral precision on the shallow basis that "the probable, or even the certain, guilt of nine men [is] sufficient warrant for the conviction of the tenth," or even on the theory that the tenth himself was or is deterrable.⁴⁸ Stated in Hart's own terms, criminal law sacrifices moral precision because it must serve a "complex of institutional ends . . . as well as a complex of substantive social ends," and because "none may be thought of as wholly excluding the others."⁴⁹ For better or worse, criminal law frequently and deliberately forgoes the additional moral precision that would bring the tenth man his salvation in order to control its juries and keep its trials manageable, to ensure that outcomes appear consistent and not the product of prejudice, sympathy, whim, or the art of jury selection, and to prevent false acquittals that reward favored defendants or finessed defenses from becoming the order of the day to the detriment of general deterrence goals and the respectability of criminal law itself. Criminal law surely *aspires* to punish only the individually blameworthy. But to say that it guarantees as much, that it never trades off moral precision for other values, is to deny the structural reality.⁵⁰

In pointing out the similarity between strict liability crimes and other line-drawing choices in criminal law, I do not deny that there

48. Hart, *supra* note 1, at 422-23 (attributing such justifications to strict liability and then ridiculing them).

49. *Id.* at 401-02.

50. The reader will note that each of the examples of moral imprecision discussed — to which we can add public-welfare strict-liability offenses, the use of strict liability elements in cases like *Prince* and *Mash*, *see supra* notes 37-38, and the maxim that ignorance of the law is no excuse — involve all-or-nothing consequences for the individual. Defendants who fall just inside of the law's rules of decision are guilty notwithstanding their moral blamelessness, whereas defendants who fall just to the outside are acquitted. Legislative decisions that designate a matter that is relevant to criminal responsibility an affirmative defense rather than an element of the crime, thereby shifting the burden of proof from the government to the defendant, have a similar effect; the maneuver presupposes moral imprecision, and it is undertaken precisely because it will limit acquittals to more clear-cut cases of moral blamelessness.

The fact that criminal law does not adhere to Hart's principle of moral blameworthiness is thrown into still further relief when attention is turned from these all-or-nothing doctrinal lines and focused instead on the many lines that are drawn to grade punishment. Were the system really committed to circumspection in the matter of blameworthiness, for example, it long ago would have renounced the felony murder rule, as well as the crabbed categorical treatment of the heat-of-passion doctrine.

are differences between them. Strict liability crimes represent a legislative determination that the actors and conduct falling within their ambit are by some probability blameworthy, but that probability could be considerably lower than, for example, the probability that all defendants who kill in circumstances of claimed necessity are genuinely blameworthy by the full measure of society's moral calculus. Strict liability crimes also leave considerably less room for moral input from lay jurors in response to the actual facts of the case; the moral judgment of fault is prescribed by the legislature by definition, with the jury's role confined to determining whether the conduct and circumstantial elements of the offense are satisfied.⁵¹ In terms of individual blameworthiness, then, strict liability may be more overinclusive both in fact and appearance than are the various forms of interplay between liability rules and defense rules examined above. A general objection to strict liability on this ground is fair enough, but also fairly weak. Strict liability comes in different shapes and sizes, and there is no reason in theory why a strict-liability crime cannot be tailored to reduce its overinclusiveness to a level of acceptability comparable, for example, to the hoary but durable maxim that ignorance of the law is no excuse. Unless we are to prohibit legislatures from ever using the tool merely because it might be used poorly on some jobs, the "too overinclusive" objection fails at the general level and must move to the case-specific level. And whether raised across the board or case by case, the objection still begs two important questions. If the problem is the degree of overinclusiveness, why should a legislative decision to adopt strict liability not be respected as a conscientious determination that the overinclusiveness is acceptable? When, if ever, does that not settle the matter insofar as constitutional law is concerned?

It would have been fascinating to watch Henry Hart direct his considerable talents to the pursuit of answers to those questions, and to the associated questions about the institutional competence and structural roles of legislators, judges, and jurors that lurk beneath them.⁵² But Hart sidestepped such a process-sensitive inves-

51. See Mark Kelman, *Strict Liability: An Unorthodox View*, in 4 *ENCYCLOPEDIA OF CRIME AND JUSTICE* 1512, 1517 (Sanford H. Kadish ed., 1983) (noting that strict liability may be equated with a "rule-like" form of negligence); Richard A. Wasserstrom, *Strict Liability in the Criminal Law*, 12 *STAN. L. REV.* 731, 744 (1960) (noting similarly).

52. To accept Hart's "central thesis" that the criminal sanction is "misused when it is . . . applied to conduct which is not blameworthy," Hart, *supra* note 1, at 405 n.13, takes us only so far, and right into the question: *Not blameworthy according to whom and by what process of decision?* By ruling out strict liability and insisting on individual moral blameworthiness, Hart's answer is that the jury must decide. But why should — let alone *must* — the jury's

tigation altogether when he instead sought to indict strict liability for abridging a fundamental substantive principle. Strict liability's crime, Hart alleged, was an offense to the principle that it is impermissible to "condemn[] and punish[] a human being as a criminal when he has done nothing which is blameworthy" — or, in other words, the crime of deliberate overinclusiveness.⁵³ Only by ignoring the deliberate overinclusiveness embedded throughout criminal law, only by glossing over the occasions when the law draws the line tight and thus condemns and punishes the blameless along with the rest, only by elevating one of the law's many competing aspirations into a fundamental substantive rule, could this be considered a crime against the criminal law. Criminal law is not nearly so perfect or self-disciplined.

2. *Generalizing the Perfect Substantive Constitution*

Hart's quest for a substantive right that would impugn strict liability took him on a circuitous trip through criminal law that bypassed questions of process Hart might have been expected to stop and savor. The journey grew still more circuitous on its second leg, when Hart arrived at the Constitution itself.

This second leg of Hart's argument involved an effort to locate in the Constitution the same fundamental principle of individualized moral blameworthiness that he claimed to find in criminal law. While he proposed that courts could invoke the "broad constitu-

decision be preferred over the legislature's? Hart never really tells us. As Richard Wasserstrom pointed out a few years after Hart published *The Aims of the Criminal Law*, the answer is not self-evident. "To the extent that strict liability statutes can be interpreted as legislative judgments that conduct which produces or permits certain consequences is unreasonable, strict criminal liability is similar to a jury determination that conduct in a particular case was unreasonable." Wasserstrom, *supra* note 51, at 744; see also Kelman, *supra* note 51. Legislatures surely are competent to make serious and conscientious moral judgments on society's behalf, and they do so whenever they enact a strict liability statute. As Wasserstrom explains:

While few persons would seriously wish to maintain that the legislature is either omniscient or a wholly adequate reflection of general or popular sentiment, the fact that so many legislatures have felt such apparently little compunction over enacting such [strict-liability] statutes is surely indicative of the presence of a comparable community conviction.

Wasserstrom, *supra* note 51, at 741. To be sure, arguments can be made for preferring some jury role in the assignment of blame. The jury brings a perspective to particular facts that the legislature cannot. See PACKER, *supra* note 43, at 128 (noting that "the legislature cannot and does not foresee the infinite variation of circumstance that may affect the jury's view of a particular case"); Wasserstrom, *supra* note 51, at 744. Jury participation also might serve structural political ends. See Ann Hopkins, Comment, *Mens Rea and the Right to Trial by Jury*, 76 CAL. L. REV. 391 (1988). By the same token, however, arguments can be made for preferring the broadly representative and politically accountable judgment of the legislature.

53. Hart, *supra* note 1, at 422.

tional injunction of due process" to invalidate strict liability,⁵⁴ Hart did not rest with the narrow argument that his preferred principle had achieved due process fundamentality merely by historical and traditional acceptance — a claim that would accord with the due process methodology of the time⁵⁵ but that, as we have just seen, has problems on the merits. Hart looked past the Due Process Clause and saw an even more perfect Constitution as a whole. If only judges would open their eyes to the "unmistakable indications that the Constitution means something definite and something serious when it speaks of 'crime,'"⁵⁶ they would see that the principle of individualized blameworthiness permeates the entire document — that it is "the understanding embodied" in the Constitution,⁵⁷ or, as Hart's Legal Process School colleague Herbert Wechsler might have labeled it a year later, a "neutral principle" of constitutional law.⁵⁸

The "unmistakable indications" Hart had in mind were the Constitution's various allusions to crime — provisions that establish procedural safeguards to be observed in the investigation and prosecution of crime but which, in the main, do not purport to erect substantive limitations.⁵⁹ None of these provisions comes close to an explicit declaration that government's power to define crimes should be circumscribed by the likes of Hart's principle of individual blameworthiness, but Hart got around that in much the same way Justice William Douglas got around a similar snag a few years

54. *Id.* at 411.

55. See Kadish, *supra* note 31.

56. Hart, *supra* note 1, at 431.

57. See *id.* at 404.

58. See Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

59. Hart cited the following provisions: U.S. CONST. art. I, § 3, cl. 7 (limiting the sanction for impeachment to removal from office and disqualification and providing that further sanctions of a criminal nature require observance of criminal trial safeguards); U.S. CONST. art. I, § 9, cl. 2 (limiting suspension of the writ of habeas corpus); U.S. CONST. art. I, § 9, cl. 3 (barring Congress from enacting bills of attainder and ex post facto laws); U.S. CONST. art. I, § 10, cl. 1 (barring states from enacting bills of attainder and ex post facto laws); U.S. CONST. art. III, § 2, cl. 3 (requiring a jury trial and prescribing venue in federal criminal prosecutions); U.S. CONST. art. III, § 3 (regulating treason prosecutions); U.S. CONST. art. IV, § 2, cl. 2 (providing for extradition); U.S. CONST. amend. IV (regulating searches and seizures); U.S. CONST. amend. V (requiring grand juries in federal prosecutions, guarding against double jeopardy, protecting the privilege against self-incrimination, and requiring observance of due process); U.S. CONST. amend. VI (extending the rights to counsel, speedy and public trial by jury, local venue, notice, compulsory process, and confrontation of witnesses); U.S. CONST. amend. VIII (prohibiting excessive bail, excessive fines, and cruel and unusual punishments); U.S. CONST. amend. XIII (barring involuntary servitude save as punishment for crime); U.S. CONST. amend. XIV (providing for due process and equal protection). See Hart, *supra* note 1, at 404 n.12. Of the foregoing, Hart regarded the prohibition against ex post facto laws as "the only important express substantive limitation." *Id.* at 411 n.27.

later in *Griswold v. Connecticut*.⁶⁰ The constitutional text, Hart urged, should be read to imply a richer and more powerful general concept behind the specific conceptions it explicitly addresses, one that judges are not only free but in fact obligated to tap and enforce.⁶¹ Indeed, Hart went so far as to suggest that the “implicit assumptions” behind the Constitution’s text can be “more impressive than any explicit assertions” to the same effect, at least in the case of its criminal procedure provisions.⁶² Hart read those provisions to indicate that “crime is a distinctive and serious matter — a something, and not a nothing.”⁶³ As such, they cry out for a substantive unifying concept. Out of the penumbras formed by the emanations of the Constitution’s criminal procedure provisions emerges the concept of individual blameworthiness.

For our purposes, the most striking aspect of Hart’s argument is the assumption upon which it depends for all of its strength: that the Constitution’s procedural preoccupation with crime is much ado about “nothing” if that same Constitution does not also establish a substantive limitation on the definition of crime. To say the least, the assumption is contestable, yet Hart never rose to defend it. By never defending it — by depending instead on the sheer seductiveness of a substantive theory — Hart managed to avoid confronting basic questions about the interrelationships among the Constitution, the criminal law, the political process, and the legal process. Why can an intelligent constitution not be ambidextrous, passing with one hand the substantive determination of what conduct merits punishment as “crime” to the people and their political process, even as it uses the other to lay down procedural standards for the investigations and prosecutions that bring the punishment to bear in individual cases? The Constitution’s text surely can bear that interpretation, and an appeal to the original understanding will not refute it.⁶⁴ If the problem is that the legislature might administer

60. 381 U.S. 479 (1965) (finding a general constitutional right to privacy, sufficiently broad to protect the right of married couples to use contraception, in the penumbras formed by the emanations from the specific guarantees of the Bill of Rights). See generally Paul G. Kauper, *Penumbrae, Peripheries, Emanations, Things Fundamental and Things Forgotten: The Griswold Case*, 64 MICH. L. REV. 235 (1965).

61. Hart did not use the terms “concept” and “conception” as such. These are borrowed from Dworkin. See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 134-36 (1977).

62. See Hart, *supra* note 1, at 404.

63. Hart, *supra* note 1, at 404; see also *id.* at 411 n.27 (inviting courts to look past the particular evils captured by the Ex Post Facto Clauses and to identify in them some broader and more general “principles of just punishment [that are] implicit in such clauses [and which would] have relevance in other situations”).

64. Some contemporary legislative judgments about what merits punishment doubtless would look unfamiliar to 18th- or 19th-century eyes, but that does not mean our constitu-

punishment that does not agree with the public's sense of justice — that it might indulge in excessively overinclusive rules — why are political safeguards not sufficient? If the answer is that momentary passions might overcome elected legislators, making the intervention of politically insulated judges a desirable thing, what of the countervailing observation that those theoretically insulated judges are elites who easily confuse their own elitist views for the sense of justice held by the public as a whole?⁶⁵ If the answer instead is that individual defendants should not be made to suffer while a political correction is pending, but the law's rules are temporarily out of sync with the public's sense of justice, why are the various discretionary institutional safeguards built into the criminal justice system — prosecutorial discretion, jury nullification, sentencing discretion, and executive clemency — not sufficient to mitigate that harm? And while on the subject of those institutional safeguards, does their general availability not rob the constitutional (and policy and moral) objection to overinclusive criminal law rules of much of its

tional ancestors intended to deny future generations the power to identify and meet the needs of a society the framers could not foresee. The rise and fall of *Lochner*-style substantive due process should have taught us the perils of confusing the unfamiliar with the unconstitutional.

Professor William Stuntz recently has sought to justify a substantive constitutional criminal law as faithful to, or at least not wholly unfaithful to, original intent. Stuntz's argument begins with the observation that the Constitution's criminal procedure provisions began as indirect means of guarding against certain undesirable substantive outcomes. See William J. Stuntz, *The Substantive Origins of Criminal Procedure*, 105 YALE L.J. 393, 396-419 (1995). From that premise, Stuntz goes on to suggest in a later article that it is therefore appropriate to constitutionalize various unwritten substantive limitations upon the criminal sanction, that doing so is in keeping with the general spirit of the document because substantive concerns helped to inspire the document's procedural protections, and that in fact "[w]e need limits on criminal substance to make criminal procedure mean something." See Stuntz, *supra* note 11, at 40-41. Although the argument makes a nice stab at justifying the practice of perfectionist generalizing on what look like originalism grounds, Stuntz's willingness to read new substantive limitations into the Constitution that are quite unrelated to the substantive evils that gave rise to the document's procedural protections suggests, to my mind, an argument that at bottom is every bit as adventurous, and suspect, as Hart's.

65. The danger of judicial bias would seem particularly pronounced in the context of strict liability crimes, for so many of these crimes mean to take issue with, and alter the behavior of, the social elites with whom judges are most inclined to identify. See, e.g., Mark Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 STAN. L. REV. 591, 610 (1981) (noting that "[o]ne can view th[e] attack on strict liability as a simple class-biased, result-oriented defense of corporate managers" and that "the bulk of strict liability crimes are regulatory crimes which . . . are most likely to be committed by those who control the means of production").

In this connection, there is some telling and unintended irony in Hart's argument. To support his contention that strict liability saps criminal law of its moral force, Hart pointed to occasions when judges have felt the need to depreciate the significance of a criminal conviction in the course of validating strict liability. See Hart, *supra* note 1, at 423 n.57. Why these instances of judicial wrist-slapping argue for a greater constitutional role for judges in the definition of crime is not readily apparent. They just as easily support a charge that judges are much too subjective and countermajoritarian already — injecting their own beliefs that *X* is not blameworthy when the people, through their legislature, have determined otherwise.

force?⁶⁶ It is true that neither the political safeguards nor the institutional safeguards are fail-safe, nor are they perfect in combination. But if, when all is said and done, the trouble is that the safeguards are imperfect, why is that a constitutional problem? Since when has “due” process meant “perfect” process? Even if we suppose that there is room for constitutional improvement, why is a substantive constitutional trump card in the hands of the judiciary the answer? Might that not introduce a whole new set of constitutional troubles that dwarf whatever benefits we might hope to gain?⁶⁷ Might there not be an alternative, process-oriented role for the judiciary that is calculated to reinforce and strengthen the political and institutional safeguards and, conversely, to intervene when there are particular reasons to think they are failing?

By posing these questions, I do not mean to suggest that a case cannot be made for a substantive, constitutional, and judicially enforceable limitation on the legislative power to define crime. I pose them only to show that the case is not nearly as convincing or inevitable as Hart made it seem by skirting such questions.⁶⁸

66. See, e.g., Louis B. Schwartz, “Innocence” — *A Dialogue with Professor Sundby*, 41 HASTINGS L.J. 153, 160 (1989) (noting that the existence of such safeguards suggests that “a legislative choice to eliminate a culpability element from the definition of an offense does not mean that culpability is being ignored,” but rather “only that the particular culpability issue is to be weighed at a different stage and in a different manner”). Indeed, these discretionary institutional safeguards would seem to be their most trustworthy in the very cases that Hart finds most distressing: those involving the application of strict liability to a pillar of the community who has done his best to comply with an onerous statutory duty, or to an average Joe engaged in normal, everyday activities. If anyone can be expected to reap the benefits of prosecutorial discretion, it is the former. If anyone can be expected to reap the benefits of jury nullification, it is the latter.

67. Hart did not begin to explore the countermajoritarian consequences of his thesis — which, given the class implications of much strict liability legislation, would seem profound. See *supra* note 65. What is more, Hart fudged exactly how judges should play the substantive trump card he claimed that the Constitution has dealt them. In the main, Hart appeared to argue that the judiciary should find in the Constitution a categorical ban against strict liability crimes — in essence, a bright line rule of mens rea that would guard prophylactically against failures of the legislature’s sense of justice and vest juries with more authority to appraise the personal moral blameworthiness of defendants. See, e.g., Hart, *supra* note 1, at 422-25. At other points in his article, however, Hart seemed prepared to tolerate overinclusive, morally imprecise criminal law rules so long as a judge does not find them to be problematically overinclusive. See, e.g., *id.* at 418 (accepting the maxim that ignorance of the law is no excuse even as to newly defined criminal laws, provided that they are “well-considered additions to the list of the citizen’s basic legal obligations”).

68. Although Hart never squarely addressed these questions in *The Aims of the Criminal Law*, he twice came close to confronting them in his article. Each time, he poured on the rhetoric as he sidestepped them, launching a biting *ad hominem* attack against anyone who might argue that substantive legislative judgments ought to control, see *id.* at 404 (remarking that “[s]o vacant a concept is a betrayal of intellectual bankruptcy”), and dismissing the relevance of discretionary institutional safeguards with a high-handed and highly misleading brush-off, see *id.* at 424 (criticizing the “arrogant assertion that it is proper to visit the moral condemnation of the community upon one of its members on the basis solely of the private

3. *Razing the Precedent*

Perhaps the one-sidedness in Hart's pitch for a substantive constitutional criminal law can be chalked up to adversarial hard-selling. Experienced judges know it well — the lawyer's argument that moves with supreme confidence and acknowledges no weakness except to rebut those raised by the opposition. Hart sorely tested the limits, however, in the third and final step of his constitutional argument, in which he had to reckon with Supreme Court precedent that stood in the way of his substantive quest. It is here that Hart the advocate overwhelmed Hart the objective scholar. The result would not have been so damaging to the scholarly development of the relationship between the Constitution and criminal law, we shall see, were it not for the academy's inclination to receive Hart's pronouncements as gospel truth rather than adversarial spin.⁶⁹

The precedent in question consisted of seven Supreme Court decisions, spanning almost half a century, that accepted the constitutionality of strict liability by dictum or by holding.⁷⁰ These cases depict a less perfect and less substantive Constitution than Hart's argument demanded and left little room for Hart's principle of individual blameworthiness. Faced with such precedent, Hart had two options. He could concede the basic validity of the precedent and seek modest progress by fashioning a constitutional role for the Court that honors the precedent but nonetheless might move criminal law in the general substantive direction he desired,⁷¹ or he could trash the precedent and shoot for substantive perfection.

judgment of his prosecutors," but failing to acknowledge the fact that criminality never attaches "solely" on that basis).

Within that rhetoric, no doubt, lies the foundation for a more elaborate response — one that Hart did not undertake to develop — that would target the difficulties with discretionary institutional safeguards and assert a corresponding imperative for a judicially enforceable "neutral principle." See generally William N. Eskridge, Jr. & Philip P. Frickey, *The Making of the Legal Process*, 107 HARV. L. REV. 2031, 2048 (1994) (noting that Hart and like-minded scholars "were centrally concerned with the control of discretion" and therefore "designated the judiciary as the guardians of rule-of-law values and envisioned the duty of judges to be the 'reasoned elaboration' of 'neutral principles' and legislative 'purposes'" (footnotes omitted)). How Hart would handle the objection that his principle of moral blameworthiness, as he proposed it to be enforced by judges, proves too much to be "neutral," see *supra* notes 52, 65, 67 and accompanying text, and partakes too much of *Lochner*-style jurisprudence, see *infra* notes 98-105 and accompanying text, we do not know.

69. See *infra* notes 108-09, 114 and accompanying text.

70. See *Lambert v. California*, 355 U.S. 225 (1957); *Morrisette v. United States*, 342 U.S. 246 (1952); *United States v. Dotterweich*, 320 U.S. 277 (1943); *United States v. Behrman*, 258 U.S. 280 (1922); *United States v. Balint*, 258 U.S. 250 (1922); *United States v. Johnson*, 221 U.S. 488 (1911); *Shevlin-Carpenter Co. v. Minnesota*, 218 U.S. 57 (1910).

71. That approach is available, but it requires thinking about the Court's role in process-oriented rather than substance-oriented terms. See *infra* Part II.

Hart trashed. The genesis of the Supreme Court's affirmation of strict liability in the 1910 decision in *Shevlin-Carpenter Co. v. Minnesota*,⁷² Hart declared, was a moment of "impatience, and corresponding lack of hard thinking" on the part of the Justices that produced dictum to the audacious effect that a crime is anything which the legislature chooses to say it is.⁷³ During the following year, Oliver Wendell Holmes made matters worse for Hart in *United States v. Johnson*⁷⁴ with similar dictum of his own, in a gesture Hart characterized as "wholly nude of supporting authority."⁷⁵ Eleven years later, Chief Justice (and former President) William Howard Taft made "manifestly cavalier use of [the] dictum as controlling authority"⁷⁶ to flatly uphold strict liability in the 1922 decision in *United States v. Balint*.⁷⁷ On the very same day that *Balint* came down, Justice William R. Day's opinion for the Court in *United States v. Behrman*⁷⁸ exacerbated the error by following the Chief Justice's scarcely dry holding.⁷⁹ The next culprit was Felix Frankfurter, who authored the 1943 decision in *United States v.*

72. 218 U.S. 57 (1910).

73. See Hart, *supra* note 1, at 432-33 n.71 (characterizing *Shevlin-Carpenter*). Justice McKenna's dictum in *Shevlin-Carpenter* read as follows:

It is true that the police power of a State is the least limitable of its powers, but even it may not transcend the prohibition of the Constitution of the United States. . . . The Supreme Court of the State . . . decided that the legislation was in effect an exercise of the police power, and cited a number of cases to sustain the proposition that public policy may require that in the prohibition or punishment of particular acts it may be provided that he who shall do them shall do them at his peril and will not be heard to plead in defense good faith or ignorance. Those cases are set forth in the opinion of the court, and some of them reviewed.

We will not repeat them. It was recognized that such legislation may, in particular instances, be harsh, but we can only say again what we have so often said, that this court cannot set aside legislation because it is harsh.

Shevlin-Carpenter, 218 U.S. at 69-70. This is dictum, but it is not quite so off-the-cuff as Hart's dismissive characterization would suggest. Justice McKenna clearly saw the definition of crime as a debatable issue of public policy best left to the political process under traditional constitutional understandings of the appropriate roles of legislatures and courts respectively. His contention drew not a single dissent from the rest of the Court.

74. 221 U.S. 488 (1911).

75. Hart, *supra* note 1, at 433 n.71 (characterizing *Johnson*). Holmes's dictum came as he interpreted the federal Food and Drugs Act of 1906 to criminalize the shipment of a misbranded article even though it might be misbranded "without any conscious fraud at all." See *Johnson*, 221 U.S. at 497. Holmes reasoned that "[i]t was natural enough to throw this risk on shippers with regard to the identity of their wares." See *Johnson*, 221 U.S. at 497-98.

76. Hart, *supra* note 1, at 433 n.72 (characterizing *United States v. Balint*, 258 U.S. 250 (1922)).

77. 258 U.S. 250 (1922). Hart found further reason to fault Taft for "only" citing, in addition to *Shevlin-Carpenter*, "some state court cases, some lower federal court cases, and two English cases." Hart, *supra* note 1, at 433 n.72.

78. 258 U.S. 280 (1922).

79. See Hart, *supra* note 1, at 433 n.72 (characterizing *Behrman*).

Dotterweich.⁸⁰ Frankfurter followed Taft's holding in *Balint* uncritically, "treating the whole matter as a *fait accompli*" and thereby producing "one of the most drastic of the Court's decisions" in the line.⁸¹ Thereafter, two cases with pleasant results in Hart's estimation — *Morissette v. United States*⁸² and *Lambert v. California*⁸³ — needlessly worsened the situation with further dicta reaffirming the general constitutionality of strict liability.⁸⁴ Hart summarized the line of cases thusly: "From beginning to end, there is scarcely a single opinion by any member of the Court which confronts the question in a fashion which deserves intellectual respect."⁸⁵

The problem with Hart's stentorian attack on Supreme Court precedent is not his dim assessment of the quality of the Court's intellectual work product.⁸⁶ The problem is that a Court careless with its craft might nonetheless be a Court with valid and weighty concerns on its mind. So, I submit, was the Court that wended its way from *Balint* to *Dotterweich*, *Morissette*, and *Lambert*, and the valid and weighty concerns on its mind had everything to do with process. But Hart's strategy prohibited him from acknowledging even the possibility that this might be so. He was dead set on

80. 320 U.S. 277 (1943).

81. Hart *supra* note 1, at 433 (characterizing *Dotterweich*). Hart never explained how a *fait accompli* differs from *stare decisis*.

82. 342 U.S. 246 (1952).

83. 355 U.S. 225 (1957).

84. See Hart, *supra* note 1, at 431-32 n.70 (criticizing *Morissette*); *id.* at 434 (criticizing *Lambert*).

85. *Id.* at 431 (footnote omitted). Hart acknowledged that Justice Robert H. Jackson's exhaustive and oft-cited opinion in *Morissette* might qualify for an exception to his summary dismissal of the Court's intellectual work product. For Justice Jackson, however, it was a case of "damned-if-you-don't, damned-if-you-do." Hart took him to task for writing a "spread-eagle dissertation" that said more to dispose of the case than Hart thought necessary — which is to say that it acknowledged and respected the precedent laid down by the Court. See *id.* at 431-32 n.70.

86. Back in Hart's day, when terseness was the fashion in Supreme Court opinions and the turnaround time between oral argument and the issuance of an opinion might be a matter of weeks rather than months, chiding the Justices for shoddy craftsmanship became a popular parlor game in the academy. Hart's demonstration in *The Aims of the Criminal Law* was vintage, but he saved his definitive performance for the *Harvard Law Review* a year later. See Henry M. Hart, Jr., *The Supreme Court, 1958 Term — Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84, 100-01 (1959) (faulting the Court for "inadequately reasoned opinion[s]" and suggesting that they are the product of a "Court [that] is trying to decide more cases than it can decide well"). For a sense of how other scholars played the game, see PHILIP B. KURLAND, *POLITICS, THE CONSTITUTION, AND THE WARREN COURT* 91 (1970) (suggesting that "one can be among the ardent admirers of the Court and still concede the defects of its opinion-writing"); Alexander M. Bickel & Harry H. Wellington, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case*, 71 HARV. L. REV. 1, 3 (1957) (arguing that "[t]he Court's product has shown an increasing incidence of the sweeping dogmatic statement, of the formulation of results accompanied by little or no effort to support them in reason, in sum, of opinions that do not opine").

breaking the ground for a substantive constitutional criminal law, and that required razing the precedent. Crediting that precedent with an arguable foundation, let alone a foundation poured from process rather than substance, was simply out of the question. Thus, the cases were lampooned in their worst light, and, for the third time, Hart sidestepped an encounter with the Constitution and criminal law in process terms.

To illustrate, consider the much-maligned *Dotterweich* case, in which a closely divided Court upheld the strict liability conviction of a corporate executive under the federal Food, Drug, and Cosmetic Act of 1938.⁸⁷ We may agree with Hart that Justice Frankfurter's majority opinion regarded the constitutionality of strict liability as a *fait accompli*. We might even concede that Frankfurter blew the case on statutory interpretation grounds, and that reasoned elaboration of the law suffered a setback when Frankfurter passed up the opportunity to establish an interpretive presumption against strict liability in the absence of clear legislative directive.⁸⁸ But we really must object when we get to Hart's protestation that "Frankfurter's [*Dotterweich*] opinion disposes of the problem in a curt half paragraph, citing only the *Balint* case . . . and Holmes' dictum in *United States v. Johnson*."⁸⁹ The unvarnished truth is that Frankfurter's opinion had a good bit more to say about the problem of strict liability. If you read the opinion with only a modicum of charity and with attention to its important concluding paragraphs that Hart neglected, you will see that Frankfurter was defending the Court's acceptance of strict liability and that his defense reflected a strongly process-oriented understanding of the Constitution's relationship with the criminal law.

87. See *United States v. Dotterweich*, 320 U.S. 277 (1943).

88. It was on the question of statutory interpretation that the Justices divided. Justice Murphy's dissent, joined by Justices Roberts, Reed, and Rutledge, took no issue with the constitutionality of strict liability but argued that a mens rea element should be inferred in the absence of a "clear and unambiguous" legislative mandate for strict liability. See *Dotterweich*, 320 U.S. at 286 (Murphy, J., dissenting). Frankfurter, joined by Chief Justice Stone and Justices Black, Douglas, and Jackson, did not deny the role of lenity in the interpretation of criminal statutes but urged that "[l]iberalism and evisceration are equally to be avoided." 320 U.S. at 284; see also 320 U.S. at 283 (suggesting that "we free our minds from the notion that criminal statutes must be construed by some artificial and conventional rule" (quoting *United States v. Union Supply Co.*, 215 U.S. 50, 55 (1909))).

The statutory-interpretation shortcomings of Frankfurter's opinion also seem to have been the main beef for Hart. See Hart, *supra* note 1, at 431-32 n.70, 434 n.73. The Court's recent solicitude for mens rea in cases arising from legislation subject to interpretation, see, e.g., *Ratzlaf v. United States*, 510 U.S. 135 (1994); *Liparota v. United States*, 471 U.S. 419 (1985), suggests that the dissenters and Hart may have had the stronger point.

89. Hart, *supra* note 1, at 433 n.73 (citations omitted).

Although Frankfurter's defense was scattered throughout the *Dotterweich* opinion, it is not difficult to piece together. There were four key points, with the first three devoted to situating strict liability in the appropriate perspective. The defense begins with a basic articulation of the strict liability problem — which Frankfurter put forth with more precision and less substantive top spin than Hart. According to Frankfurter, the real trouble with strict liability is not that it dispenses with blameworthiness altogether,⁹⁰ but that its legislatively enacted rule-based generalization of blameworthiness is overinclusive.⁹¹ Frankfurter's second point sought to explain why a modern policymaker reasonably and conscientiously might conclude that strict liability, despite its overinclusiveness, was worth employing. As Chief Justice Taft noted in *Balint*, the criminal sanction is an instrument for securing the betterment of society, and its use in a world of increasing complexity draws into question a multiplicity of competing values and objectives.⁹² Working from that premise, Frankfurter envisioned that “the circumstances of modern industrialism”⁹³ could generate new threats to the public welfare for which a strict liability crime might seem the fairest and most effective response. A less stringent or more lenient regulatory measure conceivably might fail to stimulate the serious attention to duty necessary to protect innocent and relatively helpless citizens from harm, making strict liability at least arguably the preferred option from among an imperfect set of alternatives.⁹⁴ Frankfurter's third point suggests a further reason to uphold legislative discretion to choose the overinclusive legal rule of strict liability over a more lenient but underprotective form of regulation. Criminal law is not a closed system of legal rules that autonomously apply themselves to their full definitional reach. It is a process that relies on institu-

90. Hart made that hyperbolic assertion. See *id.* at 422.

91. As Frankfurter put it, “[h]ardship there doubtless may be under a statute which thus penalizes the transaction though such consciousness of wrongdoing be totally wanting.” *Dotterweich*, 320 U.S. at 284.

92. See *United States v. Balint*, 258 U.S. 250, 252-53 (1922). Ironically enough, this is substantially the same proposition with which Hart opened *The Aims of the Criminal Law*. See *supra* notes 24-27 and accompanying text.

93. *Dotterweich*, 320 U.S. at 280. By stressing modern industrialism, Frankfurter invited a contrast with the simpler homogeneous society that had produced the garden-variety criminal law that Sayre, two decades earlier, had noted. The “modern conception of criminality,” Sayre observed, has involved a “shifting from a basis of individual guilt to one of social danger” that seems “inevitable.” See Sayre, *supra* note 16, at 55, 67.

94. A strict legislatively prescribed duty might be necessary to encourage the utmost care in certain settings. See *Balint*, 258 U.S. at 252-53. Imprisonment, rather than a fine, might be necessary to prevent actors in industry and commerce from ignoring the duty and paying the fine instead, treating it as a license fee. See *Dotterweich*, 320 U.S. at 282-83.

tional actors with discretion to nip and tuck the application of the rules to ameliorate their harshness, their moral imprecision, and their overinclusiveness. "Our system of criminal justice necessarily depends on 'conscience and circumspection in prosecuting officers,'"⁹⁵ Frankfurter stressed, and "the ultimate judgment of juries must be trusted" as well.⁹⁶ When discretionary institutional safeguards are factored into the equation, strict liability's theoretical imperfections do not disappear, but they do lose some of their provocativeness.⁹⁷

Having placed the issue in perspective, Frankfurter turned fourth and finally to the fundamental constitutional question of *who decides* what is criminal. Frankfurter's answer was that in a multivalued world of multiple objectives and imperfect alternatives, the legislature and not the judiciary is the institution competent to conduct the necessary "[b]alancing [of] relative hardships."⁹⁸ Frankfurter did not bother to elaborate, but in context his point was perfectly clear. At the time of the *Dotterweich* decision in 1943, the Court had only recently repudiated the judicial efforts of the *Lochner* era to guard against supposed failures of the "legislature's sense of justice"⁹⁹ in the regulation of modern socioeconomic problems. The Court had observed a jurisprudence in which judges purported to find substantive, judicially enforceable limitations on the legislative power of the people in the "unmistakable indications"¹⁰⁰ of selected indeterminate constitutional clauses, or in "the

95. *Dotterweich*, 320 U.S. at 285 (quoting *Nash v. United States*, 229 U.S. 373, 378 (1913)). Frankfurter went on to note that reliance upon prosecutorial discretion is necessary "even when the consequences are far more drastic than they are under the provision of law before us." See 320 U.S. at 285 (citing *Balint*, 258 U.S. 250, which involved a maximum sentence of five years imprisonment).

96. *Dotterweich*, 320 U.S. at 285. Earlier in the opinion, and in a different connection, Frankfurter made the point that juries are free to play the equities in their decisionmaking. See 320 U.S. at 279 ("Juries may indulge in precisely such motives or vagaries.").

97. Frankfurter acknowledged what Frederick Schauer later identified as the problem of the "recalcitrant experience" — the fact that rules have the capacity to dictate results in application that would be contrary to the justifications underlying them. See FREDERICK SCHAUER, *PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE* 38-39 (1991). Here, in the case of strict liability, the problem arises because of the probabilistic generalization that the rule embodies.

One way that criminal law alleviates recalcitrant experiences is by establishing separate "decisional rules" that mitigate the harshness that would result were its "conduct rules" to control the outcome of a prosecution. See Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625 (1984). What Frankfurter realized is that discretionary judgment figures into the alleviation process as well, resolving some of the recalcitrant experiences that decisional rules produce.

98. See *Dotterweich*, 320 U.S. at 285; see also *Shevlin-Carpenter Co. v. Minnesota*, 218 U.S. 57, 70 (1910) (noting that "this court cannot set aside legislation because it is harsh").

99. Hart, *supra* note 1, at 411.

100. *Id.* at 431.

broad constitutional injunction of due process,"¹⁰¹ or in the "understanding embodied"¹⁰² by, but never stated in, the Constitution. The Court had experienced the consequences of such a jurisprudence: the ease with which judges can mistake the unfamiliar or the personally unsettling for the unconstitutional, thwarting good government and, worse, self-government. Having succeeded, after a long struggle, to renounce that business only six years earlier,¹⁰³ the Court was not about to reenter it in *Dotterweich*.

Within *Dotterweich*, then, lies a coherent, process-oriented and institution-sensitive model of the relationship between the Constitution and criminal law. Criminal law choices are controvertible, fundamentally political, and thus best left to the political departments.¹⁰⁴ There indeed is a risk that criminal law might drift too far from its moral moorings. Our chief protection against that risk, however, comes not from Platonic guardians, but from the safeguards of the political process and the opportunities for individualized, discretionary justice that are layered institutionally throughout the criminal process.¹⁰⁵ Imperfect? Undoubtedly. But with Platonic guardians in short supply, it is quite possibly safer than the alternative.

Those were the Court's terms. Hart never directly confronted them. Nor, for that matter, would the scholars who followed in his wake.

C. *Hart's Wake: Substantive Theorizing in the Academy*

Once Henry Hart pushed process considerations to the side and set off in search of a substantive constitutional criminal law, two generations of criminal law scholars would follow his course. The

101. *Id.* at 411.

102. *Id.* at 404.

103. See *West Coast Hotel v. Parrish*, 300 U.S. 37 (1937) (repudiating the substantive due process approach associated with *Lochner v. New York*, 198 U.S. 45 (1905)); see also *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) (abandoning the restrictive interpretation of the Commerce Clause).

104. In Professor Seidman's words, the distributional questions in criminal law — who to blame and what to blame — produce a "struggle [that] is, in essence, political rather than moral." See Louis Michael Seidman, *Soldiers, Martyrs, and Criminals: Utilitarian Theory and the Problem of Crime Control*, 94 *YALE L.J.* 315, 346 (1984).

105. Some substantive constitutional limits do, however, exist. There are specific provisions in the Constitution that effectively erect substantive limitations — the First Amendment is one, see *infra* note 148, and the ban against ex post facto laws might be another, see *supra* note 63. Substantive principles of limitation also exist under the Eighth Amendment and the Due Process Clause^s, but they will be identified through methodologies that are heavily imbued with process-based concerns. See *infra* section II.A.4 (discussing the due process methodology of *Patterson v. New York*, 432 U.S. 197 (1977)); *infra* note 203 (discussing the proportionality principle as interpreted in *Harmelin v. Michigan*, 501 U.S. 957 (1991)).

highly regarded Herbert Packer of Stanford was among the first to follow, publishing a call to constitutional arms against strict liability in the 1962 *Supreme Court Review* that was slavishly modeled after Hart's argument.¹⁰⁶ The Constitution had to embody a substantive theory of crime, Packer urged, because Hart was correct in his reading of the Constitution's "unmistakable indications" and any reading to the contrary would render the Constitution "anomalous."¹⁰⁷ The Supreme Court's precedent seemed to take just such a contrary reading, of course, but Packer insisted that the opinions deserved little respect because Hart's acid account of the Court's work also was correct.¹⁰⁸ In point of fact, Packer later would claim, "[t]he forthrightness of this criticism of the Supreme Court manifests Henry Hart at his best."¹⁰⁹ While mounting his argument for a constitutionalization of mens rea, Packer revealed some tinges of what might be interpreted as contrition for his unabashed substantivism to the exclusion of process considerations.¹¹⁰ But he never let the

106. See Packer, *Mens Rea*, *supra* note 1. Professor Gerhard Mueller also was an early advocate of substantive constitutional criminal law. Writing at about the same time as Hart, Mueller's inspiration was *Lambert v. California*, 355 U.S. 225 (1957), which he hailed as the decision that "unmistakably points the way in the right direction and will ultimately lead to a complete moral recovery of our penal law" — toward a ruling constitutionalizing the requirement of mens rea. See Gerhard O.W. Mueller, *On Common Law Mens Rea*, 42 *MINN. L. REV.* 1043, 1104 (1958).

107. See Packer, *Mens Rea*, *supra* note 1, at 127.

108. Packer discussed the precedent extensively, crediting Hart's analysis and showing only a little more sympathy toward the decisions than Hart. See *id.* at 110-22. According to Packer, *Shevlin-Carpenter* was "an example of constitutional adjudication at its worst." *Id.* at 111. *Balint* engaged in an "obscure process of divination." *Id.* at 114. The discussion of mens rea in *Dotterweich* was nothing but an "offhand passage." *Id.* at 119. *Morissette* was an improvement, see *id.* at 119-21, but its "highly labored" opinion was too kind to *Balint*. *Id.* at 121. *Lambert* was promising, but its "flabbiness" was regrettable. *Id.* at 133. All in all, Packer concluded, "the Supreme Court itself bears prime responsibility for having sanctioned the erosion of mens rea in what can be restrainedly described as an intellectually unsatisfying way." *Id.* at 151-52.

109. Packer, *Aims Revisited*, *supra* note 1, at 490 n.2.

110. Packer's first tinge of contrition came as he concluded his Hartesque emasculation of the strict liability precedent, when he suggested the possibility of "a more sympathetic scrutiny of what the Supreme Court has done." Packer, *Mens Rea*, *supra* note 1, at 127. While a more sympathetic account might be drawn fairly easily, see *supra* text accompanying notes 90-105 (discussing Frankfurter's opinion in *Dotterweich*), Packer offered not even a sketch.

Packer's second tinge of contrition came when he acknowledged that his endorsement of a negligence standard of criminal blameworthiness ran headlong into the quandary that Richard Wasserstrom had detailed a few years earlier: namely, that strict liability and negligence are substantively near equivalents, and that any meaningful distinction between the two must be sought in process considerations relating to the comparative strengths and weaknesses of legislative and jury determinations of fault. See *supra* notes 51-52. Packer shook off the problem with a confident assertion that "[t]here are important and, for me, decisive differences between a legislative determination that certain conduct is unacceptable, made in advance of such conduct, and a jury's determination after the fact that a particular instance of such conduct fell below a previously established community standard." Packer, *Mens Rea*, *supra* note 1, at 144 (citing Wasserstrom in a footnote). Six years later, Packer developed his

possibility of an alternative process orientation take him off-message. To the contrary, Packer eventually pursued an even more ambitious substantive theory of constitutional criminal law than had Hart and credited Hart for the inspiration. Following Hart's death in 1969, Packer authored a tribute in which he revisited Hart's "epochal essay" and suggested it was time to take the logical next step: a frontal substantive due process assault on "improvident uses of the criminal sanction" in the areas of abortion, pornography, gambling, sexual behavior, and marijuana.¹¹¹ If judges can heighten their scrutiny when First Amendment or equal protection values are concerned, then why not when the criminal sanction is implicated?¹¹²

With Hart and Packer setting the example, and the Supreme Court showing apparent openness to a more aggressive constitutional role in criminal law,¹¹³ a substantive-rights perspective on the

response a bit more, arguing that the "decisive difference is that the legislature cannot and does not foresee the infinite variation of circumstance that may affect the jury's view of a particular case." Packer, *supra* note 43, at 128. Even then, however, Packer did not explain why this difference is *always* decisive, even in situations where the legislature has foreseen and accounted for most of the "variation[s] of circumstance" that a jury likely would encounter and wishes to lay the law down there, the possibility of a few unforeseen "variation[s] of circumstance" notwithstanding. Nor did Packer offer any explanation as to why other considerations — such as the legislature's superior representativeness, a jury's capacity for false acquittal, or the existence of discretionary institutional safeguards — cannot be regarded as "decisive" the other way.

111. See Packer, *Aims Revisited*, *supra* note 1, at 490, 493. For the seminal work on the perils of overcriminalization, see Sanford H. Kadish, *The Crisis of Overcriminalization*, 374 ANNALS AM. ACAD. POL. & SOC. SCI. 157 (1967). See also John M. Junker, *Criminalization and Criminogenesis*, 19 UCLA L. REV. 697 (1972); Sanford H. Kadish, *More on Overcriminalization: A Reply to Professor Junker*, 19 UCLA L. REV. 719 (1972).

112. See Packer, *Aims Revisited*, *supra* note 1, at 497-98. For support, Packer cited the touchstone of heightened scrutiny, *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938). While Justice Stone's footnote explicitly raised the possibility of heightened scrutiny when liberties associated with the First Amendment are implicated or when legislation is directed against discrete and insular minorities, nothing in the footnote suggested a case for heightened scrutiny merely because the criminal sanction is involved. Packer was, shall we say, generalizing from the footnote.

Process-based thinking in a "footnote four" vein does, however, have a bearing on the relationship between the Constitution and the criminal law. As we shall see, process-reinforcement motivations inform the jurisprudence in this area. See *infra* section II.B.

113. *Lambert v. California*, 355 U.S. 225 (1957), may have been enigmatic, but those at the time were right to take it as a signal that the newly reconstituted Warren Court might be open to new constitutional overtures in the criminal law. See, e.g., Hart, *supra* note 1, at 433-35 (noting *Lambert's* potential more cautiously); Mueller, *supra* note 106, at 1104 (hailing *Lambert* and noting with enthusiasm its reformative potential); accord David C. Berg, *Recent Decisions*, 56 MICH. L. REV. 1008, 1008-11 (1958); Packer, *Mens Rea*, *supra* note 1, at 127-37; *The Supreme Court, 1957 Term*, 72 HARV. L. REV. 77, 183-85 (1958). *Robinson v. California*, 370 U.S. 660 (1962), underscored the potential for new substantive constitutional limits and, by the mid-1960s, the incorporation and privacy cases, see, e.g., *Malloy v. Hogan*, 378 U.S. 1 (1964) (incorporating the Fifth Amendment right to be free from compelled self-incrimination as fundamental to due process); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (incorporating the Sixth Amendment right to counsel); *Mapp v. Ohio*, 367 U.S. 643 (1961)

relationship between the Constitution and criminal law took hold in academic circles. Hart's and Packer's dismissive interpretations of precedent predating the Warren Court, moreover, became something close to canonical truth.¹¹⁴ The upshot has been worthy scholarship, but scholarship long on substance and short on process.¹¹⁵ I

(incorporating the Fourth Amendment exclusionary rule); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (finding a fundamental right to privacy), provided strong indications that the restrained due process understandings associated with Justices Frankfurter and Black, respectively, were losing their hold. *Powell v. Texas*, 392 U.S. 514 (1968), put a serious crimp in the expansionist trend in 1968, but new generative potential was about to be unleashed with respect to capital punishment. See *Furman v. Georgia*, 408 U.S. 238 (1972) (invalidating unbridled discretion in capital-sentencing schemes under the Eighth Amendment). Moreover, a whole new vista of substantive possibilities was opened by *In re Winship*, 397 U.S. 358 (1970), and the progeny it produced in the area of burdens of proof and presumptions. See *infra* notes 138, 140-47, and accompanying text.

114. See, e.g., James J. Hippard, Sr., *The Unconstitutionality of Criminal Liability Without Fault: An Argument for a Constitutional Doctrine of Mens Rea*, 10 HOUS. L. REV. 1039, 1046-48 (1973) (citing with approval Hart's and Packer's accounts of the precedent); John C. Jeffries, Jr. & Paul B. Stephan III, *Defenses, Presumptions, and Burden of Proof in the Criminal Law*, 88 YALE L.J. 1325, 1374-75 (1979) (citing with approval Packer's reading of the precedent); Mark Tushnet, *Constitutional Limitation of Substantive Criminal Law: An Examination of the Meaning of Mullaney v. Wilbur*, 55 B.U. L. REV. 775, 791 & n.112 (1975) (same).

115. See, e.g., Ronald J. Allen, *Mullaney v. Wilbur, the Supreme Court, and the Substantive Criminal Law — An Examination of the Limits of Legitimate Intervention*, 55 TEXAS L. REV. 269 (1977) [hereinafter Allen, *Limits of Legitimate Intervention*] (arguing for a restrained interpretation of the reasonable doubt rule, analyzing the issue in terms of the appropriate level of protection for individual liberty, and advocating Eighth Amendment proportionality review as the constitutional locus for that protection); Ronald J. Allen, *The Restoration of In re Winship: A Comment on Burdens of Persuasion in Criminal Cases After Patterson v. New York*, 76 MICH. L. REV. 30 (1977) [hereinafter Allen, *Restoration of Winship*] (same); Dripps, *supra* note 8 (arguing for an interpretation of the reasonable doubt rule that would constrain legislative freedom to define crimes and defenses and contending that the principle of legality underlies the reasonable doubt standard and that an individual right to be free from unauthorized punishment underlies the legality principle); Gary V. Dubin, *Mens Rea Reconsidered: A Plea for a Due Process Concept of Criminal Responsibility*, 18 STAN. L. REV. 322 (1966) (arguing for constitutionalization of the mens rea requirement); C. Peter Erlinder, *Mens Rea, Due Process, and the Supreme Court: Toward a Constitutional Doctrine of Substantive Criminal Law*, 9 AM. J. CRIM. L. 163 (1981) (same); Hippard, *supra* note 114, at 1051-57 (involving natural law, the Ninth Amendment, penumbras, emanations from the Bill of Attainder Clauses, and due process as grounds to invalidate strict liability); Jeffries & Stephan, *supra* note 114, at 1369-79 (arguing for "constitutional minima for criminal punishment" expressed through doctrines of actus reus, mens rea, and proportionality); Alan Saltzman, *Strict Criminal Liability and the United States Constitution: Substantive Criminal Law Due Process*, 24 WAYNE L. REV. 1571 (1978) (arguing for constitutionalization of the mens rea requirement); Schwartz, *supra* note 66, at 157-60 (advocating strict scrutiny of the use of the criminal sanction); Stunz, *supra* note 11, at 31-38 (arguing for constitutionalization of the mens rea requirement and a defense of desuetude); Sundby, *supra* note 8 (arguing that "innocence" should be given a constitutional definition that indirectly constrains legislative choices in applying the criminal sanction and contending that "innocence" must be assessed by reference to society's values as expressed by the legislature but that those values should be generalized by the courts so as to undo the effects of legislative procedural compromises); Tushnet, *supra* note 114, at 799-802 (discussing constitutionalization of the mens rea requirement); Note, *The Cruel and Unusual Punishment Clause and the Substantive Criminal Law*, 79 HARV. L. REV. 635, 648-51 (1966) [hereinafter *Punishment Clause*] (suggesting constitutionalization of the voluntary act requirement).

do not claim that scholars have wholly ignored process, for that clearly has not been the case. Many works have acknowledged the importance of legislative primacy and federalism to the Court's jurisprudence, but they have seen these considerations not as the foundations of a full-fledged process-theory alternative to substantive theory, but merely as the ingredients of a fairly undifferentiated mass of resistance that those who seek to generalize substantive constitutional principles in order to limit the criminal sanction have the burden to overcome.¹¹⁶ More recent works have taken the next step by offering to explain why the rights-oriented substantive limitations they espouse do not offend — or perhaps more accurately, do not offend very much — the Court's notions of legislative primacy and federalism.¹¹⁷ One recent work from Professor William Stuntz has taken a significant further step, combining an appeal to process-reinforcement theory of the sort associated with footnote four of the *Carolene Products* case¹¹⁸ with an otherwise straightforward plea for substantive constitutional criminal law in the tradition of Hart and Packer.¹¹⁹ These references to process considerations

116. Professor Allen was among the first to stress the significance of legislative primacy and federalism in this area. See Allen, *Limits of Legitimate Intervention*, *supra* note 115, at 300 (criticizing *Mullaney v. Wilbur*, 421 U.S. 684 (1975), for failing to respect federalism and "the deference properly due a legislative enactment" and for imposing "the suffocating power of the federal judge" upon state lawmakers (quoting *Planned Parenthood v. Danforth*, 428 U.S. 52, 93 (1976) (White, J., concurring))). See also Jeffries & Stephan, *supra* note 114, at 1344-53 (offering similar criticisms). But see Saltzman, *supra* note 115, at 1620 (defending the proposed constitutionalization of mens rea as bringing the Court only minimally into matters generally reserved for the legislature).

117. See, e.g., Dripps, *supra* note 8, at 1705-12 (defending his proposed interpretation of the reasonable doubt rule as relatively respectful of political prerogatives); Hopkins, *supra* note 52, at 415-17 (defending the proposed constitutionalization of mens rea by linking it to the jury's structural role under the Sixth Amendment); Sundby, *supra* note 8, at 494-95, 499-505 (defending a proposed constitutional interpretation of the reasonable doubt rule as designed to respect legislative moral judgments but not judgments on how morality and other concerns should be accommodated, and thus sufficiently sensitive to federalism and separation-of-powers considerations).

118. See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (suggesting the possibility of heightened judicial scrutiny to protect discrete and insular minorities).

119. See Stuntz, *supra* note 11, at 21 (arguing that "if criminal suspects are indeed an 'out group' of the sort that needs special constitutional protection . . . [that] protection should not stop with procedure").

Professor Stuntz's explicit attention to process considerations is welcome. His argument that mens rea should be constitutionalized and strict liability invalidated in the name of process theory, however, leaves the impression that Stuntz takes process less seriously than have the Justices. Boiled down to its essence, Stuntz's argument runs as follows: (1) a constitutionally problematic process failure that he terms "overcriminalization" can arise from broad delegation of discretion to prosecutors, law enforcement officers, and juries; (2) strict liability laws are examples of broad delegation because they contemplate that discretionary judgments will tailor their application to the needs of justice in individual cases; (3) strict liability laws thus *formally resemble* the evil of "overcriminalization"; (4) strict liability's formal resemblance to the evil of "overcriminalization" should be enough to condemn it as an occasion of process failure. See *id.* at 15-24, 31-34. The flaw in the argument is that it proves too

notwithstanding, the relevant scholarship from Hart's day forward has been uniformly touched by Hart's substantive spirit. The literature to date uniformly proceeds on the assumption that there is no meaningful relationship between the Constitution and criminal law — or at least none worth talking about — unless it is a relationship defined by substantive rights. Moreover, scholars uniformly have assumed that those substantive rights are to be found by generalizing from the Constitution's text, from Supreme Court precedent, and from the history of criminal law. Meanwhile, left largely unexplored are the process concerns that informed those disreputed pre-Warren precedents like *Dotterweich*, despite their continued influence on the Court in the years since and, most importantly, their potential implications for the development of a constitutional jurisprudence relating to substantive criminal law.

II. THE IMPLICATIONS OF PROCESS: MODELING FROM *DOTTERWEICH*

Suppose we were to take those process concerns that culminated in *Dotterweich* seriously. Not that we should praise *Dotterweich*; Frankfurter's concessions to politics and discretionary governmental actors bespeak a narrower conception of the rule of law than some would care to endorse. But suppose we were to posit that the process thinking underlying *Dotterweich* reflects a strong center of constitutional gravity from which the Court's practice of constitutional law has been proceeding. What might that do to our understanding?

One possibility is that it will bring a long and varied line of related constitutional decisions, currently dispersed across the fractured law school curriculum, into a new and sharper focus and leave us with a better appreciation of the relationship between the Con-

much. Every delegation of discretion formally resembles the hypothesized evil of "overcriminalization," yet it cannot be true that all discretion is unconstitutional because, as discussed above, the criminal law is chock full of rules that are drawn the way they are because discretion stands in the background as a check against "recalcitrant experiences." See *supra* notes 40-50, 95-97 and accompanying text. As I note in section II.B, *infra*, the constitutional trick is to separate the good delegations of discretion — those that do not evidence a failure of political or institutional safeguards from the bad delegations — those that do evidence a failure of political or institutional safeguards. I have no doubt that a strict liability statute might, depending on the circumstances, fall into either category. To presumptively invalidate strict liability across the board, however, is to assert a bright-line prophylactic rule that, to the Court's process way of thinking, cuts far too deeply into legitimate legislative practices. It exalts the fear of process failure in extreme cases over the day-to-day need for legislative flexibility in the fashioning of criminal sanctions — a move that the Supreme Court, believing in the efficacy of political and institutional safeguards, has resisted. See *infra* notes 172-78 and accompanying text.

stitution and criminal law that the Court already has forged. I would not be the first to suggest that there are affinities between cases like *Lambert*, *Robinson*, and *Powell*, the burden-of-proof and presumption cases, the vagueness decisions, and the Eighth Amendment proportionality and capital punishment cases.¹²⁰ Our habit, however, has been to seize on the affinities that support a narrative in which substantive constitutional criminal law stars in the leading role — a story of its promise,¹²¹ its initial triumphs, subsequently¹²² its frustrating rejections,¹²³ and the emptiness that followed.¹²⁴ For true substantive believers, the cases also represent opportunities. They form a constitutionally relevant milieu, precedent that contains credentialed expressions of value and theory from which the generalizer might generate substantive principles to limit the criminal sanction. Taking *Dotterweich* seriously, however, means looking for affinities that support a quite different process narrative — a story of a Constitution engaged in a considered and established relationship with the substance of criminal law, but a relationship founded on understandings of process.

The process narrative lacks the exhilarating highs and epic tone of its substantive counterpart, which may explain something about their relative popularity. But if you believe, as I do, that constitutional law is a practice that brings together an array of incommen-

120. For authorities that consider at least some of the connections between these cases, see *supra* note 115.

121. See, e.g., *Mullaney v. Wilbur*, 421 U.S. 684 (1975) (suggesting that the reasonable doubt rule might merit a broad interpretation that would restrict legislative ability to define crimes and designate affirmative defenses); *Robinson v. California*, 370 U.S. 660 (1962) (suggesting constitutionalization of some form of the actus reus requirement); *Lambert v. California*, 355 U.S. 225 (1957) (suggesting constitutionalization of some form of the mens rea requirement).

122. See, e.g., *Solem v. Helm*, 463 U.S. 277 (1983) (invalidating, on the facts of the case, a life sentence without possibility of parole as unconstitutionally disproportionate); *Woodson v. North Carolina*, 428 U.S. 280 (1976) (invalidating a mandatory death penalty law and establishing a requirement of individualized consideration of mitigating circumstances in capital cases); *Furman v. Georgia*, 408 U.S. 238 (1972) (invalidating standardless discretionary sentencing schemes in capital cases and establishing a requirement that discretion be guided and channeled); *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972) (invalidating an antivagrancy law on void-for-vagueness grounds).

123. See, e.g., *Patterson v. New York*, 432 U.S. 197 (1977) (withdrawing from *Mullaney v. Wilbur* and upholding a broad legislative authority to define crimes and affirmative defenses); *Powell v. Texas*, 392 U.S. 514 (1968) (limiting *Robinson* and upholding the constitutionality of a law criminalizing public drunkenness).

124. See, e.g., *Montana v. Egelhoff*, 116 S. Ct. 2013 (1996) (upholding state authority to render voluntary intoxication immaterial to criminal liability); *Martin v. Ohio*, 480 U.S. 228 (1987) (upholding placement of the burden of proof on the defendant to establish self-defense); *McMillan v. Pennsylvania*, 477 U.S. 79 (1986) (permitting the state to employ aggravating sentencing factors that trigger a mandatory higher sentence without adhering to the reasonable doubt rule).

surable interpretive arguments that need to be accommodated,¹²⁵ then it becomes clear that the process narrative has much to offer. Arguments from process do not alone account for the development of the relationship between the Constitution and criminal law, but there can be no doubt that they have been highly influential.

What follows is by no means a definitive exposition, but merely a tentative sketch of the salient constitutional features that appear integral to any fully developed process rendition and that seem most important for those engaged in the practice of constitutional interpretation.

A. *Legislative Primacy*

We begin with the central and dominant theme of the process account: legislative primacy over criminal law choices. The point is so familiar that it is tempting simply to move on to other matters. Succumbing to the temptation, however, runs the risk that the familiar will turn into the banal. The notion of legislative primacy as developed in the cases in question is anything but banal. It reflects deeper understandings that should not be taken for granted.

1. *Criminal Law as Process*

The definitive modern articulation of legislative primacy over criminal law is found in an opinion handed down at the height of the Warren Court's liberal reign and authored by a Justice who will never be accused of kowtowing to the majority will. Thurgood Marshall wrote in *Powell v. Texas*:

We cannot cast aside the centuries-long evolution of the collection of interlocking and overlapping concepts which the common law has utilized to assess the moral accountability of an individual for his anti-social deeds. The doctrines of *actus reus*, *mens rea*, insanity, mistake, justification, and duress have historically provided the tools for a constantly shifting adjustment of the tension between the evolving aims of the criminal law and changing religious, moral, philosophical, and medical views of the nature of man. This process of adjustment has always been thought to be the province of the States.¹²⁶

125. Professor Fallon's depiction of the practice is as good as it gets. See Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1231-37 (1987).

126. 392 U.S. 514, 535-36 (1968) (plurality opinion) (footnote omitted). Numerous expressions to similar effect may be found in the Court's decisions. See, e.g., *Harmelin v. Michigan*, 501 U.S. 957, 996-1001 (1991) (Kennedy, J., concurring in part and concurring in the judgment); *Payne v. Tennessee*, 501 U.S. 808, 824-25 (1991); *McCleskey v. Zant*, 499 U.S. 467, 491 (1991); *Martin v. Ohio*, 480 U.S. 228, 232 (1987); *McMillan v. Pennsylvania*, 477 U.S. 79, 85 (1986); *Rummel v. Estelle*, 445 U.S. 263, 275-76 (1980).

Consider Marshall's words carefully, and it becomes clear that this is no rote invocation of judicial restraint, but rather the summoning of a vision of criminal law in America the significance of which would be hard to overemphasize. The criminal law that Marshall describes is not a static manifestation of moral theory or philosophy. The doctrines that we associate with criminal law, as much as they help to outline a casebook, do not even define criminal law; rather, they are merely its "tools." For constitutional purposes, Marshall tells us, criminal law must be understood as something society *does*. It is a "process of adjustment" in which society confronts the "tension" between the "evolving aims" it wishes to pursue with the criminal sanction and "changing . . . views" about the human existence, and the accommodations it reaches are "constantly shifting."

Characterizing criminal law as a process, rather than as some substantive *corpus juris*, bears significant implications for an analysis of the Constitution's relationship with criminal law. The most important implication, however, is the most obvious one: as conceived by Justice Marshall, criminal law collapses virtually by definition into politics, for it is through politics and the processes of representative democracy that society expresses its developing norms and negotiates the accommodation of new imperatives within existing moral and philosophical commitments. If criminal law truly is and shall remain a community practice, and a flexible and dynamic one at that, then the competent forum for that practice must be the legislature, not a constitutional court whose judgments are manifestly less representative, ostensibly final and authoritative, and, thus, difficult to undo.¹²⁷

2. Federalism

Justice Marshall felt no need to invoke precedent to support his conception of the criminal law as a process rather than a substance, though a cite to *Dotterweich* would have sufficed.¹²⁸ Marshall did,

127. See, e.g., *United States v. Bass*, 404 U.S. 336, 348 (1971) ("[B]ecause of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity."); *Powell*, 392 U.S. at 547-48 (Black, J., concurring). The role of the courts in statutory interpretation and common law development is a different matter. Their effective performance of those nonconstitutional functions is, as Hart correctly stressed, critical to the reasoned elaboration of criminal law. See Hart, *supra* note 1, at 435.

128. In his concurring opinion in *Powell*, Justice Hugo Black did cite *Dotterweich*, and for roughly the same point that Marshall was making:

I feel there is much to be said for avoiding the use of criminal sanctions in many such situations [where a person is not morally blameworthy] But the question here is one of constitutional law. The legislatures have always been allowed wide freedom to

however, turn to “essential considerations of federalism”¹²⁹ to fortify his claim.

Marshall summoned two basic points from the lore of American federalism. The first was the indisputable fact that criminal law choices traditionally have “always been thought to be the province of the States.”¹³⁰ The second and equally indisputable proposition was that the possibility of differing choices from state to state has been regarded as not only tolerable but positively advantageous. Justice Brandeis’s famous metaphor was not mentioned by name,¹³¹ but his image of states as laboratories was plainly in Marshall’s mind when he noted that federalism enables “fruitful experimentation” and “productive dialogue” in matters criminal, virtues that “a constitutional rule would reduce, if not eliminate.”¹³²

As Marshall recognized, these two propositions of federalism militate against a constitutional judicial role in the realm of substantive criminal law. But the significance of federalism to Marshall’s argument runs even deeper. Brandeis’s vision of federalism and Marshall’s vision of criminal law as a process are mutually reinforcing, each validating the other’s constitutional appeal. On the one hand, a constitution with a federalism tradition that welcomes diversity in criminal law choices is naturally amenable to a conceptualization of criminal law in the substantively agnostic terms of process and community practice. On the other hand, a constitution that recognizes criminal law as a complex process of constant readjustment would be wise to seize the advantages of federalism and leave criminal law choices to the states. As Hugo Black stressed in a concurring opinion in *Powell*, joined by the Court’s then-resident proponent of federalism, John Marshall Harlan, criminal law is

determine the extent to which moral culpability should be a prerequisite to conviction of a crime. *E.g.*, *United States v. Dotterweich*, 320 U.S. 277 (1943). The criminal law is a social tool that is employed in seeking a wide variety of goals
392 U.S. at 544-45 (Black, J., concurring).

129. 392 U.S. at 535 (plurality opinion).

130. 392 U.S. at 536 (plurality opinion).

131. Brandeis wrote:

To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country. This Court has the power to prevent an experiment. We may strike down the statute which embodies it on the ground that, in our opinion, the measure is arbitrary, capricious or unreasonable. . . . But in the exercise of this high power, we must be ever on our guard, lest we erect our prejudices into legal principles. If we would guide by the light of reason, we must let our minds be bold.
New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (footnote omitted).

132. *Powell*, 392 U.S. at 536-37 (plurality opinion).

most responsive to the people who require its protection and who must live under its force when it is fashioned and maintained at the state level.¹³³ The benefit, moreover, redounds not only to the locals but to the nation as a whole. Federalism invites a decentralized disposition of issues that, if addressed at a national level, would spark peculiar divisiveness because of their myriad local implications.¹³⁴ Moreover, as Brandeis observed when he extolled the blessings of state experimentation, "one of the happy incidents of the federal system" is that it ensures that the ill-advised experiments we inevitably make will be confined to the particular laboratory "without risk to the rest of the country."¹³⁵

3. Imperfection

The concept of legislative primacy spread deeper roots in the years after *Powell*, particularly in the wake of *In re Winship*,¹³⁶ which held that due process "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."¹³⁷

The Court's affirmation in *Winship* of the constitutional stature of the reasonable doubt standard, followed by similar overtones in *Mullaney v. Wilbur*,¹³⁸ opened new possibilities for constitutional limitations on the legislative definition of criminal law that commentators and litigants have been happy to explore.¹³⁹ Over the

133. See 392 U.S. at 547 (Black, J., concurring) ("It is always time to say that this Nation is too large, too complex and composed of too great a diversity of peoples for any one of us to have the wisdom to establish the rules by which local Americans must govern their local affairs.").

134. Throughout our country's growth, Justice Black observed, "the Nation [has] remembered that it could be more tranquil and orderly if it functioned on the principle that the local communities should control their own peculiarly local affairs under their own local rules." *Powell*, 392 U.S. at 547. It is our "ancient faith based on the premise that experience in making local laws by local people themselves is by far the safest guide for a nation like ours to follow." 392 U.S. at 548.

135. See *Liebmann*, 285 U.S. at 311. The Justices seemed mindful of this fact in *Powell*. Both Justice Marshall and Justice Black made note of the District of Columbia Court of Appeals's controversial experiments with the insanity defense during the 1950s and 1960s. See *Powell*, 392 U.S. at 536-37 (plurality opinion); 392 U.S. at 546 (Black, J., concurring).

136. 397 U.S. 358 (1970).

137. 397 U.S. at 364.

138. 421 U.S. 684 (1975). As noted earlier, *Mullaney* held out promise that the reasonable doubt rule might significantly limit legislative freedom to treat certain factors deemed relevant to crime and punishment as matters of affirmative defense. For a discussion of *Mullaney* and its subsequent limitation in *Patterson v. New York*, 432 U.S. 197 (1977), see Allen, *Limits of Legitimate Intervention*, *supra* note 115; Allen, *Restoration of Winship*, *supra* note 115.

139. See, e.g., cases cited *infra* notes 140-48; Allen, *Limits of Legitimate Intervention*, *supra* note 115; Allen, *Restoration of Winship*, *supra* note 115; Ronald J. Allen, *Structuring Jury Decisionmaking in Criminal Cases: A Unified Constitutional Approach to Evidentiary*

years, the law has settled to the point that the basic constitutional rules can be stated succinctly. First, whether a particular factor should be relevant to the imposition of the criminal sanction is for the legislature to decide.¹⁴⁰ Second, the legislature also is free to choose the legal form in which to cast a factor it has desired to make relevant to the imposition of the criminal sanction. The legislature can designate the factor an "element" of the criminal offense, or the basis of an affirmative defense,¹⁴¹ or a criterion for consideration at sentencing.¹⁴² Third, if the legislature decides to treat the factor as an "element," then the Constitution requires that the prosecution bear the burden of proving the existence of the element beyond a reasonable doubt.¹⁴³ Corollary rules require that legal presumptions cannot be employed in a way that effectively lessens that burden in application.¹⁴⁴ Fourth, if the legislature decides to treat the factor as an affirmative defense or sentencing consideration, the Constitution's reasonable doubt rule is not in effect.¹⁴⁵ The legislature is free to assign the burden of persuasion to either party,¹⁴⁶ and may choose the degree of the burden.¹⁴⁷ Fifth, the legislative freedom of choice referred to in the first, second, and fourth rules, while broad, is not entirely unfettered by the Constitution. Free-standing provisions such as the First Amendment and the Eighth Amendment must be observed, and the interests they encompass may impose substantive limitations on the criminal sanction in particular circumstances.¹⁴⁸ Insofar as the Due Process Clauses are concerned, however, they afford precious little material

Devices, 94 HARV. L. REV. 321 (1980); Dripps, *supra* note 8; Jeffries & Stephan, *supra* note 114; Sundby, *supra* note 8; Tushnet, *supra* note 114.

140. See, e.g., *Montana v. Egelhoff*, 116 S. Ct. 2013 (1996); *Patterson*, 432 U.S. 197.

141. See, e.g., *Martin v. Ohio*, 480 U.S. 228 (1987); *Patterson*, 432 U.S. 197.

142. See, e.g., *McMillan v. Pennsylvania*, 477 U.S. 79 (1986).

143. See, e.g., *Patterson*, 432 U.S. 197; *Mullaney*, 421 U.S. 684.

144. See, e.g., *Francis v. Franklin*, 471 U.S. 307 (1985); *Sandstrom v. Montana*, 442 U.S. 510 (1979); *Ulster County Court v. Allen*, 442 U.S. 140 (1979). See generally *Allen*, *supra* note 139, at 348-66 (discussing presumptions).

145. See, e.g., *Martin*, 480 U.S. 228; *Patterson*, 432 U.S. 197.

146. See, e.g., *Martin*, 480 U.S. 228 (involving a burden of persuasion on the defense); *Patterson*, 432 U.S. 197 (same); see also *Hankerson v. North Carolina*, 432 U.S. 233 (1977) (involving a burden on the prosecution).

147. See, e.g., *McMillan*, 477 U.S. 79; *Leland v. Oregon*, 343 U.S. 790 (1952). But see *Specht v. Patterson*, 386 U.S. 605 (1967) (holding that the rudiments of due process that attach to criminal prosecution must be followed where the factor to be litigated may trigger an entirely different sentencing regime).

148. See, e.g., *Robinson v. California*, 370 U.S. 660 (1962) (holding that the Eighth Amendment forbids criminalization of a mere status of drug addiction); *Smith v. California*, 361 U.S. 147 (1959) (requiring mens rea as an element to safeguard First Amendment interests).

for judges to assert in contravention of legislative judgments. The choices that face legislatures call for subtle balancing. As Justice White put it in the pivotal decision of *Patterson v. New York*, “[t]raditionally, due process has required that only the most basic procedural safeguards be observed; more subtle balancing of society’s interests against those of the accused have been left to the legislative branch.”¹⁴⁹

We soon will return to the Court’s culminating impressions of the Due Process Clauses.¹⁵⁰ But first, it is instructive to explore the subtler ways in which legislative primacy became entrenched in the burden-of-proof cases, setting the stage for the Court’s later impressions of due process. The rules that emerged to solve *Winship* questions certainly are laden with judicial deference to legislative judgment, but it is the vision of criminal law underlying those rules that I wish to emphasize. Consistent with Justice Marshall’s description in *Powell*, the Court continued to view criminal law as a “process of adjustment.” But whereas *Powell* might appear to have kept its distance from that process and to have appraised it only in general terms, the burden-of-proof cases forced the Court closer to the gritty reality of what that process of adjustment actually entails. In *Patterson*, the Court came face to face with the imperfection of criminal law, and it accepted what it saw without so much as a blink.

Patterson arose out of the New York legislature’s decision to reformulate the heat-of-passion doctrine that traditionally has differentiated murder from manslaughter, extending it to a wider range of cases in which a defendant has acted “under the influence of extreme emotional disturbance.”¹⁵¹ The legislature also chose, however, to designate the “emotional disturbance” factor as an affirmative defense to the crime of murder, thereby assigning to defendants the burden of establishing the factor by a preponderance of the evidence.¹⁵² What New York’s lawmakers did, of course, was to respond to a fact of institutional life. The doctrinal tools of criminal law cannot flawlessly operationalize the more abstract values

149. *Patterson*, 432 U.S. at 210.

150. See *infra* notes 173-201 and accompanying text.

151. See *Patterson*, 432 U.S. at 198.

152. See *Patterson*, 432 U.S. at 199-200. In adopting the “emotional disturbance” formulation, New York drew directly from the American Law Institute’s treatment of manslaughter in the Model Penal Code. See MODEL PENAL CODE § 210.3(b) (1980). In shifting the burden to the defendant, however, New York departed from the Model Penal Code’s position that the prosecution should bear the burden to prove the absence of emotional disturbance beyond a reasonable doubt when the issue is raised by the evidence. See MODEL PENAL CODE § 1.12 (1985).

that guide them, but rather will err toward overinclusiveness, underinclusiveness, or both. The New York legislators evidently appreciated this, and they also understood that an integral part of the "process of adjustment" that makes criminal law what it is involves assigning the risk of error in an imperfect system. That task is performed, consciously or unconsciously, whenever the doctrinal rules of decision are formulated.¹⁵³ By manipulating the burden of proof, New York merely chose a more visible and less equivocal means of accomplishing the task. In allocating the burden of persuasion to defendants rather than the prosecution, New York sought to minimize the risk of erroneous acquittals of murder. The price was a greater risk of erroneous convictions of murder.

Justice White, writing for the Court, upheld the power of a legislature to make such choices in an opinion that is a thematic reprise of Frankfurter's opinion in *Dotterweich*. Like Frankfurter before him, White saw a criminal law that is a far cry from the comfortable, morally precise system that Henry Hart mythicized. White recognized that criminal law is a conscious exercise in imperfection that is rife with potential hardships. As the rules are framed, choices are made that consign to certain defendants the risk of morally unjustified or excessive sanctions, and those choices may be made for institutional or administrative reasons just as readily as for moral ones.¹⁵⁴ Like Frankfurter, White was not the least bit fazed by an imperfect criminal law, but accepted it as such and informed the Court's constitutional understanding accordingly. As Frankfurter concluded in 1943, hardships were the unexceptional and unsentimentalized results of a social process of "[b]alancing relative hardships,"¹⁵⁵ and so they remained for White in 1977.¹⁵⁶

When this gloss of imperfection is added to the Court's constitutional understanding of criminal law as a process of adjustment,¹⁵⁷ a substantive constitutional criminal law theory in the fashion of

153. See *supra* notes 41-50 and accompanying text.

154. See *Patterson*, 432 U.S. at 209 ("To recognize at all a mitigating circumstance does not require the State to prove its nonexistence in each case in which the fact is put in issue, if in its judgment this would be too cumbersome, too expensive, and too inaccurate.").

155. *United States v. Dotterweich*, 320 U.S. 277, 285 (1943).

156. See *Patterson*, 432 U.S. at 210. For Justice White, this was nothing new. In his first Term on the Court, he filed a dissent in *Robinson v. California*, 370 U.S. 660, 686 (1962) (White, J., dissenting), that showed considerable appreciation for the wide range of factors — there, venue considerations — that might explain a legislature's decision to frame its criminal law in morally imprecise terms. See also *United States v. Romano*, 382 U.S. 136 (1965).

157. Although in *Patterson* Justice White did not cite Justice Marshall's opinion in *Powell*, he cited other authorities to similar effect, including *Speiser v. Randall*, 357 U.S. 513, 523 (1958); *Irvine v. California*, 347 U.S. 128, 134 (1954); *Leland v. Oregon*, 343 U.S. 790, 798 (1952); *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934). See *Patterson*, 432 U.S. at 201-02.

Henry Hart becomes all the more difficult to maintain. Indeed, Justice White devoted the rest of his opinion in *Patterson* to demonstrating why this is so.

4. *Rebuffing the Generalization of Principles*

A successful theory of substantive constitutional criminal law, we saw earlier, depends upon the ability to identify some principle that can generate doctrine. Henry Hart's principle of individual moral blameworthiness offers a fine example. Not just any creatively articulated principle will do, however. To be vital in this connection, the principle requires a secure footing in some milieu that our practice of constitutional law recognizes as a legitimate source of content, such as text, history and tradition, or precedent. The principle need not locate itself firmly in every milieu, but it is highly preferable, if not essential, that the principle not be roundly refuted by any one of them.¹⁵⁸ That is why Hart set about characterizing criminal law's history and tradition in such a way that it would sustain the principle he purported to extract from it.¹⁵⁹ It is why Hart massaged the Constitution's text to render it suggestive of, or at least not inhospitable toward, the principle he espoused.¹⁶⁰ It is also why Hart blistered Supreme Court precedent that could not be reconciled with his principle.¹⁶¹

The art of generalization becomes exceedingly difficult to practice in *Patterson's* constitutional world — which, I think it is safe to say, was precisely the intention of the decision. Criminal law as described in *Patterson's* rugged and unholy terms is a social process of adjustment, constantly shifting, founded on perpetual tension between multiple and ever-evolving incommensurables, unpretentious about the efficacy of its rules of law, and candid and coldly calculating about their overinclusiveness and underinclusiveness. The result is a constitutional milieu of history and tradition that will be stubborn to admit many enduring fundamental continuities of its own, or to make room for any that the generalizer might derive elsewhere. The entrenched legislative primacy that *Patterson* yields is not wholly immune from the generalizer's efforts to discern fun-

158. See generally Fallon, *supra* note 125, at 1240-48 (discussing the need for various forms of constitutional argument from text, historical intent, precedent, theory, and values to reach "coherence").

159. See *supra* section I.B.1.

160. See *supra* section I.B.2.

161. See *supra* section I.B.3.

damental principles in the patterns and practices that time helps reveal, but it is consciously resistant to them.

Consider Justice White's treatment of the argument that New York's burden-shift in *Patterson* offended the principle underlying the reasonable doubt rule — in Justice Harlan's words, the "fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free."¹⁶² In the hands of an artful generalizer, that friendly aphorism can go far to impugn the various criminal law choices that assign risks of moral error to defendants. Henry Hart, you may remember, tossed it into his case against strict liability,¹⁶³ and the dissenters in *Patterson* put it to similar use in attacking the burden-of-proof assignment.¹⁶⁴ White made short work of it. The aphorism could not be taken seriously as a principle from which judges could generate constitutional doctrine, White concluded, because the imperfect criminal law has not taken the aphorism all that seriously itself. "While it is clear that our society has willingly chosen to bear a substantial burden in order to protect the innocent, it is equally clear that the risk it must bear is not without limits; and Mr. Justice Harlan's aphorism provides little guidance for determining what those limits are."¹⁶⁵ Criminal law, it seems, must be forgiven its slogans.

If a proposition so central to criminal law's public legitimation strategy can be constitutionally disarmed that easily, one can imagine the fate of less ingrained principles. Justice White's opinion in *Patterson* offers two representative examples. The first example involved an effort to constitutionally ensconce a principle by deriving it from fresh precedent. Petitioner and dissenters alike argued that *Mullaney v. Wilbur*,¹⁶⁶ decided just two years earlier, should be read to stand for the principle that

the State may not permit the blameworthiness of an act or the severity of punishment authorized for its commission to depend on the presence or absence of an identified fact without assuming the burden of proving the presence or absence of that fact, as the case may be, beyond a reasonable doubt.¹⁶⁷

This was not a strained reading. Justice White conceded that *Mullaney* contained language supportive of this view. But he decided that the proposed principle would impose a limitation on leg-

162. *In re Winship*, 397 U.S. 358, 372 (1970) (Harlan, J., concurring).

163. See *supra* note 40 and accompanying text.

164. See *Patterson v. New York*, 432 U.S. 197, 223-24 (1977) (Powell, J., dissenting).

165. 432 U.S. at 208.

166. 421 U.S. 684 (1975).

167. *Patterson*, 432 U.S. at 214.

islative freedom antithetical to the understanding the Court now asserted as historical and traditional wisdom.¹⁶⁸ What then of *Mullaney*, and the principle of stare decisis? White was discrete enough to refrain from airing the Court's laundry, but the implication of his opinion is clear. Some of the Justices were asleep at the switch in *Mullaney*, acquiescing in an opinion from Justice Powell that reflected a soft spot for substantive constitutional criminal law theory that he would continue to demonstrate throughout his career,¹⁶⁹ but that a majority, upon more careful consideration, could not abide. "The Court did not intend *Mullaney* to have such far-reaching effect,"¹⁷⁰ White concluded, and so the decision was reconstituted in *Patterson*.¹⁷¹

The second example in *Patterson* involved an effort to advance the principle just stripped from *Mullaney* not for its precedential stature, but for its utility as a neutral principle in the service of sound constitutional interpretation. The starting point for that effort was Justice White's concession that legislative primacy à la *Patterson* might conjure a parade of horrors the likes of which earlier dicta had balked at and which the majority in *Patterson* would be unwilling to endure.¹⁷² Justice Powell seized upon the concession in his dissent:

The Court . . . concedes that legislative abuses may occur and that they must be curbed by the judicial branch. But if the State is careful to conform to the drafting formulas articulated today, the constitutional limits are anything but "obvious." This decision simply leaves us without a conceptual framework for distinguishing abuses from legitimate legislative adjustments of the burden of persuasion in criminal cases.¹⁷³

168. See 432 U.S. at 214 n.15.

169. See, e.g., *Martin v. Ohio*, 480 U.S. 228, 240-41 (1987) (Powell, J., dissenting) (arguing for a limitation on burden-shifting under *Patterson*); *Bowers v. Hardwick*, 478 U.S. 186, 197-98 (1986) (Powell, J., concurring) (agreeing with the Court that no fundamental right exists to engage in homosexual sodomy, but suggesting that a prison sentence for such conduct would violate the Eighth Amendment); *Skipper v. South Carolina*, 476 U.S. 1, 13 (1986) (Powell, J., concurring in the judgment) (proposing that mitigating circumstances, within the meaning of the Eighth Amendment, are only "those factors that are central to the fundamental justice of execution" and that it is for the Court to make that determination). Powell was eclectic in these matters, however. For example, it was he who wrote the definitive process-based defense of the Court's capital punishment jurisprudence. See *McCleskey v. Kemp*, 481 U.S. 279 (1987).

170. *Patterson*, 432 U.S. at 215 n.15.

171. See 432 U.S. at 215-16.

172. See 432 U.S. at 210. For further discussion of the concession, see *infra* notes 177, 187-88, 235-36 and accompanying text.

173. 432 U.S. at 225 (Powell, J., dissenting). Justice Powell was not the first to ask for some conceptual framework that would explain what made the legislative abuses posited by the majority unconstitutional. See Harold A. Ashford & D. Michael Risinger, *Presumptions*,

Powell formulated a principle of "punishment and stigma" to provide the necessary conceptual framework that he found lacking in White's opinion.¹⁷⁴

The weakness in Powell's argument was his assumption that only substance could produce a conceptual framework. White's opinion offered no framework by Powell's standards because the only conceptual framework Powell would recognize was one that, like his own, asserted a substantively conceived limitation on the legislative ability to assign risks of moral error as part of its proscriptive agenda. "*Winship* [the seminal case constitutionalizing the reasonable doubt requirement] is concerned with substance," Powell insisted, quoting his own opinion in *Mullaney* for authority.¹⁷⁵

The fact that the majority had just converted Powell's substantive excursion in *Mullaney* into *Pattersonian* process terms is indicative of the depth of the disagreement here. Justice White's opinion for the Court did in fact contain the makings of a conceptual framework, but it happened to be a process-oriented framework. In the majority's view, shifting some risk of moral error to an individual defendant is an utterly unremarkable occurrence in the imperfect criminal law of process, a commonplace instance of tension adjustment that standing alone commits no constitutional indignity. Furthermore, as the New York legislation illustrated, the availability of such a tension-adjustment device promotes, and may be critical to, a state's capacity to experiment with reforms in the spirit of

Assumptions, and Due Process in Criminal Cases: A Theoretical Overview, 79 *YALE L.J.* 165, 188 (1969).

174. 432 U.S. at 226 (Powell, J., dissenting). Powell sought to make the principle more attractive for the Court by kneading some deference to history and tradition into its application:

The Due Process Clause requires that the prosecutor bear the burden of persuasion beyond a reasonable doubt only if the factor at issue makes a substantial difference in punishment and stigma. The requirement of course applies *a fortiori* if the factor makes the difference between guilt and innocence. But a substantial difference in punishment alone is not enough. It also must be shown that in the Anglo-American legal tradition the factor in question historically has held that level of importance.

432 U.S. at 226 (Powell, J., dissenting) (footnotes omitted). Given Powell's willingness to generalize history and tradition, one might legitimately wonder how much deference to objective sources he was really adding. New York's emotional-disturbance formulation surely descended from the common law heat-of-passion doctrine, but Powell was guilty of understatement when he suggested that the change offered "a somewhat broader opportunity for mitigation." 432 U.S. at 227 (Powell, J., dissenting). The change significantly broadened, and perhaps dramatically broadened, the opportunity for mitigation. Only by conflating the new standard with its lineal ancestor could Powell conclude that the historical prong of his test was satisfied.

175. 432 U.S. at 227 (Powell, J., dissenting) (quoting *Mullaney v. Wilbur*, 421 U.S. 684, 699 (1975)).

Brandeis.¹⁷⁶ Refusing to let the tail wag the dog, the majority founded its conceptual framework on these everyday process considerations and not, as Powell would have them do, on the theoretical existence of constitutional limits in certain extreme cases.

That is not to say that White and the majority disregarded the possibility of legislative failure. As noted above, they conceded that certain cases of abuse, as hypothesized by earlier Supreme Court dicta, would exceed their tolerance for legislative primacy:

[Our] view may seem to permit state legislatures to reallocate burdens of proof by labeling as affirmative defenses at least some elements of the crimes now defined in their statutes. But there are obviously constitutional limits beyond which the States may not go in this regard. “[I]t is not within the province of a legislature to declare an individual guilty or presumptively guilty of a crime.” . . . The legislature cannot “validly command that the finding of an indictment, or mere proof of the identity of the accused, should create a presumption of the existence of all the facts essential to guilt.”¹⁷⁷

Perhaps White could have elaborated on what makes the “obvious” limit so “obvious,” but he was content to leave the discussion as he did precisely for reasons relating to process.

Pivotal to White’s thinking was the effectiveness of political safeguards. Legislative primacy undeniably carries a theoretical risk of abuse, yet our constitutional tradition has been comfortable with legislative primacy because political safeguards significantly minimize that risk.¹⁷⁸ By any practical measure, White reasoned, the balance has been successful. Legislative chicanery of the sort

176. See 432 U.S. at 211 n.13, 214 n.15. Professor Dripps has criticized this portion of Justice White’s argument as revealing a naked substantive preference for reforms along the lines undertaken in New York, which the majority feared would be stifled by a ruling in Patterson’s favor. See Dripps, *supra* note 8, at 1708-09. Dripps is correct to note that “[f]irst and fundamentally, judicial reaction to the wisdom of legislative choices has no legitimate place in constitutional interpretation,” *id.* at 1708, but he misconstrues the Court’s point. What was important for the majority was not that any particular choice be made, but that the judiciary move with extreme caution before it announces a rule — divined, it should be noted, from no clear text, but instead manufactured by judicial generalizing — that would impede a legislature’s ability to adopt inventive solutions, whatever they might be.

177. 432 U.S. at 210 (quoting *McFarland v. American Sugar Ref. Co.*, 241 U.S. 79, 86 (1916), and *Tot v. United States*, 319 U.S. 463, 469 (1943), respectively).

178. As White explained:

Long before *Winship*, the universal rule in this country was that the prosecution must prove guilt beyond a reasonable doubt. At the same time, the long-accepted rule was that it was constitutionally permissible to provide that various affirmative defenses were to be proved by the defendant. This did not lead to such abuses or to such widespread redefinition of crime and reduction of the prosecution’s burden that a new constitutional rule was required.

Patterson, 432 U.S. at 211; see also 432 U.S. at 211 n.12 (“The applicability of the reasonable-doubt standard . . . has always been dependent on how a State defines the offense that is charged in any given case; yet there has been no great rush by the States to shift the burden of disproving traditional elements of the criminal offenses to the accused.”).

identified by White as beyond constitutional limits has been foreign to our experience. The traditional balance, moreover, appears to retain its vitality today. Dispiriting as the contemporary climate might be to some of us, there is little to suggest that political safeguards have lost an effectiveness that they earlier had or that the probability of legislative abuse has changed for the worse. Nor is there reason to think that the value of legislative freedom and the need for legislative flexibility in defining penal laws have waned. For White and the *Patterson* majority, the traditional balance thus reflected a satisfactory constitutional equilibrium that any judicial interpretation of due process had to respect. To be sure, alternative due process methodologies could be advanced to provide a substantive judicial safeguard against the troublesome hypothetical of legislative abuse. They might include Justice Powell's constructive generalization of the "punishment and stigma" principle in *Mullaney*¹⁷⁹ and *Patterson*,¹⁸⁰ or a variant on that theme offered by Justice Stevens a decade later in *McMillan v. Pennsylvania*,¹⁸¹ or a judicial balancing of interests and hardships as intimated by Justice Brennan in *Speiser v. Randall*,¹⁸² or the explicit balancing approach of *Mathews v. Eldridge*.¹⁸³ But for Justices who view criminal law choices in process terms, such alternative approaches share two significant shortcomings. First, they are potentially overbroad in their application, capable of invalidating even the most historically accepted legislative balance of hardships, thus threatening the consti-

179. 421 U.S. at 698-702.

180. 432 U.S. at 226-27 (Powell, J., dissenting); see also *Martin v. Ohio*, 480 U.S. 228, 242-43 (1987) (Powell, J., dissenting).

181. 477 U.S. 79, 96 (1986) (Stevens, J., dissenting) (contending that "any component of the prohibited transaction that gives rise to both a special stigma and a special punishment" must be subject to the reasonable doubt standard); see also 477 U.S. at 94 (Marshall, J., dissenting) (agreeing with the core of Stevens's position).

Justice Stevens worked to defend the apparent inconsistency between his acquiescence in *Patterson*, in which he joined the majority, and his dissent in *McMillan*, resorting to an unusually candid discussion of the operation of political safeguards to explain his views. Political safeguards could be trusted, he argued, to guard against the extreme abuse that Justice White posited as unconstitutional in *Patterson* — namely, the deliberate gross underdefinition of an offense by omission of elements, coupled with the creation of an affirmative defense that would require the defendant to prove innocence or mitigation. "No democratically elected legislature would enact such a law," maintained Stevens, "and if it did, a broad-based coalition . . . would soon see the legislation repealed." *McMillan*, 477 U.S. at 101 (Stevens, J., dissenting). But Stevens suspected that the political process might be much more tempted to do something like it did in *McMillan* — define the crime in a politically uncontroversial manner, but then subject a subset of the group captured by that definition to "further punishment for aggravating conduct not proved beyond a reasonable doubt." 477 U.S. at 102 (Stevens, J., dissenting). For this more probable scenario, Stevens argued, a judicial check was necessary. See 477 U.S. at 102 (Stevens, J., dissenting).

182. 357 U.S. 513, 524-26 (1958).

183. 424 U.S. 319 (1976).

tutional logic of legislative primacy itself. Second, they are subjective to a countermajoritarian fault, presupposing a judicial power under the Due Process Clauses to override an otherwise historically accepted balance of hardships either because that balance conflicts with a judicially created neutral principle¹⁸⁴ or because it deviates from a judicial sense of the equitable balance under the circumstances presented.¹⁸⁵

So we return, as promised, to *Patterson's* culminating impressions of the Due Process Clauses, equipped now to see that these impressions culminate in ways that reach well beyond the four corners of the *Patterson* opinion. For Justice White and the majority, *Patterson* was more than a case about elements, affirmative defenses, and the burden of proof. It was, and was meant to be, a methodologically defining moment. From the days when Henry Hart authored *The Aims of the Criminal Law*, through the 1960s, right up to the *Mullaney* decision in 1975, inventive approaches persistently sought to engage the judiciary in the making of a substantive constitutional criminal law. *Patterson* was not the first decision to resist them. Almost a decade earlier, for example, *Powell v. Texas* rejected one such overture from Justice Fortas.¹⁸⁶ But in *Patterson* the Court deliberately attempted to undermine them all, in one fell swoop, as methodologically illegitimate. Basic criminal law choices, the *Patterson* majority declared, required a due process methodology considerably narrower and less subjective than the inventive substantive alternatives. Accordingly, the Court advanced a methodology true to process premises, one that relates to criminal law as an ongoing process of tension adjustment, dependent on politically determined and imperfect accommodations rather than substantively theorized perfect answers. The majority in *Patterson* did not need to invent a new due process methodology to fit these specifications. It needed only to reassert an old one that looked to

184. Justice Powell's approach in *Mullaney* and *Patterson* fits this description, as does Justice Stevens's approach in *McMillan*.

185. The approaches suggested in *Speiser* and *Eldridge* fit this description.

186. See 392 U.S. 514, 567 (1968) (Fortas, J., dissenting). Joined by Justices Douglas, Brennan, and Stewart, the Fortas dissent is an excellent example of how to generalize an expanded constitutional principle by appealing to popular values and then laying claim to precedent which might be read to support the principle. Consider Fortas's reading of *Robinson v. California*, 370 U.S. 660 (1962):

Robinson stands upon a principle which, despite its subtlety, must be simply stated and respectfully applied because it is the foundation of individual liberty and the cornerstone of the relations between a civilized state and its citizens: Criminal penalties may not be inflicted upon a person for being in a condition he is powerless to change. *Powell*, 392 U.S. at 567 (Fortas, J., dissenting).

have lost some of its grip during the Warren years. As Justice White explained:

It goes without saying that preventing and dealing with crime is much more the business of the States than it is of the Federal Government . . . and that we should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States. Among other things, it is normally "within the power of the State to regulate procedures under which its laws are carried out, including the burden of producing evidence and the burden of persuasion," and its decision in this regard is not subject to proscription under the Due Process Clause unless "it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."¹⁸⁷

Justice White's reassertion of that familiar due process test was the culmination of a process-oriented conceptual framework, and described the means of invalidating legislative abuse should it ever occur. Judicial intervention in the name of a substantive fundamental principle could wait until political safeguards failed and a genuine need for intervention arose. In that unlikely event, an abridged due process principle would reveal itself not in a shocked judicial conscience or in the logical elaborations of the judicial mind, but in process-validated expressions of social consensus. Thus, under *Patterson*, it takes a profoundly deviant legislative judgment to offend due process. The rarity of such a judgment will afford the means for identifying and constitutionally condemning it.¹⁸⁸

187. *Patterson v. New York*, 432 U.S. 197, 201-02 (1977) (citing *Irvine v. California*, 347 U.S. 128, 134 (1954) (plurality opinion), and quoting *Speiser v. Randall*, 357 U.S. 513, 523 (1958), *Leland v. Oregon*, 343 U.S. 790, 798 (1952), and *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)).

188. The due process standard that now customarily is referred to as the *Patterson* test does not eliminate judicial subjectivity altogether. When Justices look to history, tradition, and social consensus, they may well differ in their levels of abstraction and in their translation of what they see into legal principles due to varying degrees of generality. *Patterson's* aim is to limit that kind of subjectivity by channeling judicial inquiry away from criminal law's broad aphorisms and toward specific problems in specific contexts. To judge from the Court's practice under *Patterson*, the test has succeeded in reducing the level of abstraction. Compare *Patterson*, 432 U.S. 197 (leaving legislatures broad authority to assign burdens of proof) with *Medina v. California*, 505 U.S. 437 (1992) (upholding the placement of the burden on the defendant to establish incompetency to stand trial by a preponderance of the evidence) and *Cooper v. Oklahoma*, 116 S. Ct. 1373, 1377 (1996) (distinguishing *Medina* and holding that placing the burden on the defendant to establish incompetency to stand trial by clear and convincing evidence shifts more risk of error to the defendant than history and tradition have permitted).

Some legal minds trained on expansive Warren Court opinions like *Katz*¹⁸⁹ and *Miranda*¹⁹⁰ and law review articles like those of Henry Hart and Herbert Packer have a tendency to ignore the significance of *Patterson*'s reassertion of the history-bound, consensus-weighted formulation of due process. Such minds regard it, I suspect, as little more than one of those perfunctory reiterations of the hackneyed post-*Lochner*, judicial self-restraint theme that pop up from time to time.¹⁹¹ That reading trivializes *Patterson* by generalizing it to the neglect of some important details. *Patterson* did not invoke judicial self-restraint generally; it endorsed its *particular* appropriateness with respect to legislative primacy in criminal law choices. *Patterson* was not a post-Warren Court backlash that aimed to repudiate the generalizer's methodology in all constitutional contexts; rather, it repudiated the *particular* use of that methodology under the open-ended Due Process Clauses as a means for regulating criminal law choices.

This last point of differentiation is a critical one. It is one thing for the Court to employ the generalizer's craft to ensure that textually specific constitutional protections like the privilege against self-incrimination and the freedom from unreasonable searches and seizures enjoy a contemporary meaning that is fair to their spirit. This was *Katz*, *Miranda*, and, indeed, a large part of the constitutional criminal procedure arising from the Fourth, Fifth, Sixth, and Eighth Amendments. Extending those modernized guarantees to the states through the selective-incorporation doctrine was no minor feat of expansion, but the leap in generalizing was constrained in some important respects. The textual anchors of the Bill of Rights remained close at hand, and, depending on whom you ask, their incorporation as fundamental to due process was either a faithful interpretation of the original understanding of the Fourteenth Amendment¹⁹² or a modest, or at least tolerable, incremental step beyond what Supreme Court precedent already had recognized as fundamental to ordered liberty, as historically under-

189. *Katz v. United States*, 389 U.S. 347 (1967) (liberalizing Fourth Amendment law by defining "search" as an intrusion upon a constitutionally cognizable privacy interest).

190. *Miranda v. Arizona*, 384 U.S. 436 (1966) (establishing a warnings requirement and right to counsel under the Fifth Amendment as a prophylactic protection for the privilege against self-incrimination in custodial interrogation settings).

191. Some scholars, however, were quick to recognize the methodological significance of *Patterson*. See, e.g., FLETCHER, *supra* note 46, at 550-52; Allen, *Restoration of Winship*, *supra* note 115, at 36-39.

192. See, e.g., *Adamson v. California*, 332 U.S. 46, 69-72 (1947) (Black, J., dissenting) (arguing that the Fourteenth Amendment was intended to make the Bill of Rights applicable to the states).

stood.¹⁹³ Nor were the federalism concerns associated with the Fourteenth Amendment forgotten in this process of expansion; they have been worked back into the interpretation of the Bill of Rights provisions themselves in a sort of reverse incorporation.¹⁹⁴ Finally, and significantly, the lion's share of this expansion has been consistent with, and in fact promoted, process-oriented constitutional ends, a fact that some scholars have noted.¹⁹⁵ Much of twentieth-century constitutional criminal procedure has been an exercise in reinforcing *Dotterweich's* model of the relationship between the Constitution and criminal law by shoring up the institutional discretion mechanisms upon which the model depends. Such improvements include bringing needed institutional respectability and professionalism to the law enforcement machinery that produces criminal prosecutions,¹⁹⁶ lending a semblance of representativeness to the juries that pass on them,¹⁹⁷ and affording suspects and defendants access to basic legal resources should they not be able to afford them.¹⁹⁸

While the Court's generalization of textually specific constitutional protections is in many ways defensible, the generalization of the Due Process Clauses into a substantive constitutional criminal law is a different matter entirely. Unhitched from text and its context, such an approach assumes increasing levels of abstraction and

193. See, e.g., Louis D. Bilionis, *Legitimizing Death*, 91 MICH. L. REV. 1643, 1643 n.3 (1993) (discussing the incremental nature of the incorporation cases); Herbert L. Packer, *The Courts, the Police, and the Rest of Us*, 57 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 238, 239-40 (1966) (discussing how the Court's constitutional criminal-process jurisprudence generally has grown incrementally).

194. See generally Jerold H. Israel, *Selective Incorporation: Revisited*, 71 GEO. L.J. 253, 328-36 (1982) (discussing the role of federalism considerations in postincorporation Bill of Rights interpretations).

195. See JOHN HART ELY, *DEMOCRACY AND DISTRUST* 95-98, 172-73 (1980) (discussing the process-theory implications of the criminal procedure provisions of the Constitution and of the Court's decisions interpreting them); see also Michael J. Klarman, *The Puzzling Resistance to Political Process Theory*, 77 VA. L. REV. 747, 763-68 (1991) (noting a political-process justification for 20th-century criminal procedure decisions); Stuntz, *supra* note 11, at 20-24 (same).

196. See, e.g., *Miranda v. Arizona*, 384 U.S. 436 (1966) (regulating custodial interrogations); *Mapp v. Ohio*, 367 U.S. 643 (1961) (extending the exclusionary rule to the states in order to deter Fourth Amendment violations); see also Anthony G. Amsterdam, *The Supreme Court and the Rights of Suspects in Criminal Cases*, 45 N.Y.U. L. REV. 785, 810-15 (1970) (discussing the capacity of courts to stimulate self-regulation of law enforcement).

197. See, e.g., *Batson v. Kentucky*, 476 U.S. 79 (1986) (forbidding racially discriminatory peremptory challenges); *Taylor v. Louisiana*, 419 U.S. 522 (1975) (incorporating a fair cross-section requirement); *Duncan v. Louisiana*, 391 U.S. 145 (1968) (incorporating the right to a jury trial).

198. See, e.g., *United States v. Wade*, 388 U.S. 218 (1967) (providing the right to appointed counsel in postindictment eyewitness confrontations); *Miranda*, 384 U.S. 436 (providing the right to appointed counsel in custodial interrogations); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (providing the right to appointed counsel in trials for all serious offenses).

invites perfectionist mythicizing of the relevant milieu, yielding countermajoritarian difficulties that modern substantive due process jurisprudence has recognized in other contexts.¹⁹⁹ With respect to criminal law, the approach fails to appreciate the fundamentally political and variable nature of substantive criminal law choices. It disrespects the process-based relationship between the Constitution and criminal law that *Dotterweich* stands for, defying process when it should be reinforcing process. In its heyday, the Warren Court perceived the difference in *Powell*.²⁰⁰ The Burger Court stressed it in *Patterson*. Today, the Rehnquist Court abides by it.²⁰¹

B. Process Reinforcement

Legislative primacy is the central theme of a process account of the relationship between the Constitution and criminal law, and it

199. Compare *Michael H. v. Gerald D.*, 491 U.S. 110, 127 n.6 (1989) (opinion of Scalia, J., joined by Rehnquist, C.J.) (arguing that constitutional resort to history and tradition for fundamental principles should “refer to the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified”) with 491 U.S. at 132 (O’Connor, J., joined by Kennedy, J., concurring) (critiquing Scalia’s position as inconsistent with precedent and insufficiently flexible) and 491 U.S. at 136-47, 156-57 (Brennan, J., joined by Marshall and Blackmun, JJ., dissenting) (criticizing Scalia’s position as a false palliative for judicial subjectivity and as an erroneous conflation of liberty interests and competing governmental interests).

200. See *Powell v. Texas*, 392 U.S. 514 (1968); FLETCHER, *supra* note 46, at 550 (discussing *Powell* and equating it with *Patterson*).

201. See, e.g., *Medina v. California*, 505 U.S. 437, 445-46 (1992) (reaffirming the *Patterson* test as the standard for establishing due process requirements in matters of criminal law, rejecting the balancing methodology of *Mathews v. Eldridge*, 424 U.S. 319 (1976), as too intrusive, and asserting that “because the States have considerable expertise in matters of criminal procedure and the criminal process is grounded in centuries of common-law tradition, it is appropriate to exercise substantial deference to legislative judgments in this area”).

Two interesting cases from the 1995 Term illustrate *Patterson*’s vitality in the current Court. See *Montana v. Egelhoff*, 116 S. Ct. 2013, 2017, 2021 (1996) (plurality opinion by Scalia, J.) (applying the *Patterson* test and noting that it imposes a “heavy burden” on one who seeks to establish a due process violation and holding that a proposed principle requiring jury consideration of voluntary intoxication when relevant to mens rea, though gaining acceptance, “is of too recent vintage, and has not received sufficiently uniform and permanent allegiance to qualify as fundamental, especially since it displaces a lengthy common-law tradition which remains supported by valid justifications today”); 116 S. Ct. at 2025 (Ginsburg, J., concurring) (applying *Patterson* and concluding that the state validly defined mens rea “to eliminate the exculpatory value of voluntary intoxication . . . given the lengthy common-law tradition, and the adherence of a significant minority of the States to that position today”); 116 S. Ct. at 2030-31 (O’Connor, J., dissenting) (agreeing that, under *Patterson*, the state could specially define mens rea to exclude consideration of voluntary intoxication, but arguing that Montana failed to do so); *Cooper v. Oklahoma*, 116 S. Ct. 1373, 1377 (1996) (unanimously holding that while the state may place the burden of persuasion upon the defendant to establish incompetency to stand trial, a standard of clear and convincing evidence places more risk of error upon the defendant than tradition has allowed, thereby violating due process under the *Patterson* test).

For an illustration of the force of legislative primacy in efforts to interpret the Eighth Amendment, see *Harmelin v. Michigan*, 501 U.S. 957, 996-1001 (1991) (Kennedy, J., concurring).

neatly explains the decisions that have most resolutely rejected appeals to substantive theorizing — *Powell* and *Patterson* most notably. But what are we to make of cases like *Lambert* and *Robinson*, or the due process vagueness decisions, or the Eighth Amendment forays into proportionality and capital punishment?

These cases customarily are understood as substantive constitutional criminal law's fleeting successes in the Supreme Court, the rare moments when the Justices have identified a substantive principle of individual right that might limit legislative power to impose the criminal sanction. According to this narrative, *Lambert* and *Robinson* go down as one-hit wonders, for neither produced any principle that the Court has been willing to expand beyond the narrow factual confines of each case.²⁰² Of comparably limited significance is the Court's recognition of a proportionality principle under the Eighth Amendment which stands as a theoretical promise of a substantive judicially enforceable limit, but in its current formulation is scarcely more enabling of judicial intervention than *Patterson's* tradition-, history-, and consensus-bound due process test.²⁰³ By contrast, the void-for-vagueness doctrine, insofar as it rests upon a fair-notice requirement, reflects a substantive principle of right that has achieved a stable constitutionalization over the years.²⁰⁴ Of even greater significance is the modern capital punishment jurisprudence that has developed since *Furman v.*

202. As Professor Stuntz succinctly put it, "*Lambert's* progeny is almost nonexistent." Stuntz, *supra* note 11, at 5 n.11. Regarding *Robinson*, a student commentator's forecast "that insofar as broad constitutional principles are concerned, it may be little more than a 'ticket, good for this day and train only,'" seems prescient in retrospect. See *Punishment Clause*, *supra* note 115, at 650 (quoting *Smith v. Allwright*, 321 U.S. 649, 669 (1944) (Roberts, J., dissenting)).

203. In *Harmelin v. Michigan*, 501 U.S. 957 (1991), Justice Scalia, joined by Chief Justice Rehnquist, repudiated the proportionality principle, see 501 U.S. at 974-75, 985-86 (opinion of Scalia, J.), but the center of the Court — Justices Kennedy, O'Connor, and Souter — held to the principle on stare decisis grounds, see 501 U.S. at 996-97 (Kennedy, J., concurring in part and concurring in the judgment). Cf. *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (plurality opinion of O'Connor, J., joined by Kennedy and Souter, JJ.) (adhering to the core principle of *Roe v. Wade*, 410 U.S. 113 (1973), on stare decisis grounds). For Kennedy, O'Connor, and Souter, the proportionality principle is very narrow due to "the primacy of the legislature, the variety of legitimate penological schemes, the nature of our federal system, and the requirement that proportionality review be guided by objective factors." *Harmelin*, 501 U.S. at 1001 (Kennedy, J., concurring in part and concurring in the judgment).

204. See, e.g., *Kolender v. Lawson*, 461 U.S. 352 (1983); *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972); *Coates v. City of Cincinnati*, 402 U.S. 611 (1971); *Bouie v. City of Columbia*, 378 U.S. 347 (1964); *Lanzetta v. New Jersey*, 306 U.S. 451 (1939). See generally 1 WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., *SUBSTANTIVE CRIMINAL LAW* 126-35 (1986) (discussing the void-for-vagueness doctrine); John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189 (1985) (advocating a theory that integrates vagueness with the legality principle and principles of statutory interpretation in the criminal law).

Georgia,²⁰⁵ with its requirements of an individualized mens rea determination,²⁰⁶ consideration of mitigating factors,²⁰⁷ and enforcement of proportionality limitations on the death penalty.²⁰⁸ The capital cases demonstrate just what judges can do when text, here the Eighth Amendment, allows them to generalize substantive principles in a cordoned-off area of law, secure in the knowledge that neither the principles nor the methodology that creates them will spread to other areas so long as judges can say "death is different."²⁰⁹

It is eminently reasonable to read these lines of cases as identifying substantive constitutional principles that limit legislative authority. This does not mean, however, that the cases are not susceptible to a process-oriented reading as well, one that recognizes that constitutional limitations on substantive legislative judgments need not owe their existence to some underlying theory of substantive constitutional criminal law but in fact can exist to serve and strengthen process. Such a reading is possible, and it brings to the fore the second key theme in a process account of the relationship between the Constitution and criminal law: the theme of process reinforcement.

To introduce the theme of process reinforcement, recall *Dotterweich's* understanding of criminal law, the Constitution as an instrument of judicial review, and the relationship between the two. Then do what Henry Hart did not do. Concede that process is the starting point for constitutional analysis. Admit to the multiplicity of competing values and objectives that inform criminal law and to the appropriateness of characterizing criminal law as an ongoing process of tension adjustment that society itself must practice through its politics. Accept that moral imprecision is an inevitable incident of criminal law choices, and recognize the importance of political and institutional discretionary safeguards in checking and

205. 408 U.S. 238 (1972).

206. See *Tison v. Arizona*, 481 U.S. 137 (1987); see also *Cabana v. Bullock*, 474 U.S. 376 (1986); *Enmund v. Florida*, 458 U.S. 782 (1982).

207. The progenitor of this requirement, *Woodson v. North Carolina*, 428 U.S. 280 (1976), has spawned a long line of precedent. See, e.g., *Johnson v. Texas*, 509 U.S. 350 (1993); *Penry v. Lynaugh*, 492 U.S. 302 (1989); *Sumner v. Shuman*, 483 U.S. 66 (1987); *Hitchcock v. Dugger*, 481 U.S. 393 (1987); *California v. Brown*, 479 U.S. 538 (1987); *Eddings v. Oklahoma*, 455 U.S. 104 (1982); *Lockett v. Ohio*, 438 U.S. 586 (1978).

208. See *Coker v. Georgia*, 433 U.S. 584 (1977); see also *Stanford v. Kentucky*, 492 U.S. 361 (1989); *Penry*, 492 U.S. 302; *Thompson v. Oklahoma*, 487 U.S. 815 (1988).

209. See, e.g., *Harmelin v. Michigan*, 501 U.S. 957, 995 (1991) (noting that "[o]ur cases creating and clarifying the 'individualized capital sentencing doctrine' have repeatedly suggested that there is no comparable requirement outside the capital context, because of the qualitative difference between death and all other penalties").

ameliorating that imprecision. Acknowledge that judicial skepticism toward the generalization of substantive constitutional principles exists, and that it increases considerably when we move from a textually and contextually confined provision to the open fields of the Due Process Clauses. Respect legislative primacy and instead of treating it as a canard for knee-jerk judicial self-restraint, appreciate that it is a considered judicial choice resting upon contestable, but all the same legitimate, considerations. Take these premises as your starting point, if only for the sake of argument. Then ask what a conscientious Justice would do to ensure that this process-based relationship between the Constitution and criminal law retains its legitimacy.

The specific strategies might vary, but two general approaches readily present themselves, each corresponding to an essential element of the *Dotterweich* model. The first strategy would aim to promote the ideal of deliberate legislative choices, the kind of politics that the *Dotterweich* model presupposes,²¹⁰ and refuse to dignify the status quo when that brand of politics is conspicuously missing. The second strategy would seek to mind the political and institutional safeguards upon which the *Dotterweich* model depends and to consider corrective interventions when their effective operation is in serious question.

The Supreme Court's recognition of certain constitutional limitations on legislative decisionmaking in the criminal law area, I believe, reflects these strategies. I wish to stop short, however, of suggesting that a comprehensive theory informs the Court's process-reinforcement actions, or that those actions have been pursued with any conscious sense of conformity to a given set of strategies. If that marks a shortcoming in the Court's jurisprudence, think twice before blaming the Court. For more than half a century now, Justices have made no secret of their allegiance to the *Dotterweich* model, yet those of us blessed with the time to develop a sound theory of process reinforcement in this area — that is, criminal law academics, not busy Justices with a diverse docket — have not done much to help. Substantive theorizing always will have a rightful and important place, but until process experiences an equivalent ascension in the criminal law academy — as opposed to the constitutional law academy, where process theory already has won notable adherents — the Justices should not be faulted if their

210. For development of this point, see *infra* section II.B.1.

approach to process reinforcement falls short of reflecting a comprehensive theory.

The theme of process reinforcement does not leap off the pages of the *United States Reports* in self-announcing legal doctrine, but its presence is plainly revealed in a distinct pattern within the Supreme Court's precedents. As we have seen, substantive perfectionist generalizing and legislative primacy are forces that usually pull in opposite directions for the Court, and legislative primacy prevails in that tug-of-war unless the generalizing is well anchored to a particular textual guarantee²¹¹ or makes a convincing appeal to an enduring social consensus.²¹² In those particular and unusual cases, however, in which the Court seems to have given in to substantive constitutional criminal law penchants, often the forces are not nearly so opposed as one might expect. Typically, and perhaps invariably — though I reserve judgment on quite so sweeping a claim — these cases involve some serious fissure in the foundation of *Dotterweich's* model: either an absence of deliberative legislative choice or some dysfunction in the operation of political and discretionary institutional safeguards. As those fissures deepen, the picture of process that materializes is so alien to *Dotterweich's* premises that the process-minded Justice can no longer countenance it in good conscience. With the substance-oriented and process-oriented forces now pointing in the same direction, a majority of the Court will come together to invalidate the status quo represented by the case. The written work produced by the Court to accompany that judgment, however, will inevitably show signs of instability that underscore the fact that a delicate accommodation has been struck between forces usually locked in opposition. The Court might assert a principle whose rationale depends on an uncertain blend of substance and process. The void-for-vagueness opinions are a good example, resting on a substantive concern for fair warning as well as a process concern about arbitrary and discriminatory enforcement.²¹³ Or the Court might opt for a muddled mix of case-specific points and qualifications that dispose of the particular problem at hand, but ensure the Court's ability to distinguish the case in the future. The inscrutable *Lambert* provides a classic illustration. Sometimes the Court, unable to translate its accommodation between substance and process into an agreeable for-

211. See *supra* notes 189–93, 203, 205–09 and accompanying text.

212. See *supra* notes 178–88, 203 and accompanying text.

213. See LAFAYE & SCOTT, *supra* note 204, at 126–35 (discussing the dual grounds underlying the vagueness doctrine).

mulation, fractures itself into a cacophony of separately expressed views that announce only terms for further debate. The groundbreaking capital cases — *Furman v. Georgia*,²¹⁴ *Gregg v. Georgia*,²¹⁵ and *Woodson v. North Carolina*²¹⁶ — are prototypical. Sometimes a deceptively tranquil opinion is handed down, but instability soon reveals itself when the Court confronts the opinion in a new light and pointedly reconstitutes its meaning. *Robinson*, which yielded to *Powell*, exemplifies the phenomenon.

Some may find such instability disturbing. Given the current state of constitutional practice, I, for one, do not. If the relationship between the Constitution and criminal law is to be defined in *Dotterweich's* process terms, it will be a healthier, more stable, and more mature relationship in the long run if the Court maintains some sensitivity to the serious process dysfunctions that occasionally do surface in the real world. The short-term consequences of that sensitivity may be instability as the Justices feel their way toward a theory of process reinforcement, but even the best relationships experience growing pains.

So what exactly are these process flaws that have drawn the Court's attention, and how have they stimulated process reinforcement and set off this pattern of instability in the Court's opinions? As I have suggested, there are two general types: absences of deliberative legislative choices and dysfunction in the operation of political and discretionary institutional safeguards. In many of the cases that we customarily identify as instances of substantive constitutional criminal law, at least one of these flaws — and almost always both, as the presence of one is likely to cause the existence of another — seems to have influenced the decision. The cases thus may be identified as episodes in process reinforcement as well.

1. *The Absence of Deliberative Legislative Choices*

The concept of legislative primacy derived from *Dotterweich* and its lineal relations, we have seen, presupposes reasoned criminal law choices, consciously made by a political process that in fact “[b]alanc[es] relative hardships.”²¹⁷ The concept contemplates purposeful policy decisions that are reached with an awareness and acceptance of the “possible injustice[s]” associated with them.²¹⁸ It

214. 408 U.S. 238 (1972).

215. 428 U.S. 153 (1976).

216. 428 U.S. 280 (1976).

217. See *United States v. Dotterweich*, 320 U.S. 277, 285 (1943).

218. See *United States v. Balint*, 258 U.S. 250, 254 (1922).

may not go so far as to demand the classical republican exercise of pure civic virtue, but neither does it resign itself to a no-holds-barred pluralistic interest-group affair that merely reflects the equilibrium of private political power. The expectation throughout the Court's decisions has been that legislators will act with some autonomy, will apply their judgment, and will deliberate to produce criminal laws that reflect the moral sense of the community.²¹⁹ The constitutional literature frequently assigns the term "deliberative legislation" to that kind of politics,²²⁰ and we may appropriate it here.

If deliberative legislation undergirds *Dotterweich's* process model, then its absence presents an occasion for process reinforcement. It does not follow, however, that the Court should or does

219. Consider in this regard *Patterson v. New York*, 432 U.S. 197 (1977), and the Court's concern that it avoid an interpretation of the constitutional reasonable doubt rule that would limit legislative flexibility to reassign risks of moral error — a flexibility that the Court thought necessary "to enhance the potential for liberal legislative reforms." 432 U.S. at 209 n.11. As Professor Dripps has correctly pointed out, "[t]he Court's rule thus has the virtue of permitting deliberate legislative compromises that balance substantive expansion of exculpatory conditions against procedural concessions to the prosecution." Dripps, *supra* note 8, at 1677.

Dripps goes on to argue, however, that the Court was mistaken to think that its deferential stance was necessary to preserve legislative flexibility to compromise. A broader reasonable doubt rule, he argues, need not foreclose legislative compromises. All that politicians have to do is look more widely for their compromises:

Criminal law recodifications involve a host of issues, each of which invites a defense position and a prosecution position. . . . If burden-shifting were off-limits, the legislature's law-and-order faction might be convinced to accept a new affirmative defense if offered another concession, such as a restriction of some other substantive defense that has outlived its usefulness.

. . . If criminal law reform is an auction among legislative factions, the balance of forces in the legislature cannot be changed by judicial decision.

Id. at 1710-11 (footnotes omitted).

Dripps's invocation of pluralism in his critique of *Patterson* is intriguing, yet it also unintentionally demonstrates just how alien that vision of pluralism is to the Court's constitutional mindset in *Patterson*. The kind of logrolling that Dripps envisions — "I'll give you your broadened provocation defense if you agree to support my bill to abolish the insanity defense" — is not unthinkable. But it is no way to formulate a criminal law the individual doctrines of which reflect the considered moral judgment of the community on the particular points that each of those doctrines addresses. It misses the profound distinction between compromises that fine tune a policy by allocating the risks of error — something *Patterson* sought to preserve for the legislature — and cross-issue horse-trading that abandons even the pretense of a reasoned elaboration of policy on each of the issues involved. If the politics of criminal law should not "mask substantive policy choices" from full public view, *Patterson*, 432 U.S. at 229 n.13 (Powell, J., dissenting), the pluralism that Dripps hypothesizes would seem a nightmare of obfuscation. If I vote for your broadened provocation defense because you vote for my bill to abolish the insanity defense, what *are* the "substantive policy choices" that we have made?

220. See, e.g., Daniel A. Farber & Philip P. Frickey, *The Jurisprudence of Public Choice*, 65 TEXAS L. REV. 873, 875-76 (1987) (describing deliberative legislation, contrasting it with pluralism, and noting that both visions have figured in the Supreme Court's constitutional jurisprudence). See generally AMY GUTMANN & DENNIS THOMPSON, *DEMOCRACY AND DISAGREEMENT* (1996) (exploring deliberative democracy).

demand proof of deliberative legislation from every criminal law that is challenged under the Constitution. A broad judicial commission to stand in judgment of the deliberativeness of politics would be both unrealistic and dangerous. We are dealing here with an aspiration whose contours are uncertain, and we are dealing with human beings whose claims to identify it can and will be infected by their personal substantive preferences. Most of the time, then, the Court has little choice but to presume that deliberative legislation lies behind a criminal law, that the assignment of hardships has been conscious, and that any resulting moral imprecision has been left to discretionary institutional safeguards to ameliorate as "recalcitrant experiences"²²¹ on the facts of the particular case.

Yet that presumption need not be irrebuttable and conclusive in all cases. Extreme situations *do* present themselves, situations where the qualities of deliberative legislation seem so markedly absent as to open serious fissures in *Dotterweich's* foundation that, given their extremity, permit a discrete departure from the presumption, although one that is careful not to swallow the rule. The void-for-vagueness cases are instructive. There is no mystery to vague statutes. They fail to provide fair notice and invite arbitrary and discriminatory enforcement because basic choices were not made at the legislative level.²²² When the Court invalidates a vague law, it in essence remands the statute to the legislature for further deliberation and the making of those basic choices, thereby restoring credibility to the *Dotterweich* model and its tenet of legislative primacy.

The Supreme Court's decision in *Furman* invalidating "unbridled discretion" in capital sentencing schemes arose from similar circumstances and performed a similar remanding function as the void-for-vagueness cases. The absence of meaningful legislative standards to guide the imposition of the death penalty had been a centerpiece claim of the litigation campaign against capital punishment mounted during the 1960s. The absence of such standards, much like a vague criminal law, belied a failure of deliberative legis-

221. See *supra* note 97.

222. See, e.g., *Kolender v. Lawson*, 461 U.S. 352, 358 n.7 (1983) ("It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of government.") (quoting *United States v. Reese*, 92 U.S. 214, 221 (1876) (emphasis added)); see also *Jeffries*, *supra* note 204, at 189 (noting that the doctrine "forbids wholesale legislative delegation of lawmaking authority to the courts").

lation.²²³ Given the widespread acceptance of unbridled sentencing discretion and its history as a salutary innovation for defendants, the claim required a feat of generalizing which the Court was unwilling to perform under the Due Process Clause.²²⁴ But when the claim was raised just one year later in *Furman*, this time under the auspices of the Eighth Amendment's more discrete and therefore paradoxically more enabling Cruel and Unusual Punishment Clause, it prevailed.²²⁵ Politics, the Court concluded, would have to move capital punishment out of the shadows of discretion and express some meaningful choices about its application.²²⁶

Furman and the vagueness cases demonstrate both the Court's sensitivity to extreme situations where politics seems largely to have abdicated and the Court's ability to frame a response that is calculated to stimulate political responsibility.²²⁷ Subtler deviations

223. See, e.g., *McGautha v. California*, 402 U.S. 183, 196 (1971) (summarizing the petitioners' challenge as a claim that "to leave the jury completely at large to impose or withhold the death penalty as it sees fit is fundamentally lawless").

224. See 402 U.S. 183 (rejecting a due process challenge).

225. See *Furman v. Georgia*, 408 U.S. 238, 245 (1972) (Douglas, J., concurring); 408 U.S. at 299-300 (Brennan, J., concurring); 408 U.S. at 306-10 (Stewart, J., concurring); 408 U.S. at 314 (White, J., concurring); 408 U.S. at 363-69 (Marshall, J., concurring); see also ELY, *supra* note 195, at 173-77 (discussing *Furman*, noting its thematic relationship with the void-for-vagueness doctrine, and emphasizing the representation breakdowns that they share); Louis D. Bilionis & Richard A. Rosen, *Lawyers, Arbitrariness, and the Eighth Amendment*, 75 TEXAS L. REV. 1301, 1332-33 (1997) (discussing how moratorium-era litigation caused the Court to doubt that the democratic processes were registering respectable determinations of the public interest with respect to capital punishment).

226. Once the legislatures proceed to make choices and the Court proceeds to deal with its process-reinforcement ruling as a precedent, where constitutional law moves next is another matter entirely. A decision handed down for process-reinforcement reasons, replete with the usual instability, see *supra* notes 213-16 and accompanying text, may slip quietly into the past. See, e.g., *Lambert v. California*, 355 U.S. 225 (1957). Alternatively, it might converge with similar precedents and mature into a constitutional standard that directly reflects its substance and process lineage, such as the void-for-vagueness doctrine. As the post-*Furman* expansion of capital punishment jurisprudence demonstrates, the initial process-reinforcement decision also may assume a life of its own, serving as a rich milieu for the generalization of constitutional principles — some speaking the language of substantive right, others expressing a process perspective, and others accommodating the two — that, in turn, leads to the fashioning of rules and standards to implement those principles. See Bilionis & Rosen, *supra* note 225, at 1332-37 (discussing how process reinforcement was the impetus for *Furman* and how the Court thereafter searched for judicially manageable principles to implement the decision).

227. For another and quite striking example of judicial refusal to validate the legislative status quo on the ground that it fails to reflect a product of deliberative legislative choice, see *Thompson v. Oklahoma*, 487 U.S. 815, 848-59 (1988) (O'Connor, J., concurring in the judgment). At issue there was the constitutionality of capital punishment as applied to juveniles under the age of 16. Justice O'Connor expressed her reticence to substitute the Court's "inevitably subjective judgment . . . for the judgments of the Nation's legislatures," 487 U.S. at 854 (O'Connor, J., concurring in the judgment), yet she also found herself unable to credit general laws that operate to make such juveniles eligible for the death penalty as reflective of deliberative legislative choices. O'Connor thus reached an "unusual" resolution: Execution of such a juvenile might or might not be constitutional, but it cannot proceed under the Eighth Amendment in the absence of clear evidence that the legislature forthrightly con-

from the ideal of deliberative legislation also might influence the Court to take process-reinforcement action. Such was the case when mandatory death penalty legislation enacted in response to *Furman* came before the Court in *Woodson v. North Carolina*²²⁸ and *Roberts v. Louisiana*.²²⁹ At face value, the legislatures of North Carolina and Louisiana seemed to have made deliberate, though harsh, choices, but the Court saw these laws for what they really were: uniquely unreliable indications of society's views about the appropriate imposition of capital punishment that emanated from a politics badly warped by a failure to appreciate *Furman's* process-reinforcement intentions. Before *Furman* shook up the political process, no one seriously would have maintained that a mandatory death penalty for a broadly defined class of murderers accurately reflected society's sense of the just balance of relative hardships. American legislatures uniformly had renounced such laws as dangerously overinclusive, had instated unbridled sentencing discretion in their place, and had defended the change on the quite sensible ground that just choices between life and death require consideration of nuances that no legislature is competent to fully foresee and formalize *ex ante et pro forma*.²³⁰ As the joint opinion of Justices Stewart, Powell, and Stevens in *Woodson* concluded, "[i]t seems evident that the[se] post-*Furman* enactments reflect attempts by the States to retain the death penalty in a form consistent with the Constitution, rather than a renewed societal acceptance of mandatory death sentencing . . . attributable to diverse readings of the Court's multi-opinioned decision in [*Furman*]." ²³¹ By invalidating the mandatory laws, the Court reaffirmed and reinforced the need for legislative choices deliberative of society's moral sensibilities.

2. *Dysfunction in the Operation of the Political and Discretionary Institutional Safeguards*

The concept of legislative primacy drawn from *Dotterweich* and its lineal relations is also undergirded, we have seen, by a presuppo-

fronted the question and explicitly made the choice in favor of eligibility. See 487 U.S. at 857-59 (O'Connor, J., concurring in the judgment). The result thereby "allows the ultimate moral issue at stake in the constitutional question to be addressed in the first instance by those best suited to do so, the people's elected representatives." 487 U.S. at 858-59 (O'Connor, J., concurring in the judgment).

228. 428 U.S. 280 (1976).

229. 428 U.S. 325 (1976).

230. See *McGautha v. California*, 402 U.S. 183, 199-208 (1971); see also *Woodson*, 428 U.S. at 290-93 (plurality opinion of Stewart, J., joined by Powell and Stevens, JJ.).

231. *Woodson*, 428 U.S. at 298-99 (plurality opinion of Stewart, J., joined by Powell and Stevens, JJ.).

sition that political safeguards operate effectively to minimize the risk of excessively harsh applications of the criminal sanction — what Henry Hart called a failure of the “legislature’s sense of justice.”²³² Legislative primacy further presupposes that institutional discretionary mechanisms — chiefly prosecutorial discretion, jury discretion, and sentencing discretion, though the occasional grant of clemency should not be forgotten — will stand as meaningful safeguards against the “recalcitrant experiences” that overinclusive, morally imprecise laws can generate in particular cases. Just as the logic of process leads the Court to relax the rigors of legislative primacy when deliberative legislative choices seem pointedly absent, so too will it elicit a process-reinforcement response from the Court when strong evidence suggests that these political and institutional safeguards are malfunctioning.

A vast constitutional literature already has addressed the corrective role of judicial review over dysfunctions in the safeguards of process, much of it owing to John Hart Ely’s *Democracy and Distrust*,²³³ so we may summarize here. The heart of the matter is arbitrary, capricious, or discriminatory treatment toward peculiarly powerless groups or, to harken to Justice Harlan Fiske Stone’s fourth footnote in the *Carolene Products* case, “prejudice against discrete and insular minorities . . . which tends seriously to curtail the operation of those . . . processes ordinarily to be relied upon.”²³⁴ As political outsiders, such groups may lack the power, means, and opportunity to voice their interests at the legislative level. Even if “no one is actually denied a voice or a vote, representatives beholden to an effective majority [may] systematically disadvantage[e] some minority out of simple hostility or a prejudiced refusal to recognize commonalities of interest . . . thereby denying that minority the protection afforded other groups by a representative system.”²³⁵ At its naked worst, a failure of representational democracy along these lines produces criminal legislation that specifically targets members of a disadvantaged group. Such legislation resembles a bill of attainder,²³⁶ which, come to think of it, was

232. See *supra* sections I.B.3 & II.A.4.

233. ELY, *supra* note 195.

234. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

235. ELY, *supra* note 195, at 103.

236. See U.S. CONST. art. I, § 9, cl. 3 (barring Congress from enacting bills of attainder); U.S. CONST. art. I, § 10, cl. 1 (barring states from enacting bills of attainder). See generally *United States v. Brown*, 381 U.S. 437 (1965) (discussing bills of attainder); *United States v. Lovett*, 328 U.S. 303 (1946) (same); *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277 (1866) (same).

very nearly what Justice White described in *Patterson* as the obvious case of legislative abuse which the Court would not abide.²³⁷ But a serious representational breakdown also may manifest itself in more subtle ways — specifically, in a criminal law that on its face sweeps more generally, but which features an atypical potential for harshness that maintains its political acceptability for the very reason that it is not given and will not be given a full and consistent application in practice. The same social and cultural forces that operate to close a group out of effective participation in the political process, or that inspire hostility or prejudice toward the group at the legislative level, may generally, though not always, operate at the administrative level of criminal law as well, bringing arbitrariness and discrimination to the exercise of discretion. Dysfunction thus can radiate throughout the criminal justice system, leading to breakdowns at the legislative and the discretionary institutional level that are mutually reinforcing.

Consider once again the examples of vagueness and unbridled capital-sentencing discretion, both of which, as Ely observed, bear strong indicia of dysfunctional safeguards which do not seem to have escaped the attention of the Justices.²³⁸ The paradigmatic vague statute — an antivagrancy ordinance of the sort declared unconstitutional by the Court in *Papachristou v. City of Jacksonville*²³⁹ — theoretically puts all of us on thin ice. But most of us do not worry because that is not what the ordinance is *really* about, that is not why it was passed, and that is not how it will be enforced by the police and prosecutors with discretion to bring or drop charges. The powerless and unpopular are the ones who have to worry, for these laws in reality “are nets making easy the roundup of so-called undesirables.”²⁴⁰ The standardless discretionary death penalty laws

237. See *supra* note 177 and accompanying text.

238. See ELY, *supra* note 195, at 176-77; see also Stuntz, *supra* note 11, at 21 (discussing vagueness in process-reinforcement terms).

239. 405 U.S. 156 (1972). The ordinance challenged in that case provided:

Rogues and vagabonds, or dissolute persons who go about begging, common gamblers, persons who use juggling or unlawful games or plays, common drunkards, common night walkers, thieves, pilferers or pickpockets, traders in stolen property, lewd, wanton and lascivious persons, keepers of gambling places, common railers and brawlers, persons wandering or strolling around from place to place without any lawful purpose or object, habitual loafers, disorderly persons, persons neglecting all lawful business and habitually spending their time by frequenting houses of ill fame, gaming houses, or places where alcoholic beverages are sold or served, persons able to work but habitually living upon the earnings of their wives or minor children shall be deemed vagrants and, upon conviction in the Municipal Court shall be punished as provided for Class D offenses [punishable by 90 days' imprisonment, \$500 fine, or both].

405 U.S. at 156 n.1.

240. 405 U.S. at 171.

that *Furman* invalidated theoretically exposed every murderer to the unique risk of an unexplained and seemingly arbitrary death sentence, but society's better-connected murderers — and there have been some — really had very little reason to fear that risk. The discretion of prosecutors, judges, and juries diverted those defendants away from death row. The unfortunate ones who truly bore the risk of being struck by the legal system's equivalent of lightning were the powerless and unpopular — racial minorities and the poor.²⁴¹ As Ely tersely summed up, both of these examples “amount to failures of representation, in that those who make the laws (by refusing effectively to make the laws) have provided a buffer to ensure that they and theirs will not effectively be subjected to them.”²⁴²

Robinson and *Lambert* evidence a similar judicial sensitivity to the breakdown of process safeguards. In both cases, the laws in question raised atypical risks of harshness when measured against the usual requirements for criminal liability. Standing alone, such atypical risks barely raise the hackles of a Constitution that sees criminal law as an ongoing process of imperfect tension adjustments. But the buffers of which Ely spoke also ensured that in the final analysis these risks would be visited only upon the socially unpopular and the politically powerless, people for whom the blessings of political and institutional safeguards were effectively unavailable.

When a legislature passes a law that criminalizes a “mere status,”²⁴³ like the one criminalizing the status of narcotics addiction in *Robinson*, it creates a risk that is most unusual in criminal law: a risk of arrest and conviction without any proof of an *actus reus* — proof of a voluntary act or omission contrary to preexisting legal proscription. To judge from the statute, you would think that this extraordinary risk hangs over the heads of a wide array of individuals, including many upstanding citizens whom we would not associate with a discrete and insular minority. But that is not how it works once discretionary enforcement is brought into the picture. In application, neither the middle-class housewife nor the young professional with a drug habit truly has much to fear from the “mere status” provision; their arrests and convictions will come, if they come at all, the old-fashioned way, with evidence of purchase,

241. See, e.g., *Furman v. Georgia*, 408 U.S. 238, 252 (1972) (Douglas, J., concurring) (observing that “[t]he Leopolds and Loeb[s] are given prison terms, not sentenced to death”).

242. ELY, *supra* note 195, at 177.

243. The phrase is from *Powell v. Texas*, 392 U.S. 514, 532 (1968) (plurality opinion).

possession, or use. The “mere status” provision has its real bite for the down-and-outs who, like Robinson himself, grind up against the police on a daily basis on the public streets. They are there on the streets, as Justice White noted in a similar connection in *Powell v. Texas*, “not because their disease [of addiction] compels them to be there, but because . . . they have no place else to go and no place else to be This is more a function of economic station than of disease, although the disease may lead to destitution and perpetuate that condition.”²⁴⁴ Is it surprising that the license that “mere status” legislation grants to the law enforcement machinery to cut the usual legal corners that must be turned to lawfully stop, search, arrest, charge, and convict an individual ends up being exercised primarily if not exclusively against the downtrodden? Could a “mere status” crime survive long on the books if it were otherwise?

In *Lambert*, a municipal ordinance established a registration system for the monitoring of all convicted felons who remained in Los Angeles for more than a few days.²⁴⁵ The Justices voiced no constitutional objection to the general policy behind such criminal registration laws, though Warren Christopher’s celebrated *amicus* brief in the case mounted an impressive substantive due process challenge to the upset of privacy and personal liberty those laws can work.²⁴⁶ The problem that drew the attention of the Justices was the highly atypical risk to which Virginia Lambert herself was subjected. Lambert was convicted for failing to register (usually, the law criminalizes acts of commission and not omissions), an obscure and unpublicized duty (when the criminal law imposes duties, they normally tend to be morally intuitive or well publicized among those who must perform them), on strict liability terms, without any proof of “actual knowledge of the duty to register or proof of the probability of such knowledge.”²⁴⁷ To be sure, one might try to defend the “no ifs, ands, or buts” nature of the law by raising the usual arguments supporting strict liability, including the need to encourage compliance with the law and to prevent false claims of ignorance that lead to erroneous acquittals, and by then ascribing those arguments to a fair and open political process whose representational safeguards are in good working order. One also might point to the existence of discretionary safeguards against overly

244. *Powell*, 392 U.S. at 551 (White, J., concurring in the result).

245. See *Lambert v. California*, 355 U.S. 225, 226 (1957).

246. See Brief of Amicus Curiae for Appellant at 21-46, *Lambert v. California*, 355 U.S. 225 (1957) (No. 47).

247. See *Lambert*, 355 U.S. at 229.

harsh applications of the law. But does any of this ring true in Lambert's case? The people upon whom this legislation imposes this unusual risk count for virtually nothing in the political process. The characteristic that defines their commonality, a record of a felony conviction, is triply disabling. It strips them of the franchise by law, it impedes their ability to organize by virtue of its embarrassing nature, and it arouses hostility and prejudice that no one can deny. To say that their interests were even remotely represented in the Los Angeles City Council is a considerable stretch, yet that is only half of the process problem. The individuals who actually will endure the unusually harsh strict liability pinch of this law are people who, like Lambert, come under the unhappy eye of the police for other reasons, and whose failures to register are discovered when they are booked on some other charge or when a chagrined officer runs a background check. For people in Lambert's predicament, it seems safe to say, the system's discretionary mechanisms are most unlikely to operate as checks against "recalcitrant experiences."²⁴⁸

In setting aside the criminal laws involved in *Robinson* and *Lambert*, the Court took no power of critical importance away from the legislatures. Legislative primacy in matters of substantive criminal law remained the rule. But sensitivity to the process underpinnings of that rule required that exceptions be noted when faith in process cannot conscientiously be expressed.

248. Warren Christopher's *amicus* brief filed on behalf of Lambert made this point with admirable delicacy:

Since convicted persons are often not aware of their duty to register, the ordinance is susceptible of being used by the police to harass persons who are regarded as "undesirable." Although the statements attributed to former Los Angeles Chief of Police James Davis in Note, 103 U. of Pa. L. Rev. 60, 63 n.17 (1954), suggest that there may have been selective harassment under the ordinance, the record here does not contain the evidence of systematic or intentional discrimination necessary to support such a charge. . . . However, if intent were held to be a necessary element of the crime, the possibilities of unfair harassment would be drastically reduced if not totally eliminated.

Brief of Amicus Curiae for Appellant at 20 n.*, *Lambert v. California*, 355 U.S. 225 (1957) (No. 47). The University of Pennsylvania Law Review Note cited by Christopher reported the following:

Referring to the adoption of the Los Angeles, California, ordinance, it was reported that: "District Attorney Buron Fitts and Robert P. Stewart, chief deputy district attorney, who framed the legislation, and Chief of Police James Davis, one of its chief supporters, declare, however, that the very fact that dangerous ex-convicts will not register is the strength of the law.

" 'In the past,' says Chief Davis, 'after every major crime we have picked up many suspects with criminal records. In some of these cases we have been sure that we had in custody the guilty men, but we often lacked legal proof to convict. Under the new registration laws, each of these men can now be dealt with not for the crime suspected, but for failing to register'"

Note, *Criminal Registration Ordinances: Police Control over Potential Recidivists*, 103 U. PA. L. REV. 60, 63 n.17 (1954) (quoting THE LITERARY DIGEST, Sept. 30, 1933, at 39).

CONCLUSION

If process considerations influence the intersection of the Constitution and substantive criminal law as deeply as this examination has indicated they do, three conclusions immediately suggest themselves.

Scholars have their work cut out for them. Substantive constitutional criminal law theorizing in the tradition of Henry Hart should continue, but equivalent efforts on the process front are long overdue. We are in need of sustained scholarship that explores the dimensions of legislative primacy, the nature of process dysfunctions, and the possibilities of process reinforcement in substantive criminal law. It can no longer be enough to equate process concerns with a nondescript sense of judicial self-restraint, or to treat them as nuisances to counter or mollify in the course of substantive theorizing, or to conscript them in service of substantive theorizing without proper appreciation of their inherent limits.²⁴⁹ The task, as I have stressed, requires that process be taken seriously and that it be taken on its own terms.

Those who teach the law have their work cut out for them as well. The conventional story line — the tale of the unfulfilled promise of substantive constitutional criminal law — should continue to be told, but the lesson is incomplete and misleading so long as it omits the process account of the Constitution and criminal law. Given prevailing curricular conventions, however, teaching the process rendition may be difficult. The cases that dramatize and ultimately explain the dominant influence that process considerations have had on the Court's jurisprudence currently are scattered across the typical law school curriculum — a phenomenon that I do not regard as coincidental, but which I take as an unsurprising reflection of the singlemindedness toward substance that has gripped criminal law scholars these many years. Until the decisions that make up the process account are brought together for consideration as closely related precedent, their collective teachings about legislative primacy and process reinforcement in the realm of substantive criminal law will remain diffused and obscured.

Finally, the constitutional practitioners — bench and bar alike — also have work ahead of them. Intoning legislative primacy, federalism, and other familiar phrases in support of limited constitutional intrusion upon society's use of the criminal sanction is easy enough. Converting those intonations into a mature and conscien-

249. See *supra* notes 116–17, 119 and accompanying text.

tious jurisprudence that respects healthy process, disrespects dysfunctional process, and possesses the tools needed to distinguish the two is more difficult. As we have seen, that slow and difficult work has been underway in the Supreme Court for some time. The challenge is to complete it.