THE CIVIL-CRIMINAL CONVERGENCE

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Federal courts take criminal law seriously. Indeed, a particular solicitude for the criminal process undergirds several legal doctrines. These doctrines generally require courts to distinguish between civil and criminal law. Despite this requirement, the line between civil and criminal law is often blurry. That is especially true in administrative law, as administrative agencies frequently take punitive enforcement actions against private parties. And in the civil context, courts have long applied seemingly special criminal law doctrinal carveouts and constitutional protections. This Article takes account of the convergence of civil and criminal law.

The application of criminal law doctrines in civil cases has often been about procedural protections. But the next frontier appears to be substantive review. Indeed, some even argue that substantive review doctrines that are usually framed as specific to criminal law—the void-for-vagueness doctrine and the rule of lenity, for example—have always been appropriate to apply in civil cases. Looking ahead, a shift in administrative law may be forthcoming. Much of the focus in administrative law right now is on doctrines like nondelegation and major questions, which arguably vindicate the separation of powers. But the civil-criminal convergence may introduce doctrines like void-for-vagueness and lenity into litigants' toolkits in agency cases. These doctrines focus more on individual liberty than on separation of powers, and raising them in regulatory litigation could shift the framing of key challenges to agency action.

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INTRODUCTION

In criminal cases, federal courts often need to make decisions that are similar to the ones they make in civil cases: What is the meaning of the statute? Is this law unconstitutional? Should we abstain from hearing this case? Courts apply familiar rules and doctrines to decide these questions in civil cases. But in criminal cases, special principles sometimes modify the application of these doctrines, and special rules govern. These principles and procedures reflect a recognition of the awesome power of the state to punish misconduct—a power that includes the ability to deprive individuals of their property and their liberty.

Yet the criminal law is not the only mechanism by which the state can deprive a person of property or liberty. The civil regulatory scheme also provides for such deprivations by the state. Take the

Bank Secrecy Act, for example. The law requires Americans to file reports concerning their foreign bank accounts.[1] A willful violation of this duty subjects the violator to a penalty of either $100,000 or an amount determined under a separate subparagraph.[2] Although a neighboring section of the law prescribes criminal penalties (a $250,000 fine, imprisonment of no more than five years, "or both"), the penalty just described is explicitly labeled a civil one.[3]

The civil-criminal distinction is meaningful in our law. One reason is that civil and criminal cases follow significantly different procedures. The Bill of Rights, for example, guarantees a panoply of procedural protections in criminal cases; these "provisions . . . refer specifically to criminal cases and do not appear to reach any civil proceedings (even those involving punishment)."[4] Whether the law deems a sanctions regime civil or criminal could therefore have significant consequences for everything from the necessity of a jury trial to the applicability of the Double Jeopardy Clause. Moreover, federal courts abstain from exercising jurisdiction over "suits challenging the constitutionality of ongoing state criminal proceedings"[5]—although, as this Article will discuss, this abstention doctrine has come to encompass challenges to civil proceedings as well. The distinction has purchase in modern legal debates, too. For example, one scholar recently argued that a Texas abortion law's purportedly civil punitive regime was actually criminal, contending that "the fact that it is a criminal sanction means that defendants should have criminal procedure protections."[6]

In addition, the civil-criminal distinction has substantive consequences. Many jurists understand the rule of lenity—a canon of statutory interpretation favoring lenient constructions of penal statutes—to mean that "ambiguity concerning the ambit of *criminal* statutes should be resolved in favor of lenity."[7] (Justice Gorsuch, however, has recently submitted that "[h]istorically, lenity applied to all 'penal' laws—that is, laws inflicting any form of punishment, including ones we might now consider 'civil' forfeitures or fines."[8]) And the void-for-vagueness doctrine—pursuant to which a court will

1. *See* 31 U.S.C. § 5314.

2. *See id.* § 5321(a)(5)(C)–(D).

3. *Compare id.* ("Civil penalties"), *with id.* § 5322 ("Criminal penalties").

4. Caleb Nelson, *The Constitutionality of Civil Forfeiture*, 125 YALE L.J. 2446, 2492–93 (2016).

5. Anne Rachel Traum, *Distributed Federalism: The Transformation of* Younger, 106 CORNELL L. REV. 1759, 1760 (2021).

6. Guha Krishnamurthi, *Are S.B. 8's Fines Criminal?*, 101 TEX. L. REV. ONLINE 141, 150 (2023).

7. Cleveland v. United States, 531 U.S. 12, 25 (2000) (emphasis added) (quoting Rewis v. United States, 401 U.S. 808, 812 (1971)).

8. Wooden v. United States, 142 S. Ct. 1063, 1086 n.5 (2022) (Gorsuch, J., concurring in the judgment).

declare a statute to be unconstitutional if the statute does not provide "ordinary people [with] 'fair notice' of the conduct a statute proscribes"[9] or "provide standards to govern the actions of police officers, prosecutors, juries, and judges"—ordinarily applies in "a less searching form" in civil cases.[10]

Despite the meaningfulness of the civil-criminal distinction, courts have struggled to develop a theory of categorization. In *Hudson v. United States*,[11] a case concerning the applicability of the Double Jeopardy Clause's protections to a criminal case following an administrative proceeding, the Supreme Court set forth a framework for determining whether a punishment regime is civil or criminal for Double Jeopardy Clause purposes.[12] The determination was legally significant; had the Court decided that the monetary penalties and debarment sanctions at issue in the administrative proceeding were effectively criminal (and mislabeled as civil), the Double Jeopardy Clause would have precluded the federal government from prosecuting the subject of the enforcement in a later, formally criminal proceeding for the same conduct.[13] *Hudson* represented a break from an earlier precedent's civil-criminal framework—that of *United States v. Halper*[14]—which itself had departed from the factors laid out in a previous decision: *United States v. Ward*.[15]

These legal shifts have occurred against the backdrop of the rise of the administrative state. In recent years, commentators have lamented the explosion of regulations that govern private conduct—and the regime of penal sanctions that undergirds those regulations. As one report indicates, "[m]ore than 88,000 federal regulations were promulgated between 1995 and 2016."[16] But the sheer number of

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9. Sessions v. Dimaya, 138 S. Ct. 1204, 1212 (2018) (plurality opinion) (citing Papachristou v. Jacksonville, 405 U.S. 156, 162 (1972)).

10. *Id.*

11. 522 U.S. 93 (1997).

12. *See generally id.* at 96–105 (articulating principles of statutory construction and analyzing a host of factors in making the determination).

13. *See id.* at 95–96.

14. 490 U.S. 435 (1989).

15. 448 U.S. 242 (1980); *see also Hudson*, 522 U.S. at 95–96 ("The Government administratively imposed monetary penalties and occupational debarment on petitioners for violation of federal banking statutes, and later criminally indicted them for essentially the same conduct. We hold that the Double Jeopardy Clause of the Fifth Amendment is not a bar to the later criminal prosecution because the administrative proceedings were civil, not criminal. Our reasons for so holding in large part disavow the method of analysis used in *United States v. Halper*, 490 U.S. 435, 448 (1989), and reaffirm the previously established rule exemplified in *United States v. Ward*, 448 U.S. 242, 248–49 (1980).").

16. Jimmy Sexton, *America Has Too Many Rules*, WALL ST. J., July 10, 2023; *accord* NEIL GORSUCH & JANIE NITZE, OVER RULED 16–18 (2024); *see also id.* at 74 ("The sheer scale of agency output is staggering. . . . Take one recent year by way

regulations is only part of the story. Agencies are also seeking—and obtaining—record-breaking sanctions against Americans. To take one example, the Securities and Exchange Commission proudly announced in November 2022 that the agency won $4.2 billion in civil penalties in Fiscal Year 2022 as a result of SEC actions; that total was "the highest on record," and the agency press release trumpeted how "[t]he SEC's stand-alone enforcement actions . . . ran the gamut of conduct, from 'first-of-their-kind' actions to cases charging traditional securities law violations."[17]

The growth of the regulatory state has given rise to theorizing about the "middleground" of the civil-criminal divide. The traditional view is that "the criminal law is meant to punish, while the civil law is meant to compensate."[18] Yet as far back as 1992, Kenneth Mann noted that the government was bringing more civil proceedings, seeking "sanctions [that] are sometimes more severely punitive than the parallel criminal sanctions for the same conduct."[19] Mann concluded that "[p]unitive civil sanctions are replacing a significant part of the criminal law in critical areas of law enforcement, particularly in white-collar and drug prosecutions, because they carry tremendous punitive power"—a boon for the government, given that these sanctions "are not constrained by criminal procedure, [so] imposing them is cheaper and more efficient than imposing criminal sanctions."[20] More than thirty years ago, Mann wrote that "the jurisprudence of sanctions is experiencing a dramatic shift . . . [as] the features distinguishing civil from criminal law become less clear."[21] The impacts of this shift stretch from the federal courts all the way to the municipal courts.[22]

The issue of the civil-criminal convergence has inaugurated unconventional ideological alliances at the Supreme Court, too. In several opinions, Justice Gorsuch has called for recognizing the applicability of the rule of lenity—which is traditionally considered a rule of statutory interpretation for criminal statutes—in the civil

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of illustration. In 2015, Congress adopted about one hundred laws. The same year, federal agencies issued 3,242 final rules and published another 2,285 proposed rules." (footnotes omitted)).

17. Press Release, SEC, SEC Announces Enforcement Results for FY22 (Nov. 15, 2022), https://www.sec.gov/newsroom/press-releases/2022-206.

18. Kenneth Mann, *Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law*, 101 YALE L.J. 1795, 1796 (1992).

19. *Id.* at 1798.

20. *Id.*

21. *Id.*

22. *See* Alexandra Natapoff, *Criminal Municipal Courts*, 134 HARV. L. REV. 964, 972 (2021) (describing the "blurring [of] definitional lines between criminal and civil" in municipal courts).

context.[23] A recent Justice Gorsuch opinion also articulated a broad view of what constitutes a "punitive" sanctions regime for the purposes of the Excessive Fines Clause.[24] Justices Sotomayor and Jackson have joined these opinions.[25] These "jurisprudential friendship[s]" stand in contrast to the usual perception of the Justices' ideological commitments.[26]

The civil-criminal convergence is a longstanding feature of American law. As has often been the case with doctrines of procedural review, doctrines that courts describe as being about criminal law make their way into civil cases. But the civil-criminal convergence has become increasingly salient in substantive review of statutes—from review for constitutionality to canons of statutory interpretation. Recent developments in such areas of law as the void-for-vagueness doctrine and the rule of lenity could have a significant impact on administrative law. In particular, these traditionally criminal law doctrines rest in part on a concern for individual rights. That is different from substantive review doctrines like nondelegation and major questions, which arguably vindicate the separation of powers.[27] Applying vagueness and lenity in agency cases could shift

23. *See, e.g.*, Bittner v. United States, 143 S. Ct. 713, 724 (2023) (opinion of Gorsuch, J.); Wooden v. United States, 142 S. Ct. 1063, 1086 n.5 (2022) (Gorsuch, J., concurring in the judgment).

24. *See* Tyler v. Hennepin Cnty., 143 S. Ct. 1369, 1381 (2023) (Gorsuch, J., concurring); *see also* Toth v. United States, 143 S. Ct. 552, 553 (2023) (Gorsuch, J., dissenting from the denial of certiorari) ("We have held that 'protection against excessive punitive economic sanctions' is 'fundamental' and 'deeply rooted in this Nation's history and tradition.' And all that would mean little if the government could evade constitutional scrutiny under the [Excessive Fines] Clause's terms by the simple expedient of fixing a 'civil' label on the fines it imposes and declining to pursue any related 'criminal' case." (citations omitted) (quoting Timbs v. Indiana, 139 S. Ct. 682, 689 (2019))).

25. Justice Jackson was the only Justice on the Court who joined the portion of Justice Gorsuch's opinion in *Bittner* about lenity, and she was also the only joiner of his concurrence in *Tyler*. *See Bittner*, 143 S. Ct. at 724; *Tyler*, 143 S. Ct. at 1381. Meanwhile, Justice Sotomayor was the only Justice to join the part of Justice Gorsuch's concurrence in the judgment in *Wooden* that addressed the applicability of lenity in the civil context. *See Wooden*, 142 S. Ct. at 1086 n.5.

26. *See* Lydia Wheeler, *Gorsuch, Jackson Form Unusual Alliance Against Government Power*, BLOOMBERG L.: U.S. L. WK. (May 26, 2023, 4:46 AM), https://news.bloomberglaw.com/us-law-week/gorsuch-jackson-form-unusual-alliance-against-government-power (discussing the unexpected "jurisprudential friendship" between Justices Gorsuch and Jackson); *see also* Adam Liptak, *A Transformative Term at the Most Conservative Supreme Court in Nearly a Century*, N.Y. TIMES (July 1, 2022), https://www.nytimes.com/2022/07/01/us/supreme-court-term-roe-guns-epa-decisions.html (describing Justice Gorsuch's voting record as "conservative" and Justice Sotomayor as one of "[t]he court's three liberals").

27. *See* Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., Occupational Safety & Health Admin., 142 S. Ct. 661, 668–69 (2022) (Gorsuch, J., concurring) ("Both

the framing of some regulatory litigation to being about individual rights rather than separation of powers, potentially shuffling the ideological deck.

In three parts, this Article examines the evolution of criminal law rules in civil-regulatory cases. Part I examines criminal law as a distinct regime. It begins by walking through the places where law deals with crime in a distinct manner, focusing on the Bill of Rights before moving on to other constitutional provisions and legal doctrines. To understand the civil-criminal convergence, one must understand how criminal law is separate from civil law. Part I explores this issue by reviewing how courts distinguish between the two.

With Part I having established the distinctness of criminal law, Part II surveys the application of criminal law doctrines in civil cases. This civil-criminal convergence is particularly relevant at the "middleground" between civil and criminal law: instances in which the government brings civil sanctions. The civil-criminal convergence has a centuries-long tradition in American law. Part II considers how the convergence has impacted doctrines of both procedural and substantive review. From there, Part II highlights how the civil-criminal convergence has sparked an unconventional ideological alliance at the Supreme Court.

Part III considers how the civil-criminal convergence can impact administrative law. Administrative agencies are creatures of statutes and are generally only able to do what Congress has empowered them to do. Substantive review—pursuant to which courts interpret statutes' meaning and review them for constitutionality—is thus a hallmark of administrative law. Doctrines like void-for-vagueness and the rule of lenity have long been used in criminal cases, but Part III considers what the world might look like if courts applied these doctrines in regulatory litigation concerning civil penalties and agency rulemakings.

Part III compares vagueness and lenity to the nondelegation and major questions doctrines; unlike nondelegation and major questions, vagueness and lenity have a strong individual-rights rationale underlying them. So, challenging agency action on vagueness and lenity grounds could shift the framing of major administrative law cases. To demonstrate the potential implications of the civil-criminal convergence in administrative law, Part III concludes by considering the possible application of vagueness and lenity to a recent rule—outlawing non-compete provisions in employment agreements—that the Federal Trade Commission has promulgated.

[doctrines] are designed to protect the separation of powers and ensure that any new laws governing the lives of Americans are subject to the robust democratic processes the Constitution demands.").

I. THE CIVIL-CRIMINAL DIVIDE

The Constitution contemplates criminality. The Framers understood that crime was inevitable in a free society. In recognition of the government's grave capacity to punish criminals by taking their liberty or perhaps even their lives, the Bill of Rights enshrines robust procedural protections throughout the entirety of the criminal process—from investigation to adjudication to punishment. Moreover, other assorted provisions of the Constitution set criminal law apart from the civil legal system. And courts understand the Constitution against the backdrop of Anglo-American legal doctrines—like the rule of "lenity" in interpreting criminal laws and the rule that equity will not enjoin a criminal prosecution—that understand the criminal process to be a distinct legal setting that demands special treatment.

The divide between criminal and civil law is a foundational element of the American legal system. It is also undertheorized—a fact that becomes particularly obvious in the edge cases. The Supreme Court has oscillated between different frameworks for how to distinguish between criminal and civil law. Understanding the background constitutional framework and the Court's precedents on this issue is fundamental to exploring the core difficulty that this Article illuminates: a significant amount of civil enforcement looks a lot like criminal enforcement, especially from the perspective of the subject of the enforcement action.

This Part lays out the development of the civil-criminal divide. It explores an important period of indecision at the Supreme Court on this question, tracing the Court's rationale. Examining the Court's separation of civil and criminal law—in the context of the Constitution and the common law—frames the development that sparked this Article's writing: the civil-criminal convergence.

A. The Exceptionalism of Criminal Law

Our legal system recognizes that criminal law is just different. The Bill of Rights compels this conclusion; other constitutional provisions and the tradition of American law also support it. What emerges from these sources is a recognition that criminal law adjudication is exceptional. Courts employ different rules, different procedures, and different doctrines of review when the state prosecutes crime. Within this framework, the law requires courts to be especially solicitous of criminal defendants. To be sure, the government prevails in the overwhelming majority of criminal cases.[28] And questions abound regarding the extent to which the

28. *See* John Gramlich, *Fewer than 1% of Federal Criminal Defendants Were Acquitted in 2022*, PEW RSCH. CTR. (June 14, 2023), https://www.pewresearch.org/short-reads/2023/06/14/fewer-than-1-of-defendants-in-federal-criminal-cases-were-acquitted-in-2022/.

explosion of plea bargaining has eroded the procedural and structural guarantees attendant to the criminal process.[29] But at least in formal terms, the "gold standard of American justice" in criminal cases has been described as "exorbitant," demanding as it does "a full-dress criminal trial with its innumerable constitutional and statutory limitations upon the evidence that the prosecution can bring forward, and . . . the requirement of a unanimous guilty verdict by impartial jurors."[30] When the case is a criminal one, courts take a special approach.

1. The Bill of Rights

The Bill of Rights frames criminal law as a distinct part of the American legal system. Both the Fifth Amendment and the Sixth Amendment mention the criminal legal process twice, specifying particular protections that apply in criminal cases. These amendments also provide for other protections that are generally understood to be limited to the criminal process despite not saying so explicitly. Other amendments—like the Fourth and Eighth Amendments—have had a profound impact on crime and punishment in the United States, limiting what the government can do in the criminal sphere. And although some originalists have called the Supreme Court's jurisprudence in this area into question,[31] few would

29. *See* Gregory M. Gilchrist, *Trial Bargaining*, 101 IOWA L. REV. 609, 612 (2016) (describing the "significant costs" of plea bargaining, including "nullifying the procedural protections of trial"); Stephanos Bibas, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 CALIF. L. REV. 1117, 1131 (2011) (describing how the state is now able to "induce most [criminal] defendants to surrender their Cadillac trials in exchange for scooter plea bargains"); Roland Acevedo, Note, *Is a Ban on Plea Bargaining an Ethical Abuse of Discretion? A Bronx County, New York Case Study*, 64 FORDHAM L. REV. 987, 993 (1995) ("Removing criminal cases from the trial process through plea bargaining . . . circumvents the 'rigorous standards of due process and proof imposed during trials.'" (quoting Alissa Pollitz Worden, *Policymaking by Prosecutors: The Uses of Discretion in Regulating Plea Bargaining*, 73 JUDICATURE 335, 336 (1990))); *see also* David McGarry, *Rampant Plea Bargaining Is a Raw Deal for Defendants*, REASON (Mar. 10, 2023, 5:30 PM), https://reason.com/2023/03/10/rampant-plea-bargaining-is-a-raw-deal-for-defendants/; Somil Trivedi, *Coercive Plea Bargaining Has Poisoned the Criminal Justice System. It's Time to Suck the Venom Out.*, ACLU (Jan. 13, 2020), https://www.aclu.org/news/criminal-law-reform/coercive-plea-bargaining-has-poisoned-the-criminal-justice-system-its-time-to-suck-the-venom-out.

30. Lafler v. Cooper, 566 U.S. 156, 186 (2012) (Scalia, J., dissenting) (footnote omitted).

31. *See, e.g.*, Collins v. Virginia, 138 S. Ct. 1663, 1676–77 (2018) (Thomas, J., concurring) ("Historically, the only remedies for unconstitutional searches and seizures were 'tort suits' and 'self-help.' The exclusionary rule—the practice of deterring illegal searches and seizures by suppressing evidence at criminal trials—did not exist." (citation omitted)); Padilla v. Kentucky, 559 U.S. 356, 389 (2010) (Scalia, J., dissenting) ("The Sixth Amendment as originally understood

argue against the proposition "that in applying the Bill of Rights to the states, the Supreme Court" has regarded the Bill of Rights' "declarations of fundamental principles as if they were a detailed code of criminal procedure."[32]

The Bill of Rights mentions the words "crime" or "criminal" four times: twice in the Fifth Amendment and twice in the Sixth Amendment.[33] The Fifth Amendment begins by providing that—subject to an exception—"[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury."[34] In addition, the Fifth Amendment mandates that no person "shall be compelled in any criminal case to be a witness against himself."[35] Although the Fifth Amendment

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and ratified meant only that a defendant had a right to employ counsel, or to use volunteered services of counsel."); Dickerson v. United States, 530 U.S. 428, 450 (2000) (Scalia, J., dissenting) ("[A]ny conclusion that a violation of the *Miranda* rules *necessarily* amounts to a violation of the privilege against compelled self-incrimination can claim no support in history, precedent, or common sense . . . ." (discussing the Supreme Court's Fifth Amendment holding in Miranda v. Arizona, 384 U.S. 436 (1966))).

32. Henry J. Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CALIF. L. REV. 929, 953–54 (1965); *see also* Paul H. Violas, Note, *Civil Forfeiture vs. Civil Rights: Is the House Guilty?*, 22 W. ST. U. L. REV. 125, 128–29 (1994) ("The Constitution affords an accused in a criminal action many procedural safeguards presumably to insure that only the truly guilty will be convicted and punished. . . . These Constitutional guarantees are not necessarily applicable to civil actions. To the extent that any cause of action can be categorized as civil rather than criminal, the Government enjoys many built-in procedural advantages.").

33. *See* U.S. CONST. amends. V, VI.

34. *Id.* amend. V. This Clause excepts "cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger." *Id.*; *see also* Stephen I. Vladeck, *Military Courts and Article III*, 103 GEO. L.J. 933, 952 n.129 (2015) (discussing the Supreme Court's understanding of the exception's contours); Earl F. Martin, *Separating United States Service Members from the Bill of Rights*, 54 SYRACUSE L. REV. 599, 614 (2004) ("[T]he Fifth Amendment specifically exempts courts-martial from its grand jury requirement.").

35. U.S. CONST. amend. V. To be sure, one could read the Fifth Amendment and make a plausible textual argument that the Self-Incrimination Clause should be read as follows: No person "shall be compelled in any criminal case to be a witness against himself . . . without due process of law." *Id.* Consider the Amendment's punctuation. As one commentator has pointed out, "the Amendment itself is one long and complex sentence; . . . it contains a number of restrictions on governmental power and . . . those restrictions seem to be independent and separated by three semicolons." Michael Nardella, Note, *Knowing When to Stop: Is the Punctuation of the Constitution Based on Sound or Sense?*, 59 FLA. L. REV. 667, 668 (2022). But "the Self-Incrimination Clause runs right into the Due Process Clause, with only a comma between them." *Id.* That may have been an intentional decision. *See id.* at 671–73 (discussing the drafting history). So, one could contend, the soundest grammatical reading of the Fifth

"mixe[s] civil and criminal guarantees,"[36] it includes other protections that have been understood only to apply in criminal cases.[37] Meanwhile, the Sixth Amendment provides a set of rights to be afforded to the accused "[i]n all criminal prosecutions," including "an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law."[38]

Other amendments further govern the criminal process.[39] For example, the Fourth Amendment promises security "against unreasonable searches and seizures,"[40] and the Supreme Court has effectuated this guarantee by excluding illegally obtained evidence in criminal trials—and only criminal trials.[41] The Amendment also prescribes a series of requirements for the issuance of warrants to police.[42] At the same time, the Eighth Amendment limits what the state can require at the front end of the criminal process and what it

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Amendment would seem to be that the Self-Incrimination Clause is not absolute; rather, the protection is qualified and merely requires the provision of due process. Yet that has not been the path that the Supreme Court has taken, and one commentator has defended the Court's approach as based on a "discrepancy in usage" of punctuation between the founding era and the modern day. *Id.* at 670; *see generally id.* at 669–70.

36. Jerold H. Israel, *Free-Standing Due Process and Criminal Procedure: The Supreme Court's Search for Interpretive Guidelines*, 45 ST. LOUIS U. L.J. 303, 337 (2001).

37. *See, e.g.*, Hudson v. United States, 522 U.S. 93, 95–96 (1997) (holding that the Double Jeopardy Clause only applies when the prior proceeding was a "criminal" one). Courts have also effectuated the Fifth Amendment's guarantee of due process by declaring statutes to be void when they are too vague (the void-for-vagueness doctrine) less rigorously in civil cases than they have in criminal cases—with certain exceptions, like civil deportation. *See* Sessions v. Dimaya, 138 S. Ct. 1204, 1212–13 (2018) (plurality opinion).

38. U.S. CONST. amend. VI.

39. Even when cases concern the rights enshrined in amendments that do not appear to govern the criminal process, some evidence suggests that courts are more solicitous when a criminal sanction—rather than a civil penalty—is at issue. *See, e.g.*, Animal Legal Def. Fund v. Reynolds, 297 F. Supp. 3d 901, 916 (S.D. Iowa 2018) ("[C]oncerns over the chilling effects on speech are significantly more acute when a criminal sanction is involved rather than a civil cause of action.").

40. U.S. CONST. amend. IV.

41. *See* Pa. Bd. of Prob. & Parole v. Scott, 524 U.S. 357, 363–64 (1998); *see also* Gerstein v. Pugh, 420 U.S. 103, 125 n.27 (1975) ("The Fourth Amendment was tailored explicitly for the criminal justice system . . . .").

42. U.S. CONST. amend. IV ("[N]o Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."). For an argument that the Fourth Amendment's warrant-particularity requirement is a rule of nondelegation, see Eli Nachmany, *Bill of Rights Nondelegation*, 49 BYU L. REV. 513, 544–45 (2023).

can do to convicted criminals at the back end of it.[43] The Amendment is short: it states that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[44] In the 1970s, the Supreme Court observed that "[b]ail, fines, and punishment traditionally have been associated with the criminal process," determining in *Ingraham v. Wright*[45] to "adhere to [the Court's] longstanding limitation" on "construing the proscription against cruel and unusual punishment . . . to protect those convicted of crimes."[46] Nevertheless, the Court has held that "[t]he Eighth Amendment protects against excessive *civil* fines, including forfeitures."[47]

2. Other Constitutional Provisions

The Bill of Rights is not the only part of the Constitution that appears to paint criminal law as a distinct setting. Consider three other provisions: the Venue Clause, the Ex Post Facto Clause, and the Pardons Clause. The first of these three clauses explicitly limits itself to criminal cases.[48] But traditionally, the other two have been understood also to apply only in the criminal setting. Whether each of these interpretations is consistent with the original meaning of the Constitution is a separate question.

The Sixth Amendment is not the only part of the Constitution that protects a criminal defendant's right to a jury trial. Article III's Venue Clause provides that "[t]he Trial of all Crimes, except in Cases of Impeachment, shall be by Jury" and specifies where those trials are to take place.[49] The Clause evinces an "underlying policy concern [about] the protection of a defendant from prosecution in a place far from his home and the support system that is necessary to mount an adequate defense."[50] Because of the Clause's particular mention of "crimes," the Clause's protections have not been thought to extend into the civil context.

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43. U.S. CONST. amend. VIII.

44. *Id.*

45. 430 U.S. 651 (1977).

46. *Id.* at 664.

47. Hudson v. United States, 522 U.S. 93, 103 (1997) (emphasis added).

48. *See* U.S. CONST. art. III, § 2, cl. 3.

49. *Id.* The Clause mandates that "such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed." *Id.* Post-constitutional innovations like air travel have presented interesting questions about the Clause's modern application; in 2020, the Ninth Circuit held that "[f]or crimes committed on planes in flight, the Constitution does not limit venue to the district directly below the airspace where the crime was committed. And thus venue 'shall be at such Place or Places as the Congress may by Law have directed.'" United States v. Lozoya, 982 F.3d 648, 652 (9th Cir. 2020) (quoting U.S. CONST. art. III, § 2, cl. 3).

50. United States v. Muhammad, 502 F.3d 646, 651 (7th Cir. 2007).

The Ex Post Facto Clause is not as textually deliberate about the civil-criminal distinction. The Clause simply states that "[n]o . . . ex post facto Law shall be passed."[51] The Supreme Court has explained that an ex post facto law is one that "punishes as a crime an act previously committed, which was innocent when done; which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with crime of any defense available according to law at the time when the act was committed."[52] Early on, the Court rejected an understanding of the Clause that would have extended its protections to civil offenses.[53] That interpretation persists to the modern day.[54]

The Pardons Clause offers another example of the civil-criminal distinction in constitutional law. That Clause clarifies Article II's grant of the executive power to the president, establishing that the president "shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment."[55] As far back as 1833, Chief Justice Marshall opined that "[a] pardon is an act of grace . . . on whom it is bestowed, from the punishment the law inflicts for a *crime* he has committed."[56] That understanding appears to be consistent with Alexander Hamilton's discussion of the clemency power in Federalist No. 74.[57] And, subject to some debate, it remains the common conception of the power's reach today.[58]

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51. U.S. CONST. art. I, § 9, cl. 3.

52. Beazell v. Ohio, 269 U.S. 167, 169 (1925).

53. *See* Calder v. Bull, 3 U.S. 386, 390 (1798); *see also* Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519, 579–83 (2003) (discussing the Court's opinion in *Calder*); Watson v. Mercer, 33 U.S. 88, 110 (1834) ("In short, ex post facto laws relate to penal and criminal proceedings which impose punishments or forfeitures, and not to civil proceedings which affect private rights retrospectively.").

54. *See* Smith v. Doe, 538 U.S. 84, 92 (2003); *see also* United States v. D.K.G. Appaloosas, Inc., 829 F.2d 532, 540 (5th Cir. 1987) ("It is beyond dispute that the *ex post facto* clause applies only to criminal cases.").

55. U.S. CONST. art. II, § 2, cl. 1; *see also* SAIKRISHNA BANGALORE PRAKASH, IMPERIAL FROM THE BEGINNING: THE CONSTITUTION OF THE ORIGINAL EXECUTIVE 8 (2015) ("The Executive Power Clause is Article II's most important provision. It is a grant of all power commonly regarded as executive; *the rest of Article II amplifies, clarifies, and constrains the grant*." (emphasis added)).

56. United States v. Wilson, 32 U.S. (7 Pet.) 150, 160 (1833) (emphasis added).

57. *See* THE FEDERALIST NO. 74, at 447 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("The *criminal* code of every country partakes so much of necessary severity that without an easy access to exceptions in favor of unfortunate guilt, justice would wear a countenance too sanguinary and cruel." (emphasis added)).

58. *See* Noah A. Messing, *A New Power? Civil Offenses and Presidential Clemency*, 64 BUFF. L. REV. 661, 663–64 (2016).

3. Criminal-Law-Specific Doctrines

Moving past particular textual provisions of the Constitution, courts have employed several doctrines of judicial review in criminal cases that are based on longstanding English legal traditions. Two deserve attention. First, federal courts abstain from enjoining ongoing criminal proceedings in state courts. Second, courts construe ambiguities in criminal statutes in favor of criminal defendants. These doctrines are known respectively as *Younger* abstention and the rule of lenity. Both doctrines have come to straddle the civil-criminal divide. But each one's traditional application has been in the criminal setting.

Begin with *Younger* abstention. In *Younger v. Harris*,[59] the Supreme Court instructed that federal courts should not issue injunctions that interfere with ongoing state criminal proceedings.[60] The Court based its decision in part on "the basic doctrine of equity jurisprudence that courts of equity should not act, and particularly should not act to restrain a criminal prosecution, when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief."[61] Admitting that "[t]he doctrine may originally have grown out of circumstances peculiar to the English judicial system and not applicable in this country," the Court noted that "its fundamental purpose of restraining equity jurisdiction within narrow limits is equally important under our Constitution."[62] The Court also grounded its holding in the notion of respect for state courts—known as comity.[63] Although the Court would soon extend *Younger* abstention to civil cases, "the roots of the doctrine are found in the criminal law context."[64]

The rule of lenity is commonly understood to be a criminal law doctrine. The rule is a canon "of statutory construction that requires a court to resolve statutory ambiguity in favor of a criminal defendant, or to strictly construe the statute against the state."[65] The Supreme Court has described the canon as applying "primarily to the interpretation of criminal statutes," noting that "the rule of lenity can apply when a statute with criminal sanctions is applied in a noncriminal context."[66] The rule is rooted in English tradition;

59. 401 U.S. 37 (1971).

60. *Id.* at 43–44.

61. *Id.*

62. *Id.* at 44.

63. *See id.*

64. Daniel C. Norris, Comment, *The Final Frontier of* Younger *Abstention: The Judiciary's Abdication of the Federal Court Removal Jurisdiction Statute*, 31 FLA. ST. U. L. REV. 193, 194 (2003).

65. David S. Romantz, *Reconstructing the Rule of Lenity*, 40 CARDOZO L. REV. 523, 524 (2018).

66. Kasten v. Saint-Gobain Performance Plastics Corp., 563 U.S. 1, 16 (2011).

indeed, "[c]ourts and scholars generally accept that the rule of lenity arose as a response to the severity of English penal law—and specifically, laws carrying the death penalty."[67] In recent years, however, some jurists have taken the position that lenity has long applied in the civil context when a statute is penal.[68]

B. Dividing Criminal and Civil Offenses

But what does it mean for an offense to be "criminal"? Where is the line between civil and criminal statutes? As Justice Gorsuch has asked in another context: "What's the test?"[69] Acknowledging the definition's "shortcomings and circularity," one scholar opines that "civil law may be described as all law which is not criminal law."[70] Perhaps unsurprisingly, the cases demonstrate that the Supreme Court has struggled with this question as well.[71] The Court set out its

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67. Joshua S. Ha, *Limiting the Rule of Lenity*, 12 WAKE FOREST L. REV. ONLINE 45, 46 (2022).

68. *See, e.g.*, Bittner v. United States, 143 S. Ct. 713, 724 (2023). Lenity is not the only rule of statutory interpretation for which the civil-criminal distinction is relevant. Prior to the Supreme Court's decision in *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024), prominent jurists argued that *Chevron* deference—pursuant to which courts deferred to agencies' interpretations of ambiguous laws—should not apply when the ambiguity was in a "hybrid" penal statute that had both criminal and civil applications. *See, e.g.*, Whitman v. United States, 574 U.S. 1003, 1004 (2014) (Scalia, J., respecting the denial of certiorari) (opining that a court does not "owe deference to an executive agency's interpretation of a law that contemplates both criminal and administrative enforcement"); Carter v. Welles-Bowen Realty, Inc., 736 F.3d 722, 730 (6th Cir. 2013) (Sutton, J., concurring) ("[A] court should not defer to an agency's anti-defendant interpretation of a law backed by criminal penalties."); *see also* Jeffrey B. Wall & Owen R. Wolfe, *Why* Chevron *Deference for Hybrid Statutes Might Be a No-No*, 25 WASH. LEGAL FOUND.: LEGAL OP. LETTER (June 24, 2016), https://www.wlf.org/2016/06/24/publishing/why-chevron-deference-for-hybrid-statutes-might-be-a-no-no/. *But see* Dan M. Kahan, *Is* Chevron *Relevant to Federal Criminal Law?*, 110 HARV. L. REV. 469, 469 (1996) ("Federal criminal law would be better by any conceivable measure . . . if the executive branch was treated as an authoritative law-expositor, and not merely an authoritative law-enforcer. The proper mechanism for integrating these powers is the so-called *Chevron* doctrine, which requires courts to defer to administrative interpretations of ambiguous statutes as binding exercises of delegated lawmaking authority.").

69. Gundy v. United States, 139 S. Ct. 2116, 2135–37 (2019) (Gorsuch, J., dissenting) (laying out a three-part test for determining whether a statute violates the Article I nondelegation doctrine).

70. FRED COHEN, THE LAW OF DEPRIVATION OF LIBERTY: CASES AND MATERIALS 61 (1991).

71. *See* Carol S. Steiker, Foreword, *Punishment and Procedure: Punishment Theory and the Criminal-Civil Procedural Divide*, 85 GEO. L.J. 775, 797 (1997) (describing the Supreme Court's approaches over time as "divergent and inconsistent"). The Court is not alone. *See id.* at 782 ("The distinction between

now-prevailing framework in *Hudson v. United States*,[72] a case decided in 1997. But *Hudson* did not write on a blank slate; in fact, *Hudson* abrogated a 1989 case—*United States v. Halper*[73]—in which the Court had taken a different approach to the question. These two cases were far from the origin of the Court's consideration of the issue. The development of the civil-criminal divide at the Court helps to set up this Article's discussion of the civil-criminal convergence.

As Subpart I.A demonstrates, the civil-criminal divide is baked into our legal system. In *United States v. Ward*,[74] the Court recognized that "[t]he distinction between a civil penalty and a criminal penalty is of some constitutional import," citing the Fifth Amendment's Self-Incrimination Clause, the Sixth Amendment's criminal procedure protections, the Double Jeopardy Clause, and the proof-beyond-a-reasonable-doubt standard in criminal adjudication.[75] The Court explained that drawing this distinction "is a matter of statutory construction" that proceeds in two steps: (1) ask whether Congress "indicated either expressly or impliedly a preference for one label or the other," then (2) ask—if Congress intended to establish a civil penalty—"whether the statutory scheme was so punitive either in purpose or effect as to negate that intention."[76]

Discussing the second step of the framework, the Court mentioned a set of seven considerations that it had previously laid out in *Kennedy v. Mendoza-Martinez*.[77] The *Kennedy* Court had described its inquiry as one of "determin[ing] whether an Act of Congress is penal or regulatory in character, even though in other cases this problem has been extremely difficult and elusive of solution."[78] Drawing on past precedents, the Court divined seven factors—mostly all focused on the sanction in question—to guide this inquiry[79]:

- Whether the sanction involves an affirmative disability or restraint
- Whether the sanction has historically been regarded as a punishment
- Whether the sanction comes into play only on a finding of scienter

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criminal and civil wrongs, and the nature of the processes used to address them, have never been static, but rather have continuously changed over time, often dramatically.").

72. 522 U.S. 93 (1997).

73. 490 U.S. 435 (1989).

74. 448 U.S. 242 (1980).

75. *Id.* at 248.

76. *Id.* at 248–49.

77. *See id.* at 249 (citing Kennedy v. Mendoza-Martin, 372 U.S. 144, 168–69 (1963)).

78. *Kennedy*, 372 U.S. at 168.

79. *See id.* at 168–69.

- Whether the sanction's operation will promote the traditional aims of punishment—retribution and deterrence
- Whether the behavior to which the sanction applies is already a crime
- Whether an alternative purpose to which the sanction may rationally be connected is assignable for it
- Whether the sanction appears excessive in relation to the alternative purpose assigned

The factors "have their earlier origins in cases under the Sixth and Eighth Amendments, as well as the Bill of Attainder and Ex Post Facto Clauses."[80] *Kennedy* saw its multi-factor test as providing the basis for ascertaining whether "the procedural safeguards required as incidents of a criminal prosecution are lacking" for a given statutory scheme—referencing the Fifth and Sixth Amendments in particular.[81] But as Subpart I.A demonstrates, the determination that an offense is criminal has deeper implications.

The Court departed from *Ward* and the *Kennedy* factors in *Halper*.[82] The case concerned the applicability of the Double Jeopardy Clause to a civil enforcement proceeding (under the False Claims Act) that followed a criminal prosecution.[83] The Court observed "that in a particular case a civil penalty authorized by the Act may be so extreme and so divorced from the Government's damages and expenses as to constitute punishment."[84] Confining *Ward* to contexts in which a court's task is "identifying the inherent nature of a proceeding, or . . . determining the constitutional safeguards that must accompany those proceedings as a general matter," the *Halper* Court concluded that a different approach was appropriate in Double Jeopardy Clause cases.[85] Here, the Court explained, "the labels 'criminal' and 'civil' are not of paramount importance"—the proper question is whether a sanction constitutes *punishment*.[86] And, the Court stated, "a civil as well as a criminal sanction constitutes punishment when the sanction as applied in the individual case serves the goals of punishment."[87] So, the Court held, "under the Double Jeopardy Clause a defendant who already has been punished in a criminal prosecution may not be subjected to an additional civil sanction to the extent that the second sanction may not fairly be

80. Smith v. Doe, 538 U.S. 84, 97 (2003).

81. *Kennedy*, 372 U.S. at 167; *see also* Hudson v. United States, 522 U.S. 93, 99 (1997) (describing the *Kennedy* factors as "provid[ing] useful guideposts").

82. United States v. Halper, 490 U.S. 435, 447–48 (1989).

83. *Id.* at 437–38.

84. *Id.* at 442.

85. *Id.* at 447.

86. *See id.*

87. *Id.* at 448.

characterized as remedial, but only as a deterrent or retribution."[88] The Court "acknowledge[d] that this inquiry will not be an exact pursuit," setting forth instead a "rule . . . of reason" and "leav[ing] to the trial court the discretion to determine on the basis of such an accounting the size of the civil sanction the Government may receive without crossing the line between remedy and punishment."[89]

Eight years later, the Court pivoted back to *Ward*'s multi-factor test for Double Jeopardy Clause cases. In *Hudson*, the Court disavowed the reasoning of *Halper*, describing the case's analysis as "deviat[ing] from [the Court's] traditional double jeopardy doctrine in two key respects."[90] The first was the case's analysis of whether the successive sanction constituted "punishment"—a bypassing of "the threshold question: whether the successive punishment at issue is a 'criminal' punishment."[91] Here, the Court took issue with how *Halper* "elevated a single *Kennedy* factor—whether the sanction appeared excessive in relation to its nonpunitive purposes—to dispositive status."[92] Second, the *Hudson* Court took issue with the *Halper* Court's "decision to 'asses[s] the character of the actual sanctions imposed,'"[93] "rather than, as *Kennedy* demanded, evaluating 'the statute on its face' to determine whether it provided for what amounted to a criminal sanction."[94]

Recognizing "that all civil penalties have some deterrent effect," the Court worried that "[i]f a sanction must be 'solely' remedial (*i.e.*, entirely nondeterrent) to avoid implicating the Double Jeopardy Clause, then no civil penalties are beyond the scope of the Clause."[95] And because *Halper*'s analysis requires a court to "look at the 'sanction actually imposed' to determine whether the Double Jeopardy Clause is implicated," a court could not know "whether the Double Jeopardy Clause is violated [if the civil enforcement proceeding comes second] until a defendant has proceeded through a trial to judgment."[96] This is true despite the fact that the Double Jeopardy Clause's protection is supposed to prevent even an *attempt* at a second prosecution.[97] The Court proceeded to analyze the

88. *Id.* at 448–49.

89. *Id.* at 449–50.

90. Hudson v. United States, 522 U.S. 93, 101 (1997); *see also* Alafair S. Burke, *Unpacking New Policing: Confessions of a Former Neighborhood District Attorney*, 78 WASH. L. REV. 985, 1034 (2003) (describing *Halper* and other cases from the era as "a brief flirtation with aggressive judicial scrutiny of supposedly civil legislation").

91. *Hudson*, 522 U.S. at 101.

92. *Id.*

93. *Id.* (citing United States v. Halper, 490 U.S. 435, 447 (1989)).

94. *Id.* (citing Kennedy v. Mendoza-Martin, 372 U.S. 144, 169 (1963)).

95. *Id.* at 102.

96. *Id.*

97. *See id.*

Kennedy factors within the *Ward* framework, asking whether the punishments in both of the proceedings at issue were each criminal.[98]

II. CIVIL OFFENSES, CRIMINAL DOCTRINES

The civil-criminal distinction has had a practical upshot. If a court characterizes a sanction as civil, then the subject of the enforcement will lose access to a variety of procedural protections—as discussed in Part I. But in light of this situation, the last few decades have seen a fraying of the civil-criminal divide. Although courts have traditionally understood various legal doctrines only to apply in criminal cases, several jurists and scholars have been urging—with some success—the application of these doctrines in civil cases. At the Supreme Court, these efforts have cut across perceived ideological lines, uniting Justices who do not always see eye-to-eye on the law.

This Part begins by surveying the civil-criminal convergence across various legal doctrines. From individual rights to statutory interpretation, this convergence is impacting our law in profound ways. And more might be on the horizon. This Part then explores the convergence at the Supreme Court, examining how its leading judicial proponents have made common cause in spite of deep philosophical differences in other areas of the law.

A. Civil Penalties and Criminal Law

The government uses *civil* regulatory law to exact significant fines against individuals and businesses. Yet monetary penalties are not the sole endgame of civil enforcement. Frequently, the state succeeds in using the civil legal process to incarcerate, deport, and restrain people. Because the process is explicitly *not* criminal, the targets of these civil actions do not enjoy the usual protections that the legal system affords those accused of crime. Still, jurists and scholars are taking an increasing account of the penalties that make the civil system feel criminal. And judicial review of civil enforcement is adapting as a result.

This Part surveys the particulars of that adaptation. It begins with a discussion of the "middleground" of civil and criminal law—where the two regimes overlap. From there, it contemplates "criminal" procedure developments in civil cases. Then, it considers how doctrines of substantive law have come to embody the civil-criminal convergence. Recent decades have seen tectonic shifts at the civil-criminal middleground; this phenomenon has had a profound impact on American law.

98. *See id.* at 103–05.

1. The Middleground

Over 30 years ago, Kenneth Mann observed the emergence of a "middleground" between criminal and civil law.[99] To be sure, Mann noted the paradigmatic distinction between "criminal penalties" and "civil remedies"[100]—reflective of a difference in the sanctions' underlying purposes. But courts have long understood that some punitive civil sanctions are best understood as "quasi-criminal," demanding the protections that criminal law offers those accused of crimes.

Acknowledging the existence of a "middleground" presupposes the existence of two poles: a clearly civil universe and an obviously criminal domain. Mann summarized the hallmarks of criminal and civil law.[101] He charted out the classic civil paradigm, noting that the usual civil action has a private entity as the moving party, employs relaxed procedures, calls for damages or an injunction as a remedy, and sees restitution and compensation as its purpose.[102] That description squares with William Prosser's description of tort law as "directed toward the compensation of individuals, rather than the public, for losses which they have suffered within the scope of their legally recognized interests generally, rather than one interest only, where the law considers that compensation is required."[103] Meanwhile, Mann wrote that the quintessential criminal case has the state as its moving party, employs rigorous procedures, calls for imprisonment and stigma as its remedies, and sees punishment as its purpose.[104]

The paradigms make sense. Indeed, Mann's distinctions fit with Blackstone's original formulation of the civil-criminal divide: a civil injury is a private wrong—"an infringement . . . of the civil rights which belong to individuals, considered merely as individuals"—while a criminal offense is a public wrong—"a breach and violation of the public rights and duties, due to the whole community, considered as a community, in it's [sic] social aggregate capacity."[105] Of course, "[c]rimes and torts frequently overlap," given that "most crimes that cause definite losses to ascertainable victims are also torts: the crime of theft is the tort of conversion; the crime of assault is the tort of battery—and the crime of fraud is the tort of fraud."[106] But that is no problem, for "this overlap does not create redundancy. The tort and the crime arise from the same wrongful act, but they are distinct legal

99. *See* Mann, *supra* note 18, at 1799.

100. *See id.* at 1803.

101. *See id.* at 1812–13.

102. *See id.* at 1813.

103. *Id.* at 1808 (quoting WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 1, at 5–6 (5th ed. 1984)).

104. *See id.* at 1813.

105. 4 WILLIAM BLACKSTONE, COMMENTARIES *5.

106. United States v. Bach, 172 F.3d 520, 523 (7th Cir. 1999).

wrongs, invading the rights of separate victims. The tort is a private wrong to the individual victim; the crime is a public wrong to society."[107]

After laying out the paradigms, Mann identified a middleground: state-invoked punitive civil sanctions.[108] These civil sanctions exact more than the damage that the conduct at issue had caused—penalties like treble damages, punitive damages, and forfeitures. Here, Mann contended, "the courts have fashioned a complicated but unequivocally supporting jurisprudence to justify the place of punitive civil sanctions in the constitutional structure of American law."[109] Mann observed that punitive civil sanctions have experienced "rapid development," thanks in large part to Congress's willingness to take advantage of the prospect of punishment with relaxed procedural protections.[110]

The Supreme Court has recognized that these sanctions appear to be a puzzling fit in the American legal system. As early as 1886, the Court in *Boyd v. United States*[111] described "suits for penalties and forfeitures" as "quasi-criminal," subjecting them to the protections of the Fourth Amendment and the Self-Incrimination Clause of the Fifth Amendment.[112] In *One 1958 Plymouth Sedan v. Pennsylvania*,[113] the Court justified the labeling of a forfeiture proceeding as "quasi-criminal" by stating that the proceeding's purpose was punishment.[114] Although recent cases like *Hudson* cast doubt on *Boyd*'s doctrinal approach, the idea of punitive civil sanctions as quasi-criminal has permeated the law. Indeed, the monetary penalty is merely one way that the government can affect

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107. Thomas B. Colby, *Clearing the Smoke from* Philip Morris v. Williams*: The Past, Present, and Future of Punitive Damages*, 118 YALE L.J. 392, 424 (2008) (footnote omitted); *cf.* Gamble v. United States, 139 S. Ct. 1960, 1964 (2019) (reaffirming the Court's longstanding position "that a crime under one sovereign's laws is not 'the same offence' as a crime under the laws of another sovereign" even if the crime arises out of the exact same course of conduct).

108. *See* Mann, *supra* note 18, at 1813.

109. *Id.*

110. *See id.* at 1844.

111. 116 U.S. 616 (1886).

112. *Id.* at 634; *see also* Iowa v. Union Asphalt & Roadoils, Inc., 281 F. Supp. 391, 407 (S.D. Iowa 1968) ("An action for treble damages under the antitrust laws is . . . quasi-criminal.").

113. 380 U.S. 693 (1965).

114. *Id.* at 700–01. The Court explained that the proceeding's "object, like a criminal proceeding, is to penalize for the commission of an offense against the law," as indicated by the fact that the subject of the forfeiture proceeding in question "was subject to the loss of his automobile, which at the time involved had an estimated value of approximately $1,000, a higher amount than the maximum fine in the criminal proceeding." *Id.*

rights and liberties through the civil process.[115] Some jurists and commentators have advocated the "quasi-criminal" label for other proceedings, such as the physical removal of a child from a parent's home through a juvenile dependency proceeding.[116] The remedies available to the state through the civil process run the gamut from incarceration[117] to disqualification of professionals from their industries[118] to an injunction to compel removal of obstructions to navigable waterways[119] to the prohibition of a sex offender from living in his home and the requirement that the sex offender report regularly to law enforcement.[120] As one scholar writes, "The civil law

115. Another method, not discussed in this Article, is the phenomenon of "purchasing submission," by which the government "offer[s] . . . money and other privileges to secure submission to unconstitutional power." PHILIP HAMBURGER, PURCHASING SUBMISSION: CONDITIONS, POWER, AND FREEDOM 151 (2021).

116. *See* Kendra Weber, *Life, Liberty, or Your Children: California Parents' Fifth Amendment Quandary Between Self-Incrimination and Family Preservation*, 12 CHAP. L. REV. 155, 158–59 (2008).

117. 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, 1343–44 (1991).

118. *See* Calcutt v. FDIC, 143 S. Ct. 1317, 1319 (2023) (describing the FDIC's efforts to have a banking executive "barred from the banking industry" for alleged civil violations).

119. *See* Wyandotte Transp. Co. v. United States, 389 U.S. 191, 203 (1967). In permitting the government to seek this sort of remedy in the civil context, the Supreme Court noted "[t]he inadequacy of the criminal penalties" authorized by some statutes, reasoning that injunctive relief was sometimes available—even if not explicitly mentioned in the law—when "criminal liability was inadequate to ensure the full effectiveness of the statute which Congress had intended." *Id.* at 202.

120. *See* Shaw v. Patton, 823 F.3d 556, 568 (10th Cir. 2016) ("These in-person reporting requirements are burdensome; but under our precedents, the burden is not so harsh that it constitutes punishment.").

is rich in remedies."[121] Meanwhile, courts may use civil contempt to incarcerate those who do not comply with their orders.[122]

The middleground has some historical pedigree. Mann cited Blackstone's Commentaries to illuminate the old English understanding: civil penalties were private wrongs that arose from a party's breach of "an implied contract between every citizen and the civic polity or the King"; for this reason, "[a] breach of contract entitled the King, or a private party acting in the name of the King, to liquidated damages . . . assessed *a priori* rather than being tied to a *post hoc* measure of injury actually caused."[123] Yet Mann's description of Blackstone would seem to limit penalties to those that would be reasonable to compensate the party that suffered the breach; here, one would expect some "connection between the actual costs of enforcement and the permissible size of the money

121. Cheh, *supra* note 117, at 1333 ("It offers compensatory damages, punitive damages, restitution, specific performance, injunctive relief, constructive trusts, abatement of nuisances, and forfeitures."); *see also* Sessions v. Dimaya, 138 S. Ct. 1204, 1229 (2018) (Gorsuch, J., concurring in part and concurring in the judgment) ("Ours is a world filled with more and more civil laws bearing more and more extravagant punishments. Today's 'civil' penalties include confiscatory rather than compensatory fines, forfeiture provisions that allow homes to be taken, remedies that strip persons of their professional licenses and livelihoods, and the power to commit persons against their will indefinitely. Some of these penalties are routinely imposed and are routinely graver than those associated with misdemeanor crimes—and often harsher than the punishment for felonies."). Indeed, one scholar has even advocated for the extension of criminal procedural protections to evictions for violating crime-free rental housing ordinances. *See* Kathryn Ramsey Mason, *Civil Means to Criminal Ends*, 81 WASH. & LEE L. REV. 655, 701–07 (2024).

While not exactly a "remedy," the Securities and Exchange Commission often requires that when someone settles with the Commission, that person "must agree both to rescind her past in-court statements contesting the truth of the Commission's allegations and promise never again to contest the truth of the Commission's allegations herself, or even permit others to contest the allegations." Hester M. Peirce, Comm'r, SEC, *Unsettling Silence: Dissent from Denial of Request for Rulemaking to Amend 17 C.F.R. § 202.5(e)* (Jan. 30, 2024), https://www.sec.gov/news/statement/peirce-nand-013024. One SEC Commissioner has criticized this "policy of denying defendants the right to criticize publicly a settlement after it is signed" as butting up against the "freedom to speak against the government and government officials." *Id.*; *cf.* PHILIP HAMBURGER, PURCHASING SUBMISSION 18 (2021) (lamenting how "[t]he growth of federal spending" since the 1960s has allowed the government to demand "massive regulatory, commandeering, and unconstitutional conditions" in exchange for the disbursement of federal funds).

122. *See* Hicks *ex rel.* Feiock v. Feiock, 485 U.S. 624, 632–35 (1988).

123. Mann, *supra* note 18, at 1821.

judgment."[124] That has not been the experience in American courts.[125] Still, the middleground persists in the modern era.[126]

2. Developments in Procedure

As discussed earlier in this Article, the Constitution recognizes a robust package of procedural protections that are specifically for criminal cases. Other procedural protections are grounded in language that could be read to limit the protection to criminal cases yet allow a more expansive reading. In recent years, some jurists have urged the extension of certain of these procedural protections in purportedly civil cases. These efforts have highlighted the difficulty of fitting civil penalties into a legal system designed to safeguard individual liberty and check the government's prosecutorial power. This Part discusses civil-criminal developments with respect to two elements of procedure: the Fourth Amendment's protection against unreasonable searches and seizures and the Sixth Amendment's right to counsel. In addition, this Part surveys the development of another aspect of procedure that the civil-criminal convergence has shaped: *Younger* abstention.

a. The Fourth Amendment

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."[127] To enforce this protection, courts have fashioned what is known as the "exclusionary rule," by which a court assures a criminal defendant—with notable exceptions—"that no evidence seized in violation of the Fourth Amendment will be introduced at his trial unless he consents."[128] Yet courts have considered the possible application of the exclusionary rule in civil cases as an extension of the protection against unlawful government conduct.

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124. *Id.* at 1824.

125. *See id.*

126. While this Article focuses on practices in federal courts, Alexandra Natapoff has pointed out that the "inferior status" of institutions like municipal courts, juvenile courts, family courts, and immigration tribunals has exerted "a gravitational pull on the law itself, blurring definitional lines between criminal and civil, and injecting informality into a relatively formalistic jurisprudential culture." Alexandra Natapoff, *Criminal Municipal Courts*, 134 HARV. L. REV. 964, 972 (2021). This Article concludes that the lines are blurred even at the highest level, but Natapoff observes a starker phenomenon, suggesting "that municipal courts have been partially excused from the Warren Court criminal procedure revolution," given that "the Supreme Court has affirmatively validated the lack of jury trials, the lack of counsel, the lack of legally trained judges, the lack of a record, and the summary quality of proceedings" in municipal courts. *Id.* In sum, Natapoff writes, "[c]riminal law is different" in these courts. *Id.*

127. U.S. CONST. amend. IV.

128. Illinois v. Rodriguez, 497 U.S. 177, 183 (1990).

When applying the exclusionary rule, a threshold question for a court is whether the Fourth Amendment even applies. As Justice Marshall pointed out, "the Fourth Amendment—unlike the Fifth and Sixth—does not confine its protections to either criminal or civil actions. Instead, it protects generally '[t]he right of the people to be secure.'"[129] Courts have applied the Fourth Amendment in all sorts of civil contexts: civil asset forfeiture,[130] administrative searches;[131] involuntary confinement;[132] and, "[u]nder certain narrow circumstances, . . . a civil tax assessment."[133] Still, the Supreme Court has relaxed the Fourth Amendment's protections for civil administrative searches, noting that "a health official need [not] show the same kind of proof to a magistrate to obtain a warrant as one must who would search for the fruits or instrumentalities of crime."[134] The Fourth Amendment also applies "when the Government acts in its capacity as an employer."[135] Yet here, again, the probable cause inquiry is not as rigorous as it is in the criminal context: the Court explained that "'operational realities' could diminish an employee's privacy expectations, and . . . this diminution could be taken into consideration when assessing the reasonableness of a workplace search."[136] Some have criticized the Court's lax approach to the Fourth Amendment's protections in civil cases. Dissenting in *Skinner v. Railway Labor Executives' Ass'n*,[137] Justice Marshall lamented that the Court in that case had effectively "eliminat[ed] altogether the probable-cause requirement for civil searches."[138]

Once the Fourth Amendment applies, the next question for a court is whether it may consider evidence that the government obtained as a result of an unlawful search. In some civil cases, the

129. Skinner v. Ry. Lab. Execs.' Ass'n, 489 U.S. 602, 641 (1989) (Marshall, J., dissenting) (quoting U.S. CONST. amend. IV).

130. *See, e.g.*, Boyd v. United States, 116 U.S. 616 (1886).

131. *See, e.g.*, See v. City of Seattle, 387 U.S. 541, 544 (1967); Camara v. Mun. Ct. of S.F., 387 U.S. 523, 534 (1967); *see also* Laprease v. Raymours Furniture Co., 315 F. Supp. 716, 722 (N.D.N.Y. 1970) ("The Fourth Amendment does not exist simply as a shield to prevent intrusions in criminal matters, but is a basic protection available to all, in matters both civil and criminal.")

132. *See, e.g.*, Glass v. Mayas, 984 F.2d 55, 58 (2d Cir. 1993).

133. Louis J. DeReuil, *Applicability of the Fourth Amendment in Civil Cases*, 1963 DUKE L.J. 472, 487 (1963); *see also* Harry N. MacLean, Note, *The Fourth Amendment and the Exclusionary Rule in Civil Cases*, 43 DENVER L.J. 511, 514–16 (1966) (describing the rule's applicability in tax proceedings).

134. *Camara*, 387 U.S. at 538 (quoting Frank v. Maryland, 359 U.S. 360, 383 (1958) (Douglas, J., dissenting)).

135. City of Ontario v. Quon, 560 U.S. 746, 756 (2010).

136. *Id.* at 756–57 (describing the inquiry as concerning the totality of the circumstances (quoting Nat'l Treasury Emps. Union v. Von Raab, 489 U.S. 656, 671 (1989))).

137. 489 U.S. 602 (1988).

138. *Id.* at 640 (Marshall, J., dissenting).

answer is no. *Boyd* is one of the original examples. There, the Court determined that the Fourth Amendment's protections applied in "proceedings instituted for the purpose of declaring the forfeiture of a man's property by reason of offences committed by him," because "though they may be civil in form, are in their nature criminal."[139] In *One 1958 Plymouth Sedan*, the Court elaborated on *Boyd*, concluding that "a forfeiture proceeding is quasi-criminal in character," for "[i]ts object, like a criminal proceeding, is to penalize for the commission of an offense against the law."[140]

Yet as late as 1984, the Court was still unsure of "[t]he reach of the exclusionary rule beyond the context of a criminal prosecution."[141] In that case, *INS v. Lopez-Mendoza*, the Court held that the "balance between costs and benefits comes out against applying the exclusionary rule in civil deportation hearings."[142] Earlier, the Court had reached the same conclusion with respect to "the use in the civil proceeding of one sovereign of evidence seized by a criminal law enforcement agent of another sovereign."[143] *Lopez-Mendoza* stands for the proposition that the exclusionary rule does not apply in immigration hearings, but a later Ninth Circuit decision nevertheless stated "that *egregious* Fourth Amendment violations warrant the application of the exclusionary rule in civil proceedings."[144]

Reflecting on the application of the exclusionary rule in civil cases, the Court stated that "[t]here comes a point at which courts, consistent with their duty to administer the law, cannot continue to create barriers to law enforcement in the pursuit of a supervisory role that is properly the duty of the Executive and Legislative Branches."[145] Nevertheless, the Court acknowledged that "[t]he seminal cases that apply the exclusionary rule to a civil proceeding involve 'intrasovereign' violations."[146] And since *One 1958 Plymouth Sedan*, multiple examples exist of courts "prohibit[ing] governmental authorities from using illegally seized evidence in the proceedings for which the search was conducted, not only in a criminal prosecution, but also in the variety of civil proceedings."[147] But in the particular context of the exclusionary rule, one court has observed that "[t]he Supreme Court has *never* held that the benefits of the exclusionary

139. Boyd v. United States, 116 U.S. 616, 633–34 (1886); *see also* DeReuil, *supra* note 133, at 482 ("A number of judicial decisions have been cited for the proposition that the federal exclusionary rule of the fourth amendment applies to civil cases.").

140. 380 U.S. 693, 700 (1965).

141. INS v. Lopez-Mendoza, 468 U.S. 1032, 1041 (1984) (emphasis added).

142. *Id.* at 1050.

143. United States v. Janis, 428 U.S. 433, 459–60 (1976).

144. Gonzalez-Rivera v. INS, 22 F.3d 1441, 1448 (9th Cir. 1994).

145. *Janis*, 433 U.S. at 459.

146. *Id.* at 456.

147. Tirado v. Comm'r, 689 F.2d 307, 311 & n.5 (2d Cir. 1982).

rule outweigh its costs in a civil case."[148] Looking ahead, the next battleground appears to be whether the exclusionary rule applies in civil rights actions under 42 U.S.C. § 1983.[149]

b. The Right to Counsel

The Sixth Amendment guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."[150] In *Gideon v. Wainwright*,[151] the Supreme Court announced that the Sixth Amendment—"refracted" through the "lens" of the Fourteenth Amendment's due process clause—requires the appointment of counsel for indigent defendants in state criminal cases.[152] To satisfy the Court's interpretation of the Sixth Amendment, counsel must be effective.[153] Some courts have extended to civil cases the right to counsel. Moreover, a recent Supreme Court case determined that counsel was ineffective when that lawyer did not inform a defendant about a conviction's *civil* consequence: deportation.

The meaning of "have the Assistance of Counsel" in the Sixth Amendment is contested. As noted, the Supreme Court has interpreted this text to establish an individual right to state-furnished counsel. But some Justices have contended that this understanding is inconsistent with the original meaning of the Constitution.[154] Justice Scalia has submitted that "[t]he Sixth

148. Black v. Wigington, 811 F.3d 1259, 1267–68 (11th Cir. 2016) (emphasis added).

149. *See* Vargas Ramirez v. United States, 93 F. Supp. 3d 1207, 1230 (W.D. Wash. 2015). In *Vargas Ramirez*, a plaintiff sought to invoke the exclusionary rule to exclude a confession of his that resulted from an unlawful seizure; the confession might have undermined a civil tort claim that he sought to maintain. *See id*. The court determined "that the exclusionary rule is inapplicable in the context of civil tort claims." *Id*. But citing cases like *Vargas Ramirez* might prove too much for the government in such cases. The exclusionary rule is a means of balancing the costs of excluding good evidence in criminal cases with the benefits of deterring police misconduct. *See* Utah v. Strieff, 579 U.S. 232, 235 (2014). Meanwhile, § 1983 cases do not require such a balancing, because the litigant's goal is compensation—not evidentiary exclusion. Thus, if the exclusionary rule does not apply, neither might the Fourth Amendment holdings of the arsenal of criminal-procedure precedents that effectively excuse constitutional violations when the main question before the court was whether to exclude evidence at trial.

150. U.S. CONST. amend. VI.

151. 372 U.S. 335 (1963).

152. *Id.* at 343–44; Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1137 (1991) ("[M]ost lawyers read the Bill of Rights through the Fourteenth Amendment without realizing how powerfully that lens has refracted what they see.").

153. *See* Strickland v. Washington, 466 U.S. 668, 685–86 (1984).

154. *See* Garza v. Idaho, 139 S. Ct. 738, 756–57 (2019) (Thomas, J., dissenting); Padilla v. Kentucky, 559 U.S. 356, 389 (2010) (Scalia, J., dissenting).

Amendment as originally understood and ratified meant only that a defendant had a right to employ counsel, or to use volunteered services of counsel."[155] Over these Justices' objections, however, the Court has forged ahead, requiring not only state-furnished counsel but also *effective* counsel.[156] The Court has crafted a two-part test for ineffectiveness: "[A] defendant who claims ineffective assistance of counsel must prove (1) 'that counsel's representation fell below an objective standard of reasonableness,' and (2) that any such deficiency was 'prejudicial to the defense.'"[157]

In rare circumstances, courts have extended *Gideon* to civil cases. Of course, the Sixth Amendment applies only to "criminal prosecutions."[158] So, because "the Sixth Amendment does not govern civil cases," the Supreme Court has looked to the Fourteenth Amendment's Due Process Clause in determining the right to counsel in civil proceedings—even those in which incarceration is a possible result.[159] In *Turner v. Rogers*,[160] the Court held that "the Due Process Clause does not *automatically* require the provision of counsel at civil contempt proceedings to an indigent individual who is subject to a child support order, even if that individual faces incarceration (for up to a year)."[161] Yet the Court emphasized the limits of this holding, noting that it was only talking about cases in which "the opposing parent or other custodian (to whom support funds are owed) is not represented by counsel and the State provides alternative procedural safeguards."[162]

That is because the Court has acknowledged that there is a right to counsel in at least *some* civil cases in which incarceration is on the table.[163] Indeed, the Court has required counsel in civil juvenile delinquency proceedings because, though labeled civil, these proceedings are "comparable in seriousness to a felony prosecution"—subjecting the accused as they do "to the loss of his liberty for years."[164] Moreover, the Court in *Turner* left open the door to a right to counsel in "civil contempt proceedings where the underlying child support payment is owed to the State, for example, for reimbursement of welfare funds paid to the parent with custody" (analogizing these

155. *Padilla*, 559 U.S. at 389 (Scalia, J., dissenting).

156. *See Garza*, 139 S. Ct. at 743–44.

157. *Id.* at 744 (quoting *Strickland*, 466 U.S. at 687–88, 692).

158. U.S. CONST. amend. VI.

159. Turner v. Rogers, 564 U.S. 431, 441 (2011) (analyzing the right to counsel in civil contempt proceedings).

160. 564 U.S. 431 (2010).

161. *Id.* at 448.

162. *Id.*

163. *Id.* at 442–43; Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 25–27 (1981).

164. *In re* Gault, 387 U.S. 1, 36 (1967). Also, the Court has required the assistance of a mental health professional in cases concerning the transfer of a prisoner to a mental hospital; a four-Justice plurality would have required a lawyer. *See* Vitek v. Jones, 445 U.S. 480, 496–97 (1980) (plurality opinion).

to debt-collection proceedings) and "in an unusually complex case where a defendant 'can fairly be represented only by a trained advocate.'"[165]

The civil-criminal convergence has also impacted the effectiveness inquiry in right-to-counsel jurisprudence. In *Padilla v. Kentucky*,[166] the Supreme Court confronted a case concerning the first element of the two-part ineffectiveness-of-counsel test: "whether counsel's representation 'fell below an objective standard of reasonableness.'"[167] Reviewing the state of the law in 2010, Justice Alito noted that "the longstanding and unanimous position of the federal courts was that reasonable defense counsel generally need only advise a client about the direct consequences of a criminal conviction."[168] That meant that a failure to advise a client of the collateral consequences of a conviction would not constitute ineffective counsel. Yet the *Padilla* Court pivoted from this long-held understanding; the Court concluded that there was one collateral consequence of which "counsel must inform her client whether his plea carries a risk": "deportation."[169] In justifying its rule, the Court explained that "[a]lthough removal proceedings are civil in nature, deportation is nevertheless intimately related to the criminal process."[170]

In a concurrence in the judgment, Justice Alito noted that the Court had "never held that a criminal defense attorney's Sixth Amendment duties extend to providing advice about" other civil collateral consequences of criminal convictions.[171] He listed the variegated consequences that can flow from such convictions: "civil commitment, civil forfeiture, the loss of the right to vote, disqualification from public benefits, ineligibility to possess firearms, dishonorable discharge from the Armed Forces, and loss of business or professional licenses."[172] *Padilla* is an outlier, and at least one

165. *Turner*, 564 U.S. at 449 (quoting Gagnon v. Scarpelli, 411 U.S. 778, 788 (1973)).

166. 559 U.S. 356 (2010).

167. *Id.* at 366 (quoting Strickland v. Washington, 466 U.S. 668, 688 (1984)).

168. *Id.* at 375–76 (Alito, J., concurring in the judgment).

169. *Id.* at 374 (majority opinion).

170. *Id.* at 365 (citation omitted); *see also id.* at 365–66 ("Our law has enmeshed criminal convictions and the penalty of deportation for nearly a century . . . .").

171. *Id.* at 376–77 (Alito, J., concurring in the judgment).

172. *Id.* at 376 (citing Gabriel J. Chin & Richard W. Holmes, *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 CORNELL L. REV. 697, 705–06 (2002)); *see also* Paul T. Crane, *Charging on the Margin*, 57 WM. & MARY L. REV. 775, 785 (2016) ("Collateral consequences are generally understood to include sex offender registration, civil commitment, civil forfeiture, firearm prohibitions, disenfranchisement, preclusion from juror service, bans on running for public office, disqualification from public benefits (such as public housing or food assistance), ineligibility for business and professional licenses, termination

district court has cited Justice Alito's separate opinion in declining to extend *Padilla* to some of these other circumstances.[173] Yet the Second Circuit just announced that it will go en banc to consider whether "the Sixth Amendment require[s] criminal defense counsel to advise a naturalized-citizen client of the risks of denaturalization and/or deportation that flow from the entry of a guilty plea," raising the possibility of a significant extension of *Padilla*'s rule.[174]

c. *Younger* Abstention

The final procedural doctrine that this Part will discuss is *Younger* abstention. It is axiomatic that federal courts have a "virtually unflagging obligation . . . to exercise the jurisdiction given them."[175] Butting up against this principle, the Supreme Court in *Younger v. Harris* explained that "settled doctrines [had] always confined very narrowly the availability of injunctive relief against state criminal prosecutions."[176] That case's holding and reasoning flowed from a deeply rooted Anglo-American legal tradition: "[E]quity will not enjoin a criminal prosecution."[177] Yet in recent years, the Court has extended *Younger* abstention to civil cases. *Younger*'s leakage into civil cases started in *Huffman v. Pursue, Ltd.*,[178] which the Court determined to resemble a criminal prosecution. In recent years, courts (including the Supreme Court) have invoked *Younger* in a whole host of situations, keying the extension of *Younger* to cases

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or limitation of parental rights, and—for noncitizen defendants—deportation."); *see also* Jenny Roberts, Gundy *and the Civil-Criminal Divide*, 17 OHIO ST. J. CRIM. L. 207, 221 (2019) (suggesting that technological advances, through which the public now has ready access to criminal record databases, have created new consequences for convictions).

173. *See* Horton v. Recktenwald, No. 15-CV-843-RJA, 2017 WL 2964726, at *8 (W.D.N.Y. Feb. 6, 2017) (rejecting an ineffectiveness-of-counsel claim that rested on the allegation that "counsel erroneously failed to advise [a defendant] that he would forfeit his right to vote and possess a firearm upon pleading guilty").

174. Order at 1, Farhane v. United States, No. 20-1666 (2d Cir. Feb. 20, 2024), ECF No. 219.

175. Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 817 (1976); *see also* Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404 (1821) ("We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the Constitution.").

176. 401 U.S. 37, 53 (1971).

177. Stefanelli v. Minard, 342 U.S. 117, 120 (1951) ("The maxim . . . summarizes centuries of weighty experience in Anglo-American law."); *see also* Note, *Federal Equitable Restraint: A* Younger *Analysis in New Settings*, 35 MD. L. REV. 483, 484–85 n.16 (1976) (describing this principle as embodying a "powerful tradition").

178. 420 U.S. 592 (1975).

that "implicate a State's interest in enforcing the orders and judgments of its courts."[179]

The Court held in *Younger* that a California federal court should abstain from enjoining ongoing criminal proceedings against a defendant in California state court.[180] This holding came in spite of the defendant's allegation that the prosecution and the underlying state statute violated the federal Constitution's First Amendment.[181] *Younger* vindicated a longstanding principle of equity in the English courts: "[C]ourts of equity should not act, and particularly should not act to restrain a criminal prosecution, when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief."[182] Yet *Younger* also gave voice to another interest that was ascendant at this time at the Court: federalism.[183] The Court noted that a respect for federalism—which it described as "a system in which there is sensitivity to the legitimate interests of both State and National Governments," as well as one "in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States"—served to "reinforce[]" the equity argument for *Younger*.[184]

But the Court did not stop at *criminal* proceedings. A few years later, the Court in *Huffman* confronted an Ohio county's attempt to

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179. Sprint Commc'ns, Inc. v. Jacobs, 571 U.S. 69, 72–73 (2013).

180. *See Younger*, 401 U.S. at 41; *see also id.* at 56 (Stewart, J., concurring) ("[W]e hold that a federal court must not, save in exceptional and extremely limited circumstances, intervene by way of either injunction or declaration in an existing state criminal prosecution.").

181. *See id.* at 38–39.

182. *Id.* at 43–44. The Court observed that "[t]he doctrine may originally have grown out of circumstances peculiar to the English judicial system and not applicable in this country, but its fundamental purpose of restraining equity jurisdiction within narrow limits is equally important under our Constitution." *Id.* at 44. Here, the Court justified the importation of this equity principle "in order to prevent erosion of the role of the jury and avoid a duplication of legal proceedings and legal sanctions where a single suit would be adequate to protect the rights asserted." *Id.* In an earlier case, the Court had described this understanding of equity jurisprudence as a limitation on the doctrine of *Ex parte Young*. *See* Fenner v. Boykin, 271 U.S. 240, 243 (1926) ("*Ex parte Young* . . . and following cases have established the doctrine that, when absolutely necessary for protection of constitutional rights, courts of the United States have power to enjoin state officers from instituting criminal actions. But this may not be done, except under extraordinary circumstances, where the danger of irreparable loss is both great and immediate.").

183. *See Younger*, 401 U.S. at 44 (tying *Younger* abstention to the doctrine of "Our Federalism"); *see also* Anne Rachel Traum, *Distributed Federalism: The Transformation of* Younger, 106 CORNELL L. REV. 1759, 1768–70 (2021) (describing *Younger*'s elevation of federalism to a threshold issue).

184. *Younger*, 401 U.S. at 44.

invoke a state public nuisance law against a theater that displayed pornographic films.[185] Though civil in nature, the law provided for such remedies as "closure for up to a year of any place determined to be a nuisance" and "sale of all personal property used in conducting the nuisance."[186] The county had instituted a nuisance proceeding against the defendant in state court, and the court determined that closure and a sale of assets was appropriate.[187] Rather than appealing the judgment in state court, the owner of the theater sued in federal court, alleging a First Amendment violation.[188]

The Court acknowledged that the case presented a different question than did *Younger*—here, the Court needed to decide whether "the principles of *Younger* are applicable even though the state proceeding is civil in nature."[189] The Court answered in the affirmative.[190] Expanding on *Younger*, the Court explicitly centered federalism in deciding the question, determining that "[t]he component of *Younger* which rests upon the threat to our federal system is . . . applicable to a civil proceeding such as this quite as much as it is to a criminal proceeding."[191] The Court conceded—as it had to—that the history-of-equity element of *Younger* was inapplicable in civil cases, but it squared the circle by concluding that it was dealing "with a state proceeding which in important respects is more akin to a criminal prosecution than are most civil cases."[192] Drawing on several federal appellate decisions that applied *Younger* in the civil context, the Court moved the doctrinal needle and grafted *Younger* onto a noncriminal case.[193]

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185. *See* Huffman v. Pursue, Ltd., 420 U.S. 592, 595 (1975).

186. *Id.* at 595–97 (describing OHIO REV. CODE ANN. § 3767.01 (West 1971)).

187. *Id.* at 598.

188. *Id.* at 598–99.

189. *Id.* at 594.

190. *See id.*

191. *Id.* at 604.

192. *Id.*; *see also id.* at 604–05 ("The State is a party to the Court of Common Pleas proceeding, and the proceeding is both in aid of and closely related to criminal statutes which prohibit the dissemination of obscene materials. Thus, an offense to the State's interest in the nuisance litigation is likely to be every bit as great as it would be were this a criminal proceeding. *Cf.* Younger v. Harris, 401 U.S. at 55 n.2 (Stewart, J., concurring). Similarly, while in this case the District Court's injunction has not directly disrupted Ohio's criminal justice system, it has disrupted that State's efforts to protect the very interests which underlie its criminal laws and to obtain compliance with precisely the standards which are embodied in its criminal laws.").

193. The Court cited *Duke v. Texas*, 477 F.2d 244 (5th Cir. 1973); *Lynch v. Snepp*, 472 F.2d 769 (4th Cir. 1973); and *Cousins v. Wigoda*, 463 F.2d 603 (7th Cir. 1972), as three examples of cases in which, "[i]nformed by the relevant principles of comity and federalism, . . . Courts of Appeals have applied *Younger* when the pending state proceedings were civil in nature." *Huffman*, 420 U.S. at 607. *Duke* concerned the issuance of a temporary restraining order—which matured into an arrest for contempt of court when the subjects of the order did

Younger's domain continued to expand. Two later cases saw the Court move past state proceedings akin to criminal prosecutions. In *Juidice v. Vail*[194] and *Pennzoil Co. v. Texaco Inc.*,[195] the Court applied *Younger* to compel lower-court abstention in contempt proceedings. The Court saw contempt proceedings as implicating "the importance to the States of enforcing the orders and judgments of their courts," given that "[t]here is little difference between the State's interest in forcing persons to transfer property in response to a court's judgment and in forcing persons to respond to the court's process on pain of contempt."[196] One scholar described *Pennzoil* as "herald[ing] the full civil application of *Younger*."[197] Perhaps most importantly, the Court in *Juidice* described the *Huffman* proceedings as "quasi-criminal,"[198] harkening back to a term used in *Boyd* and some of the other search-and-seizure cases discussed earlier. In cases spanning from *Huffman* to *One 1958 Plymouth Sedan*, the Court has dealt with the issue of proceedings that are not *formally* criminal yet are criminal *enough* to justify applying some of the legal doctrines (in some instances watered down) that are traditionally reserved for criminal cases.

The Court has formalized *Huffman* and *Juidice*/*Pennzoil* as categories of *Younger* abstention. The Court limited *Younger* to these categories, as well as ongoing state criminal proceedings, in *NOPSI v. Council of New Orleans*.[199] The *NOPSI* Court rejected the application of *Younger* abstention to a challenge against state ratemaking action that the Court termed legislative in nature.[200] Later, in *Sprint Communications, Inc. v. Jacobs*,[201] the Court

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not comply—against three people who tried staging a rally at North Texas State University in protest of certain military activities in Southeast Asia. *See Duke*, 477 F.2d at 246–47; Duke v. Texas, 327 F. Supp. 1218, 1223 (E.D. Tex. 1971). The *Lynch* court halted proceedings that reviewed a preliminary injunction against certain North Carolina state officials—the injunction barred them from entering the public schools of Mecklenburg County. 472 F.2d at 770. And in *Cousins*, the Seventh Circuit dealt with state proceedings orchestrated to prevent a group of Illinois Democratic delegates from challenging the Illinois Democratic Party's seating of an alternate slate of delegates ahead of the 1972 Democratic National Convention. 463 F.2d at 604–05. Notably, however, *Huffman* distinguished between civil enforcement by the state and "civil litigation involving private parties." 420 U.S. at 604.

194. 430 U.S. 327 (1977).

195. 481 U.S. 1 (1987).

196. *Id.* at 13. Here again, the *Younger* abstention cases' federalism throughline was on display. *See id.* at 14 (citing the need for "proper respect for the ability of state courts to resolve federal questions presented in state-court litigation").

197. Howard B. Stravitz, Younger *Abstention Reaches a Civil Maturity:* Pennzoil Co. v. Texaco Inc., 57 FORDHAM L. REV. 997, 999 (1989).

198. *Juidice*, 430 U.S. at 335.

199. 491 U.S. 350 (1989).

200. *Id.* at 372.

201. 571 U.S. 69 (2013).

described its jurisdiction as admitting of three *Younger* exceptions: (1) "federal intrusion into ongoing state criminal prosecutions,"[202] (2) "certain 'civil enforcement proceedings,'"[203] and (3) "pending 'civil proceedings involving certain orders . . . uniquely in furtherance of the state courts' ability to perform their judicial functions.'"[204]

3. Developments in Substantive Law

Robust procedure is not the only protection that the accused enjoy in the American legal system. Law also limits the legislature in *how* it can punish. The civil-criminal convergence is coming for the legal doctrines that give effect to these limitations. This Part discusses three: the void-for-vagueness doctrine, the rule of lenity, and the protection against ex post facto laws. Although the bar has traditionally understood each of these doctrines only to apply in criminal cases, a jurisprudential and scholarly effort is afoot to bring these protections into civil cases.

a. Vagueness

The Supreme Court has interpreted the Due Process Clauses of the Fifth and Fourteenth Amendments to prohibit legislation that is too vague in setting out the conduct that it prohibits.[205] Courts have traditionally understood the most rigorous version of vagueness doctrine to be a limitation on the state's criminal lawmaking power.[206] Yet the Court—in *Sessions v. Dimaya*[207]—recently applied a robust vagueness doctrine in the immigration context against the backdrop of *civil* deportation.[208] And although this purported extension of criminal-level vagueness review to civil cases met with some protest in *Dimaya*, it represents yet another example of the civil-criminal convergence.

The Supreme Court has explained that due process requires a penal statute to "define the *criminal* offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement."[209] Applying the void-for-vagueness

202. *Id.* at 78 (quoting *NOPSI*, 491 U.S. at 368).

203. *Id.* (citing Huffman v. Pursue, Ltd., 420 U.S. 592, 604 (1975)).

204. *Id.* (citing *NOPSI*, 491 U.S. at 368).

205. *See, e.g.*, Holder v. Humanitarian L. Project, 561 U.S. 1, 18–19 (2010) (describing the Court's Fifth Amendment jurisprudence); Papachristou v. City of Jacksonville, 405 U.S. 156, 165 (1972) (noting that the federal due process implications of the vagueness doctrine are equally applicable in the state context).

206. *See Papachristou*, 405 U.S. at 165.

207. 138 S. Ct. 1204 (2018).

208. *Id.* at 1213.

209. Kolender v. Lawson, 461 U.S. 352, 357 (1983) (emphasis added); *see also* Skilling v. United States, 561 U.S. 358, 402–03 (2010) (tying vagueness to due

doctrine, the Supreme Court has declared numerous criminal anti-loitering laws unconstitutional.[210] Indeed, courts have described the vagueness limitation as "primarily a criminal doctrine."[211] Relatedly, in vagueness cases, the Supreme Court has been vigilant about preventing legislatures from achieving criminal law ends without affording the protection that mens rea requirements guarantee.[212]

To be sure, the vagueness doctrine has been applied in civil cases. In *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*,[213] the Court evaluated whether a drug paraphernalia licensing ordinance was void for vagueness.[214] Years earlier, the Court in *Keyishian v. Board of Regents*[215] declared a state's hiring program—pursuant to which the state had disqualified certain "subversive" persons from state employment—to be unconstitutionally vague in its standards for who qualified as subversive.[216] In another case decided that year, *Boutilier v. INS*,[217] the Court stated that it had "held the 'void for vagueness' doctrine applicable to civil as well as criminal actions."[218] And in *FCC v. Fox Television Stations, Inc.*,[219] the Court applied the

process). The vagueness doctrine also comes into play with statutes defining the contours of a criminal sentencing regime. *See* Beckles v. United States, 137 S. Ct. 886, 892 (2017).

210. *See, e.g.*, City of Chicago v. Morales, 527 U.S. 41, 41–42 (1999); *Kolender*, 461 U.S. at 352; *Papachristou*, 405 U.S. at 156; Coates v. City of Cincinnati, 402 U.S. 611, 614 (1971).

211. Griffin v. Bryant, 30 F. Supp. 3d 1139, 1173 (D.N.M. 2014); S.C. Hum. Affs. Comm'n v. Zeyi Chen, 846 S.E.2d 861, 871 (S.C. 2020). The Supreme Court has routinely described the vagueness doctrine with reference to criminal law. *See, e.g.*, *Beckles*, 137 S. Ct. at 892; Johnson v. United States, 576 U.S. 591, 595 (2015); *Kolender*, 461 U.S. at 357; United States v. Batchelder, 442 U.S. 114, 123 (1979); Smith v. Goguen, 415 U.S. 566, 574 (1974); *see also* Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67, 67 n.2 (1960) (describing "Supreme Court review of state *criminal* administration" as "the most significant sphere of operation of the void-for-vagueness doctrine" (emphasis added)).

212. *See* Colautti v. Franklin, 439 U.S. 379, 395 (1979) ("This Court has long recognized that the constitutionality of a vague statutory standard is closely related to whether that standard incorporates a requirement of *mens rea*."); *see also Morales*, 527 U.S. at 55 (plurality opinion) (describing—in the context of a vagueness challenge—an anti-loitering ordinance as "a criminal law that contains no *mens rea* requirement"); Michael J. Zydney Mannheimer, *Vagueness as Impossibility*, 98 TEX. L. REV. 1049, 1093 & nn.311–15 (2020) (discussing the connection).

213. 455 U.S. 489 (1982).

214. *Id.* at 492–95.

215. 385 U.S. 589 (1967).

216. *Id.* at 591, 609–10.

217. 387 U.S. 118 (1967).

218. *Id.* at 123 (citing A.B. Small Co. v. Am. Sugar Ref. Co., 267 U.S. 233, 239 (1925)).

219. 567 U.S. 239 (2012).

vagueness doctrine in the civil regulatory context to set aside orders of the Federal Communications Commission.[220] Yet despite vagueness's appearance in civil cases, courts have applied a different vagueness standard in such cases than they have in criminal cases.[221]

As far back as 1925, the Court had interpreted "[t]he ground or principle" of prior vagueness jurisprudence as "not such as to be applicable only to criminal prosecutions" because "[i]t was not the criminal penalty that was held invalid, but the exaction of obedience to a rule or standard which was so vague and indefinite as really to be no rule or standard at all."[222] By comparison, the standard described in *Kolender v. Lawson*[223] for criminal vagueness review sets a higher bar for constitutionality.[224] As with many of the other doctrines discussed in this Article, the key question in a given case thus becomes: Does the civil vagueness or the criminal vagueness standard apply?

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220. *Id.* at 258. To be sure, the orders in *Fox Television* concerned restrictions on speech—a setting in which the Court observed that "rigorous adherence to [the vagueness doctrine's] requirements is necessary to ensure that ambiguity does not chill protected speech." *Id.* at 254.

221. One scholar has written, in the vagueness context, that "enactments with civil penalties are subject to a less exacting test for precision than enactments carrying criminal penalties." Mila Sohoni, *Notice and the New Deal*, 62 DUKE L.J. 1169, 1176 (2013). That tracks with the Court's observation in *Hoffman Estates* that when applying the vagueness doctrine, "[t]he Court has . . . expressed greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe." *Hoffman Ests.*, 455 U.S. at 498–99. Some courts have disagreed, at least in certain contexts, that the standard should be different. *See, e.g.*, *In re* Treatment of Mays, 68 P.3d 1114, 1117 (Wash. Ct. App. 2003) (rejecting "the State's claim that the criminal due process test for vagueness does not apply to civil commitments" and opining that "there is no distinction between the vagueness tests applicable to civil and criminal proceedings").

222. *A.B. Small Co.*, 267 U.S. at 239.

223. 461 U.S. 352 (1983).

224. *See id.* at 357 ("As generally stated, the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement."). Carving out one possible exception from the civil-criminal distinction in this area of the law, the *Hoffman Estates* Court noted that "perhaps the most important factor affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights." *Hoffman Ests.*, 455 U.S. at 499. By way of example, the Court highlighted that if a "law interferes with the right of free speech or of association, a more stringent vagueness test should apply." *Id.* Vagueness is not the only doctrine that has separate rules when Bill of Rights guarantees are at stake. *See, e.g.*, Nachmany, *supra* note 42, at 519 (uncovering a Bill of Rights nondelegation jurisprudence at the Supreme Court).

This all came to a head in *Dimaya*. There, the Court dealt with a vagueness challenge to a statutory definition of "crime of violence" for which the prescribed statutory penalty is deportation.[225] Although the consequence is severe, deportation is formally a *civil*—not a criminal—penalty.[226] Justice Kagan's plurality opinion declared that the more-exacting form of vagueness review was applicable because "'of the grave nature of deportation'—a 'drastic measure,' often amounting to lifelong 'banishment or exile.'"[227] In a concurring opinion, Justice Gorsuch indicated that he would go further—in his view, the exacting vagueness standard applies in all "civil cases affecting a person's life, liberty, or property."[228] Dissenting in *Dimaya*, Justice Thomas expressed "doubts about whether the vagueness doctrine can be squared with the original meaning of the Due Process Clause," stating that those doubts are "only amplified in the removal context."[229] Still, Justice Thomas described modern vagueness doctrine as "extend[ing] to all regulations of individual conduct, both penal and nonpenal."[230]

The penal-nonpenal distinction is different from the criminal-civil distinction. Civil laws may well be penal. The divide, as Justice Thomas explains in his *Dimaya* dissent, is whether a law touches one of the private rights enumerated in the Due Process Clause: life, liberty, or property—narrowly defined.[231] Justice Thomas took the position that deportation did not fall into any of these three categories because removal from the country only deprives one of a "[q]uasi-private right[]" (the right to reside in the country) that is better understood in the immigration context as a "'privilege[]' or 'franchise[]' bestowed by the government on individuals."[232] In an earlier vagueness dissent, Justice Thomas illustrated how modern vagueness precedents have—in his view, wrongly—run the gamut from penal to nonpenal laws.[233]

Setting aside the penal-nonpenal distinction: Whether grounded in the original meaning of the Due Process Clause (as Justice Gorsuch suggests) or the result of modern doctrinal innovations (as Justice Thomas contends), the extension of a robust vagueness doctrine to

225. Sessions v. Dimaya, 138 S. Ct. 1204, 1210 (2018).

226. *See id.* at 1213.

227. *Id.* (quoting Jordan v. De George, 341 U.S. 223, 231 (1951)).

228. *Id.* at 1225, 1228 (Gorsuch, J., concurring in part and concurring in the judgment).

229. *Id.* at 1242 (Thomas, J., dissenting).

230. *Id.* at 1244; *see also* Johnson v. United States, 576 U.S. 591, 612–13 (2015) (Thomas, J., concurring in the judgment) (describing the reach of modern vagueness doctrine).

231. *See Dimaya*, 138 S. Ct. at 1246 (Thomas, J., dissenting).

232. *Id.*

233. *See Johnson*, 576 U.S. at 612 (Thomas, J., concurring in the judgment) (describing *Keyishian* as concerning a nonpenal law).

civil cases shows how the civil-criminal convergence implicates more than just procedural review. Moreover, in the wake of *Dimaya*, the test for whether the strict vagueness standard applies appears no longer to be simply whether the case is civil or criminal. Rather, the *Dimaya* plurality looked to the graveness of the sanction, seeming to echo the "quasi-criminal" inquiry that animates some of the procedural doctrines discussed earlier.

b. Lenity

Courts apply a range of "canons" of interpretation, linguistic and substantive, to guide their determination of what a given statute means.[234] One such canon is the rule of lenity, which is "typically described this way: it instructs courts to resolve ambiguities in *criminal* statutes in favor of the *criminal* defendant."[235] Yet courts have applied lenity in civil cases. Recently, Justice Gorsuch has led the charge at the Supreme Court to recognize these efforts as consistent with the rule of lenity's tradition. Justice Gorsuch's argument has been that lenity applies when a statute imposes a *penalty*, even if that penalty is civil.

Only when a statute is ambiguous will a court apply the rule of lenity.[236] The Supreme Court has explained that "the rule of lenity is a principle of statutory construction which applies not only to interpretations of the substantive ambit of *criminal* prohibitions, but also to the penalties they impose."[237] That word—criminal—appears frequently in the lenity cases. In *Ladner v. United States*,[238] the Court conceived of "[t]he policy of lenity" as implicating its interpretation of "federal criminal statute[s]."[239] Indeed, lenity traces its origins to early English common law, when "English jurists sought creative ways to avoid capital punishment" by strictly construing criminal felony laws.[240] And in the 1817 case of *United States v. Sheldon*[241]—which one scholar describes as when "the Supreme Court first suggested that an ambiguity in a criminal statute ought to be strictly construed against the government"[242]—the Court interpreted an ambiguity in a *criminal* misdemeanor law in favor of the defendant.[243]

234. For a general overview of canons employed by courts, see Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109 (2010).
235. *Id.* at 117–18 (emphasis added).
236. *See* Albernaz v. United States, 450 U.S. 333, 342 (1981).
237. *Id.* (emphasis added).
238. 358 U.S. 169 (1958).
239. *Id.* at 178.
240. Romantz, *supra* note 65, at 526–27.
241. 15 U.S. (2 Wheat.) 119 (1817).
242. Romantz, *supra* note 65, at 517.
243. *Sheldon*, 15 U.S. (2 Wheat.) at 121–22.

That said, the Court described what it was doing as "construing a *penal* law by equity."[244]

Does lenity apply to civil penal laws? Justice Gorsuch submits that it does. Concurring in the judgment in *Wooden v. United States*,[245] Justice Gorsuch criticized those who "have treated the rule as an island unto itself—a curiosity unique to criminal cases."[246] Taking the position that "lenity has long applied outside what we today might call the criminal law," Justice Gorsuch described the relevant distinction for lenity's purposes as penal vs. nonpenal, rather than criminal vs. civil.[247] That understanding comports with how Chief Justice Marshall described the rule in an 1812 case.[248] A year after *Wooden*, Justice Gorsuch applied the rule of lenity to a civil penal statute, citing more recent cases that establish a basis in modern precedent for lenity's civil application.[249]

c. Ex Post Facto Laws

The Constitution provides that "[n]o . . . ex post facto Law shall be passed."[250] Early interpretations of the Ex Post Facto Clause oscillated between highlighting the penal-nonpenal distinction and focusing particularly on *crime*.[251] Yet the Court came to limit the Ex Post Facto Clause's application to criminal cases.[252] Today, the question in a "civil" Ex Post Facto Clause case is whether the law is actually criminal; to engage in this inquiry, courts apply the *Hudson*

244. *Id.* at 121 (emphasis added).

245. 142 S. Ct. 1063 (2022).

246. *Id.* at 1086 (Gorsuch, J., concurring).

247. *Id.* at 1086 n.5 ("Historically, lenity applied to all 'penal' laws—that is, laws inflicting any form of punishment, including ones we might now consider 'civil' forfeitures or fines.").

248. *See* The Adventure, 1 F. Cas. 202, 204 (Marshall, Circuit Justice, C.C.D. Va. 1812) (No. 93) (stating "[t]he maxim[] that penal laws are to be construed strictly").

249. *See* Bittner v. United States, 143 S. Ct. 713, 724–25 (2023); *see also* Brandon Hasbrouck, *On Lenity: What Justice Gorsuch Didn't Say*, 108 VA. L. REV. ONLINE 239, 243 (2022) (discussing lenity's application to civil penal laws).

250. U.S. CONST. art. I, § 9, cl. 3.

251. *Compare* Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 138 (1810) ("The state legislatures can pass no ex post facto law. An ex post facto law is one which renders an act punishable in a manner in which it was not punishable when it was committed."), *with* Calder v. Bull, 3 U.S. (3 Dall.) 386, 391 (1798) (opinion of Chase, J.) ("But I do not consider any law ex post facto, within the prohibition, that modifies the rigor of the criminal law; but only those that create, or aggravate, the crime; or increase the punishment, or change the rules of evidence, for the purpose of conviction.").

252. *See* Johannessen v. United States, 225 U.S. 227, 242 (1912) ("It is . . . settled that this prohibition is confined to laws respecting criminal punishments, and has no relation to retrospective legislation of any other description.").

test discussed earlier.[253] Still, some contend that the Clause's reach should extend to civil cases.[254]

In this Clause, "[t]he Constitution makes no distinction between laws on the basis of whether they are civil or criminal in form."[255] One scholar has opined that the proper inquiry in Ex Post Facto Clause cases is not "whether the punitive law takes civil or criminal form" but rather whether the law has any "punitive motives."[256] Other scholars have also criticized the idea that the Ex Post Facto Clause only applies in criminal cases.[257] Time will tell if the civil-criminal convergence comes for the Ex Post Facto Clause outside of the academic literature. But it is another area of jurisprudence that is vulnerable to the convergence's undercurrent.

B. An Unexpected Alliance at the Supreme Court

The civil-criminal convergence has given rise to a fascinating alliance among the current Justices. As the lenity and vagueness subparts suggest, Justice Gorsuch has urged the application of various doctrines in ways that would transcend the civil-criminal divide. A skepticism of the civil penal regime has characterized Justice Gorsuch's jurisprudence even past the lenity and vagueness cases. But while some criticize the Court as a polarized, political institution with "conservative Justices" on one side and "progressive Justices" on the other, the civil-criminal convergence offers a counterargument. That is because Justices Sotomayor and Jackson—whom many would not consider part of Justice Gorsuch's judicial "team"—have made common cause with Justice Gorsuch in this area of the law.

Commentators have described philosophical differences among the Justices as "partisan, ideological divisions."[258] Court watchers

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253. *See, e.g.*, Massachusetts v. Schering-Plough Corp., 779 F. Supp. 2d 224, 233 (D. Mass. 2011); Kansas v. Hendricks, 521 U.S. 346, 361–67 (1997); United States v. D.K.G. Appaloosas, Inc., 829 F.2d 532, 540 (5th Cir. 1987) ("[T]he ex post facto effect of a law cannot be evaded by simply giving a civil form to that which is essentially criminal."); Louis Vuitton S.A. v. Spencer Handbags Corp., 765 F.2d 966, 972 (2d Cir. 1985) ("Although the prohibition generally applies to criminal statutes, it may also be applied in civil cases where the civil disabilities disguise criminal penalties.").

254. *See generally* Evan C. Zoldan, *The Civil Ex Post Facto Clause*, 2015 WIS. L. REV. 727 (calling for greater judicial scrutiny and reconsideration of *Calder*); Steve Selinger, *The Case Against Civil Ex Post Facto Laws*, 15 CATO J. 191 (1995) (arguing against civil ex post facto laws).

255. Jane Harris Aiken, *Ex Post Facto in the Civil Context: Unbridled Punishment*, 81 KY. L.J. 323, 324 (1993).

256. *Id.* at 325–26.

257. *See supra* note 254.

258. Leah Litman, *The Supreme Court Is Uber-Conservative. A Few Recent Decisions Don't Change That.*, NBC NEWS (July 3, 2021, 10:28 AM),

commonly refer to the institution's "6-to-3 conservative majority," pitting the six Justices appointed by Republican presidents (Chief Justice Roberts and Justices Thomas, Alito, Gorsuch, Kavanaugh, and Barrett) against the three Justices appointed by Democratic presidents (Justices Sotomayor, Kagan, and Jackson).[259] Amid the criticism, public perception of the Supreme Court has fallen.[260]

Despite this state of affairs, the civil-criminal convergence demonstrates that there is still room at the Court for unconventional ideological alliances. Justice Gorsuch was appointed by President Donald Trump, a Republican. Meanwhile, Justices Sotomayor and Jackson were appointed by Democratic Presidents Barack Obama and Joe Biden, respectively. So, one might expect that the three would have little in common. Yet in several opinions, Justice Gorsuch has written separately from the Court and garnered Justice Sotomayor's or Justice Jackson's vote while advocating for the civil-criminal convergence.

Consider a few opinions. In *Bittner v. United States*,[261] Justice Gorsuch wrote the opinion of the Court, construing a civil penal statute in a manner favorable to the subject of a government enforcement action.[262] But one part of his opinion did not garner a majority of the Court—a part advocating for (and applying) the rule of lenity in civil cases. The only Justice to join this part was Justice Jackson.[263] Justice Gorsuch had already developed this concept in a concurrence in *Wooden v. United States*, and while Justice Sotomayor did not join his whole opinion in *Wooden*, she was the only Justice to join in his advocacy for lenity's application in civil cases.[264] Justice Gorsuch returned serve in a later case, joining Justice Sotomayor's

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https://www.nbcnews.com/think/opinion/supreme-court-uber-conservative-few-recent-decisions-don-t-change-ncna1273014.

259. Nina Totenberg, *The Supreme Court Is the Most Conservative in 90 Years*, NPR (July 5, 2022, 7:04 AM), https://www.npr.org/2022/07/05/1109444617/the-supreme-court-conservative. *But see* Mark Sherman, *Roberts, Trump Spar in Extraordinary Scrap Over Judges*, ASSOCIATED PRESS (Nov. 21, 2018, 6:42 PM), https://apnews.com/article/north-america-donald-trump-us-news-ap-top-news-immigration-c4b34f9639e141069c08cf1e3deb6b84 ("We do not have Obama judges or Trump judges, Bush judges or Clinton judges. What we have is an extraordinary group of dedicated judges doing their level best to do equal right to those appearing before them." (statement of Roberts, C.J.)).

260. *See* Katy Lin & Carroll Doherty, *Favorable Views of Supreme Court Fall to Historic Low*, PEW RSCH. CTR. (July 21, 2023), https://www.pewresearch.org/short-reads/2023/07/21/favorable-views-of-supreme-court-fall-to-historic-low/.

261. 143 S. Ct. 713 (2022).

262. *Id.* at 724–25.

263. *See id.* at 724 (opinion of Gorsuch, J.).

264. *See* Wooden v. United States, 142 S. Ct. 1063, 1086 (2022) (Gorsuch, J., concurring).

dissent in *Pugin v. Garland*[265]—there, Justice Sotomayor also argued that lenity should apply in civil cases (writing in the context of deportation).[266] Notably, Justice Kagan and Justice Gorsuch were the only two Justices to join Justice Sotomayor in *Pugin*, but Justice Kagan did *not* join the lenity part of the dissent. Additionally, in *Pulsifer v. United States*,[267] Justices Sotomayor and Jackson were the only two to join a Justice Gorsuch dissent that claimed that "[c]ourts construe ambiguous *penal* laws with lenity because a free nation operates against a background presumption of individual liberty."[268]

Yet lenity is not the only issue on which a democratic-appointed Justice agrees with Justice Gorsuch. Justice Jackson was the lone Justice to join Justice Gorsuch's concurrence in *Tyler v. Hennepin County*.[269] *Tyler* concerned a woman's Takings Clause claim in relation to a county's collection of excess forfeiture proceeds from a foreclosure sale of her home; the Supreme Court reversed an Eighth Circuit opinion that had affirmed a dismissal of the claim.[270] The woman had also brought an Excessive Fines Clause claim, but the Eighth Circuit determined "that the forfeiture was not a fine because it was intended to remedy the State's tax losses, not to punish delinquent property owners."[271] The Supreme Court did not reach the Excessive Fines Clause issue, but Justice Gorsuch discussed it in a concurrence.[272] There, he emphasized that the Excessive Fines Clause applies to statutory schemes that serve even in part to punish, no matter if they have a predominantly remedial purpose.[273] Moreover, he analogized the punishment of excess-foreclosure-proceeds collection to the punishments of incarceration and court-ordered rehabilitation.[274] And he criticized the view that a lack of a culpability requirement can suggest that a given statutory scheme is not punitive.[275]

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265. 143 S. Ct. 1833 (2023).

266. *See id.* at 1855 (Sotomayor, J., dissenting).

267. 144 S. Ct. 718 (2024).

268. *Id.* at 755 (Gorsuch, J., dissenting) (emphasis added); *see also id.* ("We resolve doubts about a criminal law's reach in favor of lenity, *too* . . . ." (emphasis added) (distinguishing criminal and penal laws through the use of the word "too")).

269. *See* 143 S. Ct. 1369, 1381 (2023) (Gorsuch, J., concurring).

270. *Id.* (majority opinion).

271. *Id.* at 1374.

272. This concurrence was not the first time that Justice Gorsuch had raised this issue. *See* Toth v. United States, 143 S. Ct. 552 (2023) (Gorsuch, J., dissenting from the denial of certiorari).

273. *See Tyler*, 143 S. Ct. at 1381 (Gorsuch, J., concurring).

274. *Id.*

275. *See id.* ("[W]hile a focus on 'culpability' can sometimes make a provision 'look more like punishment,' this Court has never endorsed the converse view." (quoting Austin v. United States, 508 U.S. 602, 619 (1993))).

To be sure, Justice Gorsuch has bucked his conservative colleagues in several rulings. *Bostock v. Clayton County*[276] and *McGirt v. Oklahoma*[277] are examples. But the civil-criminal convergence opinions are unique for two reasons. First, not all of the purportedly "progressive" Justices have joined him; for example, Justice Kagan has been conspicuously absent from Justice Gorsuch's opinions in this space. Second, these are not majority opinions—they represent an undercurrent of skepticism of civil penalties that suffuses Justice Gorsuch's civil-libertarian approach to law. This jurisprudential approach dates to the Justice's time on the Tenth Circuit.[278] And it leads to some thought-provoking conclusions, including the Justice's reverse civil-criminal convergence opinion (joined only by Justice Alito) in *Turkiye Halk Bankasi A.S. v. United States*.[279]

III. THE CIVIL-CRIMINAL CONVERGENCE AND THE ADMINISTRATIVE STATE

Dating back at least to *Boyd*, the civil-criminal convergence has had a profound impact on the American legal tradition. As Part II demonstrates, the civil-criminal convergence is nothing new—particularly with respect to procedural law: when can the police search someone, when must the state afford a lawyer to someone, when should federal courts refrain from intervening in ongoing state proceedings, etc. But recent cases suggest that the next frontier for the civil-criminal convergence is substantive judicial review of statutory law in civil regulatory cases.

If the civil-criminal convergence takes hold in this area of law, a legal revolution could be afoot in administrative law. These doctrines of substantive review, if applied with full force in the civil context, could provide a new slate of arguments for litigants challenging the administrative state. Administrative law is a function of statutory law—in general, agencies can only do what statutes allow them to

276. 140 S. Ct. 1731 (2020).

277. 140 S. Ct. 2452 (2020).

278. *See, e.g.*, Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1155–56 (10th Cir. 2016) (Gorsuch, J., concurring) (suggesting that the non-use of *Chevron* deference in criminal cases should carry over to civil cases).

279. 143 S. Ct. 940 (2023); *id.* at 952 (Gorsuch, J., concurring in part and dissenting in part) ("Sometimes the [Foreign Sovereign Immunities Act (FSIA)] authorizes American courts to hear cases against foreign sovereigns; sometimes the statute immunizes foreign sovereigns from suit. Today, however, the Court holds that the FSIA's rules apply only in *civil* cases. To decide whether a foreign sovereign is susceptible to *criminal* prosecution, the Court says, federal judges must consult the common law. Respectfully, I disagree. The same statute we routinely use to analyze sovereign immunity in civil cases applies equally in criminal ones.").

do.[280] And in recent years, scholars and jurists have paid much attention to doctrines of review that enforce a particular, formalist vision about how the Constitution allocates lawmaking power—the nondelegation doctrine and the major questions doctrine come to mind. Yet the civil-criminal convergence offers the prospect of a series of newly *themed* arguments for litigants against the administrative state: ones focused on individual liberty as opposed to the separation of powers. For the discerning challenger, this litigation approach could expand the universe of jurists to whom such arguments might be persuasive.

The civil-criminal convergence could have significant implications for the administrative state's power. This Part concludes by considering the potential applicability of the vagueness and lenity doctrines to a recent Federal Trade Commission rule outlawing non-compete agreements in employment contracts.

A. Civil Penal Regulatory Regimes: Nothing New

The civil-criminal convergence is not new, but neither is the existence of civil penal regulatory regimes. Earlier, this Article cited *Calcutt v. FDIC*[281] as an example of a case in which a federal administrative agency imposed a severe sanction—disbarment from the banking industry—as a result of a civil violation.[282] Disbarment is one of several sanctions that an agency can pursue in a civil enforcement context. The classic sanctions, of course, are civil monetary penalties. And administrative agencies today collect *billions* of dollars in such penalties every year.[283] Yet injunctive

280. *See* La. Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 374 (1986) ("[A]n agency literally has no power to act . . . unless and until Congress confers power upon it."). *But cf.* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952) (Jackson, J., concurring) ("When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility.").

281. 143 S. Ct. 1317 (2023).

282. *Id.* at 1319; *see supra* note 118 and accompanying text.

283. *See, e.g.*, *Enforcement by the Numbers*, CONSUMER FIN. PROT. BUREAU, https://www.consumerfinance.gov/enforcement/enforcement-by-the-numbers/ (last visited Sept. 20, 2024); Press Release, SEC, SEC Announces Enforcement Results for FY22 (Nov. 15, 2022), https://www.sec.gov/newsroom/press-releases/2022-206 ("Money ordered in SEC actions, comprising civil penalties, disgorgement, and pre-judgment interest, totaled $6.439 billion, the most on record in SEC history and up from $3.852 billion in fiscal year 2021. Of the total money ordered, civil penalties, at $4.194 billion, were also the highest on record."); Press Release, Commodities Futures Trading Comm'n, CFTC Releases

remedies that are practically quite coercive, like a requirement that a company take actions required to correct a violation of environmental laws and "install pollution control equipment,"[284] are also available to the government.[285]

Today, agencies like the Securities and Exchange Commission, Occupational Safety and Health Administration, and Environmental Protection Agency administer penal regulatory regimes. But these regimes are not without precedent. In 1933, Francis Sayre documented the rise of "public welfare offenses"—strict-liability criminal regulatory offenses—in the United States since the dawn of the republic.[286] Sayre described these offenses as "a noteworthy exception" to the general rule that "[c]riminality is . . . based upon a requisite state of mind as one of its prime factors."[287] Indeed, "early health and safety laws . . . often imposed strict liability," and "[m]any judges who considered the problem of enforcing health and safety laws agreed that imposing strict liability was essential if anyone was to be convicted."[288]

As Richard Lazarus explains, the same has been true of environmental law, for "environmental standards, unlike most traditional crimes, present questions of degree rather than of kind."[289] Lazarus contrasts environmental crime with "[m]urder, burglary, assault, and embezzlement," which are "simply unlawful," as "[t]here

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Annual Enforcement Results (Oct. 20, 2022), https://www.cftc.gov/PressRoom/PressReleases/8613-22.

284. *Basic Information on Enforcement*, EPA, https://www.epa.gov/enforcement/basic-information-enforcement (Feb. 7, 2024).

285. Indeed, one scholar has been careful to distinguish "economic critique[s]" from "legal critique[s]" of administrative power, asserting that the most important objection to the modern administrative state is "that administrative power violates one constitutional freedom after another." Philip Hamburger, *The Administrative Threat to Civil Liberties*, 2017–18 CATO SUP. CT. REV. 15, 15–16 (2018). This is all to say nothing of the fact that the regulatory requirements underlying administrative penalties are laid out over hundreds of thousands of pages in the Code of Federal Regulations. The agencies themselves sometimes lose track of these requirements when applying the law and seeking sanctions. *See, e.g.*, Caring Hearts Pers. Home Servs. v. Burwell, 824 F.3d 968, 969–70 (10th Cir. 2016); *see also* GORSUCH & NITZE, *supra* note 16, at 3 ("It turned out that the government produces such a large number of rules, at such a furious clip and with such complexity, that even the agency officials responsible for them had become confused." (describing *Caring Hearts*)).

286. Francis Bowes Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55, 55–56 (1933).

287. *Id.*

288. Nancy Frank, *From Criminal to Civil Penalties in the History of Health and Safety Laws*, 30 SOC. PROBS. 532, 533–34 (1983).

289. Richard J. Lazarus, *Assimilating Environmental Protection into Legal Rules and the Problem with Environmental Crime*, 27 LOY. L.A. L. REV. 867, 882 (1994).

is no threshold level below which such conduct is acceptable."[290] "In contrast," Lazarus explains:

> [P]ollution is not unlawful per se: In many circumstances, some pollution is acceptable. It is only pollution that exceeds certain prescribed levels that is unlawful. But, for that very reason, the mens rea element should arguably be a more, not less, critical element in the prosecution of an environmental offense.[291]

Yet the criminal nature of public welfare offenses shifted, in part because "the adoption of strict liability in laws invoking criminal penalties created a dilemma," given that "lawyers traditionally had been taught that culpability was an essential element of any criminal offense."[292] So after a bit of time, "[c]ivil penalties were proposed, explicitly, to avoid criminal strict liability."[293] To be sure, remnants of criminal law for regulatory offenses remained. But agencies now exert a significant amount of control over the American economy through *civil* law.

B. The Centrality of Substantive Review in Administrative Law

Courts have focused on the separation of powers to check this control. Agencies are creatures of statute, so agency enforcement is a function of positive law. Although *procedural* law remains important—consider the Supreme Court's recent focus on issues such as the timing of judicial review[294] and trial by jury[295] in agency

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290. *Id.*

291. *Id.*

292. Frank, *supra* note 288, at 534.

293. *Id.*

294. *See* Axon Enter., Inc. v. FTC, 143 S. Ct. 890, 903 (2023) (expressing concern over "the interaction between the alleged injury and the timing of review").

295. *See* SEC v. Jarkesy, 144 S. Ct. 2117, 2127 (2024). *Jarkesy* concerned the Securities and Exchange Commission's use of its in-house proceedings to assess hundreds of thousands of dollars in civil penalties and to bar a securities trader "from various securities industry activities: associating with brokers, dealers, and advisers; offering penny stocks; and serving as an officer or director of an advisory board or as an investment adviser" because of alleged securities fraud. Jarkesy v. SEC, 34 F.4th 446, 450 (5th Cir. 2022), *aff'd sub nom.* SEC v. Jarkesy, 144 S. Ct. 2117. Notably, *Jarkesy* involved the Seventh Amendment right to a jury trial in *civil* cases. Indeed, one of the more controversial elements of administrative civil enforcement concerns the forum in which the enforcement takes place. Even in light of *Jarkesy*, several agencies bring enforcement actions inside the agency itself before "judges" who are employed by the agency. For an overview, see generally Kent Barnett, *Against Administrative Judges*, 49 U.C. DAVIS L. REV. 1643 (2016); see also Richard Lorren Jolly, *The Administrative State's Jury Problem*, 98 WASH. L. REV. 1187 (2023). As one scholar has noted, "most agencies offer pale imitations of at least some of the Constitution's procedural rights," including the trial by jury. Philip Hamburger, *How*

cases—much of the recent action in administrative law has come from substantive doctrines of judicial review that are grounded in the separation of powers. Two that have dominated the administrative law discourse in recent years are the nondelegation doctrine and major questions doctrine. These doctrines both enforce an understanding of the separation of powers that limits agency discretion. But some commentators have taken these doctrines to task, criticizing the underlying separation-of-powers assumptions that animate them.

The nondelegation doctrine—in particular, the Article I nondelegation doctrine[296]—prevents Congress from delegating legislative power to the executive branch.[297] In applying the nondelegation doctrine, courts declare statutes to be unconstitutional.[298] This exercise of judicial review rests on an understanding of how the Constitution separates power—proponents of the doctrine assert "that it would frustrate 'the system of government ordained by the Constitution' if Congress could merely announce vague aspirations and then assign others the responsibility of adopting legislation to realize its goals."[299] To be sure, the Supreme Court has not applied the Article I nondelegation doctrine since the 1930s, but the doctrine appears to be making something of a comeback.[300] And given the doctrine's ability to establish the unconstitutionality—and thus unenforceability—of federal statutes, it is a potentially potent tool in a litigant's toolkit for agency cases.

But the nondelegation doctrine is strong medicine. In recent years, the Supreme Court has ruled in favor of numerous challenges to agency authority on different grounds: the major questions doctrine.[301] As opposed to a constitutional limitation on Congress's authority, the major questions doctrine is a canon of statutory

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Government Agencies Usurp Our Rights, CITY J. (2017), https://www.city-journal.org/article/how-government-agencies-usurp-our-rights. "Agencies can impose career-ending bans and ruinous monetary penalties through in-house proceedings." Petition for a Writ of Certiorari at 2, Calcutt v. FDIC, 143 S. Ct. 1322 (2023) (No. 22-714).

296. *See* Nachmany, *supra* note 42, at 516–17.

297. *See* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 537–38 (1935).

298. *See, e.g.*, *id.* at 542.

299. Gundy v. United States, 139 S. Ct. 2116, 2133 (2019) (Gorsuch, J., dissenting) (quoting Marshall Field & Co. v. Clark, 143 U.S. 649, 692 (1892)).

300. *See* Nachmany, *supra* note 42, at 516.

301. *See* Mila Sohoni, *The Major Questions Quartet*, 136 HARV. L. REV. 262, 262 (2022) (listing cases); *cf.* Brian Chen & Samuel Estreicher, *The New Nondelegation Regime*, 102 TEX. L. REV. 540, 542 (2024) (advocating for application of the major questions doctrine to avoid "the disruption that comes with a robust constitutional doctrine").

interpretation.[302] It instructs that when a court must determine the meaning of a statute "that confers authority upon an administrative agency," certain "cases in which the 'history and the breadth of the authority that [the agency] has asserted,' and the 'economic and political significance' of that assertion, provide a 'reason to hesitate before concluding that Congress' meant to confer such authority."[303] Applying the major questions doctrine, a court can uphold a statute on constitutional grounds but conclude that an agency overstepped the bounds of the authority conferred in the statute. Like the Article I nondelegation doctrine, the major questions doctrine is "grounded in the 'separation of powers.'"[304]

Controversial assumptions about the separation-of-powers underlie the nondelegation doctrine and the major questions doctrine.[305] Indeed, several scholars and jurists have taken the Supreme Court to task for the structural constitutional theories underlying these doctrines of review. Set aside whether the doctrines are consistent with prevailing interpretive methodologies at the Supreme Court: originalism for the nondelegation doctrine[306] and textualism for the major questions doctrine.[307] The point is that

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302. *See* West Virginia v. EPA, 142 S. Ct. 2587, 2607–08 (2022). Scholars have noted multiple versions of the major questions doctrine—in addition to a canon of statutory interpretation, another version of the doctrine had functioned as a carveout to *Chevron* deference. *See* Cass R. Sunstein, *There Are Two Major Questions Doctrines*, 73 ADMIN. L. REV. 475, 477 (2021).

303. *West Virginia*, 142 S. Ct. at 2608 (quoting FDA v. Brown & Williamson, 529 U.S. 120, 159–60 (2000)).

304. Louis J. Capozzi III, *The Past and Future of the Major Questions Doctrine*, 84 OHIO ST. L.J. 191, 223 (2023) (quoting *West Virginia*, 142 S. Ct. at 2609); *see also West Virginia*, 142 S. Ct. at 2609 (describing the basis of the major questions canon of interpretation as "both separation of powers principles and a practical understanding of legislative intent"); *id.* at 2616 (Gorsuch, J., concurring) (describing the major questions canon as "operat[ing] to protect foundational constitutional guarantees").

305. Benjamin Silver has observed that some nondelegation cases rest on a rationale other than separation of powers: sovereignty. Silver takes the position that certain nondelegation cases effectuate the "view that certain governmental functions must be exercised by public officials acting in their official capacities." Benjamin Silver, *Nondelegation in the States*, 75 VAND. L. REV. 1211, 1241 (2022). Silver's sovereignty theory largely concerns *private* nondelegation cases, which raise some different concerns. Still, Silver concludes that the separation of powers is a leading explanation for the nondelegation doctrine. *See id.* at 1214–15.

306. *Compare* Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277 (2021), *with* Ilan Wurman, *Nondelegation at the Founding*, 130 YALE L.J. 1490 (2021).

307. *See* Biden v. Nebraska, 143 S. Ct. 2355, 2376 (2023) (Barrett, J., concurring) (discussing the debate and citing Justice Kagan's dissent in *West Virginia v. EPA* for the idea that some jurists "charge that the [major questions] doctrine is inconsistent with textualism"); *see also* Chad Squitieri, *Who*

significant disagreement exists about whether the nondelegation doctrine and the major questions doctrine even effectuate the correct vision of the separation of powers.[308] To be sure, that disagreement

Determines Majorness?, 44 HARV. J.L. & PUB. POL'Y 463, 465 (2021) (describing the major questions doctrine as inconsistent with textualism).

308. Beginning with the nondelegation doctrine, some have charged that "a statutory grant of authority to the executive branch or other agents can *never* amount to a delegation of legislative power." Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1723 (2002); *see also id.* at 1722 ("The nondelegation position lacks any foundation in . . . sound economic and political theory."); Nikolas Bowie & Daphna Renan, *The Separation-of-Powers Counterrevolution*, 131 YALE L.J. 2020, 2096 (2022) (describing commitments to "a reinvigorated nondelegation doctrine" as "obscur[ing] the political developments that have in fact sustained the democratic legitimacy of American constitutional governance"); Gundy v. United States, 139 S. Ct. 2116, 2130 (2019) ("If [this statute's] delegation is unconstitutional, then most of Government is unconstitutional—dependent as Congress is on the need to give discretion to executive officials to implement its programs."). *But see* Philip Hamburger, *Nondelegation Blues*, 91 GEO. WASH. L. REV. 1083, 1088 (2023) ("[T]he fundamental principle underlying the American government is consent—to be precise, consent by an elected representative body. Without such consent, the law is without obligation or legitimacy. It therefore is worrisome that much legislative power, including binding legislative power, is delegated or otherwise shunted off to unelected agencies."); David Schoenbrod, *Consent of the Governed: A Constitutional Norm that the Court Should Substantially Enforce*, 43 HARV. J.L. & PUB. POL'Y 213, 215 (2020) ("Congress can outsource responsibility for the laws by giving lip service to the vaguest of goals.").

Meanwhile, several scholars have claimed that the major questions doctrine "undermine[s] the public values of separation of powers and deliberation by enlarging the judicial power at the expense of the legislative and executive branches and by leaning hard against one side of the debate over the scope of regulatory power." Lisa Heinzerling, *The Power Canons*, 58 WM. & MARY L. REV. 1933, 1940 (2017); *see also* David M. Driesen, *Does the Separation of Powers Justify the Major Questions Doctrine?*, 2024 U. ILL. L. REV. 1177, 1225 (2024) (answering the titular question in the negative); Lisa Heinzerling, *The Major Answers Doctrine*, 16 N.Y.U. J.L. & LIBERTY 506, 515–17 (2023) (criticizing the purportedly asymmetric nature of the major questions doctrine); Blake Emerson, *Administrative Answers to Major Questions: On the Democratic Legitimacy of Agency Statutory Interpretation*, 102 MINN. L. REV. 2019, 2024 (2018) ("The major questions doctrine is best explained as an attempt to reinforce democratic-constitutional values. In practice, however, it undermines such values by failing to respect the deliberative capacities of administrative agencies."). *But see* Capozzi, *supra* note 304, at 206 ("Why did courts develop a rule against implied delegations? Part of the motivation was likely a formalist concern rooted in the separation of powers."); Jennifer L. Mascott & Eli Nachmany, *The Supreme Court Reminds the Executive Branch: Congress Makes the Laws*, WASH. POST (July 1, 2022, 6:05 PM), https://www.washingtonpost.com/opinions/2022/07/01/west-virginia-epa-supreme-court-ruling-carbon-emissions-congress-laws/ (describing the Supreme Court's decision in *West Virginia v. EPA* as potentially heralding "a much-needed reinvigoration of Congress's will to reclaim its legislative prerogative").

does not necessarily mean that the doctrines' proponents are wrong. The point is simply that some of the key doctrines of judicial review in modern administrative law implicate familiar debates about the proper structure of government—with perhaps predictable ideological alignments.

C. New Arguments: Vagueness, Lenity, and the Administrative State

The civil-criminal convergence could shuffle the deck. While the modern administrative law debates center on contestable propositions about the separation of powers, the civil-criminal convergence offers the prospect of shifting the debate to individual rights. In particular, bringing vagueness and lenity to bear in regulatory litigation could provide a thematic shift in the arguments against the administrative state. While these doctrines respectively echo nondelegation and major questions, their basis is distinct. As challengers look ahead to future agency cases, vagueness and lenity could lay the groundwork for a different flavor of litigation—challenges focused on rights rather than on structure. And as other doctrines of review wither on the vine, that could be especially important.

Vagueness and lenity rest on different concerns than do nondelegation and major questions. As noted in Subpart III.B, nondelegation and major questions are largely about vindicating a particular view of the separation of powers. In contrast, vagueness and lenity each have an individual-rights component to them. Like nondelegation, vagueness is a doctrine of judicial review. Meanwhile, like major questions, lenity is a canon of statutory interpretation. If applied in the civil context, both vagueness and lenity could have force in administrative law cases.

Starting with vagueness, several have linked the doctrine to nondelegation.[309] Like the nondelegation doctrine, the vagueness doctrine has been described as "a corollary of the separation of powers—requiring that Congress, rather than the executive or judicial branch, define what conduct is sanctionable and what is not."[310] But that is not the only justification for declaring statutes void

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Indeed, Justice Kagan has charged that the modern Supreme Court's administrative law jurisprudence "commits the Nation to a static version of governance, incapable of responding to new conditions and challenges." Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2226 (2020) (Kagan, J., dissenting).

309. *See, e.g.*, Nachmany, *supra* note 42, at 546; *Gundy*, 139 S. Ct. at 2142–43 (Gorsuch, J., dissenting). *But cf.* Arjun Ogale, Note, *Vagueness and Nondelegation*, 108 VA. L. REV. 783, 786 (2022) ("[W]hile the doctrines have some overlap, Justice Gorsuch overstated their connection [in *Gundy*].").

310. Sessions v. Dimaya, 138 S. Ct. 1204, 1212 (2018) (plurality opinion).

for vagueness. In *Johnson v. United States*,[311] the Supreme Court noted the vagueness doctrine's grounding in the Fifth Amendment's Due Process Clause and explained that a criminal law may not be "so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement."[312] The Court went on to describe vagueness as vindicating "ordinary notions of fair play and the settled rules of law."[313] Relatedly, in the civil regulatory context, the application of a Due Process-grounded "fair notice rule" in agency regulatory interpretation is well established.[314] One commentator has categorized the Court's applications of the vagueness doctrine into two categories: "(1) Rights-Based Vagueness and (2) Structure-Based Vagueness,"[315] while another has criticized the Court for "conflat[ing these] two different constitutional purposes" in its vagueness jurisprudence.[316] But at bottom, the doctrine is based at least in part on the maxim "that '[all persons] are entitled to be informed as to what the State commands or forbids.'"[317]

Lenity is a bit more straightforward about individual liberty. As the Court has observed, "[t]his rule of narrow construction is rooted in the concern of the law for individual rights, and in the belief that fair warning should be accorded as to what conduct is criminal and punishable by deprivation of liberty or property."[318] To be sure, like vagueness, lenity "is also the product of an awareness that legislators and not the courts should define criminal activity."[319] As a canon of statutory interpretation, lenity is like the major questions doctrine in

311. 576 U.S. 591 (2015).

312. *Id.* at 595.

313. *Id.* (quoting Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926)); *see also* Grayned v. City of Rockford, 408 U.S. 104, 108 (1972) ("Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning.").

314. *See* Gen. Elec. Co. v. EPA, 53 F.3d 1324, 1329 (D.C. Cir. 1995).

315. Ogale, *supra* note 309, at 786.

316. Emily M. Snoddon, Comment, *Clarifying Vagueness: Rethinking the Supreme Court's Vagueness Doctrine*, 86 U. CHI. L. REV. 2301, 2304 (2019); *see also* Mannheimer, *supra* note 212, at 1051 ("The Court has in the past few decades stated that [the separation-of-powers] rationale is the more important, but the Court continues to cite lack of notice as a constitutional defect of vague statutes."); *Dimaya*, 138 S. Ct. at 1227 (Gorsuch, J., concurring in part and concurring in the judgment) ("Although today's vagueness doctrine owes much to the guarantee of fair notice embodied in the Due Process Clause, it would be a mistake to overlook the doctrine's equal debt to the separation of powers.").

317. Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972) (alteration in original) (quoting Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939)).

318. Huddleston v. United States, 415 U.S. 814, 831 (1974).

319. *Id.*

that it helps courts understand the meaning of statutory text. In practice, both are substantive canons of interpretation,[320] even if the major questions doctrine also serves as a linguistic canon that "emphasize[s] the importance of context when a court interprets a delegation to an administrative agency."[321] That is because the real-world upshot of both doctrines is that the court will construe the statute in favor of the party that is not the government—when applying either lenity or major questions, courts put a thumb on the scale against the government's interpretation. Moreover, lenity could fill in some gaps; while major questions only applies in "'extraordinary cases' . . . in which the 'history and the breadth of the authority that [the agency] has asserted,' and the 'economic and political significance' of that assertion, provide a 'reason to hesitate before concluding that Congress' meant to confer such authority,"[322] lenity does not admit of such a limitation and applies more broadly. Even still, as the Supreme Court recently noted, the rule of lenity applies only in cases of "grievous ambiguity."[323]

Courts have often seen vagueness and lenity as primarily criminal law doctrines. But the civil-criminal convergence signals that times are perhaps changing. Applied in the administrative law context, vagueness and lenity may have a unique role to play in civil cases. While they are *doctrinally* distinct from nondelegation and major questions, both also would permit savvy litigants to frame their cases as vindicating individual rights (rather than a specific view about the separation of powers). Consider the flipside—*West Virginia v. EPA*[324] was not about an individual litigant attempting to argue that a federal statute gave him insufficient notice that his conduct was unlawful. Rather, the challengers in that agency case were a consortium of states and several other institutions, and they made separation-of-powers arguments in favor of applying either the nondelegation doctrine or the major questions doctrine to invalidate

320. One can sum up the distinction between "substantive" and "linguistic" canons of statutory interpretation in the following way: "Linguistic canons apply rules of syntax to statutes," while substantive canons generally "require a court to interpret a statute to avoid a particular result unless Congress speaks explicitly to accomplish it." Barrett, *supra* note 234, at 117–18.

321. *See* Biden v. Nebraska, 143 S. Ct. 2355, 2376 (2023) (Barrett, J., concurring) (emphasis omitted); *see also* Ilan Wurman, *Importance and Interpretive Questions*, 110 VA. L. REV. 909, 917 (2024) (describing the major questions doctrine as enforcing the linguistic assumption that ordinary speakers expect "clarity before assuming [that] . . . important actions ha[ve] been authorized").

322. West Virginia v. EPA, 142 S. Ct. 2587, 2608 (2022) (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159–60 (2000)).

323. Pugin v. Garland, 143 S. Ct. 1833, 1843 (2023).

324. 142 S. Ct. 2587 (2022).

an EPA rule.[325] Of course, sometimes an institutional litigant is necessary because of a justiciability limitation,[326] but in those cases that do not present justiciability issues, the civil-criminal convergence can shift the conversation from the separation of powers to individual liberty.

Vagueness and lenity would not be an awkward fit in agency cases. Take Paul Larkin's arguments for applying the vagueness doctrine to the Clean Water Act, in which Larkin lays out a case for declaring a classic agency statute unconstitutional on vagueness grounds.[327] Still, Larkin ultimately concludes that although the Act is susceptible to a vagueness challenge, the doctrine's criminal-law focus means that courts should merely "hold the [Act's] criminal penalties unenforceable . . . while allowing the government (and private parties) to pursue administrative and civil remedies for unlawful actions."[328] And yes, "[p]urely civil laws . . . are only rarely held to be void for vagueness."[329] But assume that the jurisprudence is shifting. The main takeaway thus remains that administrative law is not impervious to the civil-criminal convergence in substantive review.

Vagueness might be too strong of a review doctrine for courts to use with regularity.[330] But like courts have done with the nondelegation doctrine,[331] jurists may shift to statutory interpretation to vindicate vagueness's underlying concerns about notice and due process. Indeed, in asserting that vagueness doctrine is consistent with the original meaning of the Constitution, Justice Gorsuch admitted that early vagueness cases "often spoke in terms of construing vague laws strictly rather than declaring them void."[332] One scholar has suggested that courts engage in what he calls "vagueness avoidance," pursuant to which courts ameliorate

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325. *See* Brief for Petitioners, West Virginia v. EPA, 142 S. Ct. 2587 (2022) (No. 20-1530), 2021 WL 5921627. Ultimately, West Virginia argued for applying the major questions doctrine to avoid "jump[ing] to invalidate [the] statute[] on constitutional grounds," *id.* at 45, and the Court ended up doing just that.

326. *See, e.g.*, Biden v. Nebraska, 143 S. Ct. 2355, 2365–68 (2023).

327. *See* Paul Larkin, *The Clean Water Act and the Void-for-Vagueness Doctrine*, 20 GEO. J.L. & PUB. POL'Y 639, 641 (2022).

328. *Id.* at 664.

329. Matthew G. Sipe, *The Sherman Act and Avoiding Void-for-Vagueness*, 45 FLA. ST. U. L. REV. 709, 733 (2018).

330. *Cf.* Nachmany, *supra* note 42, at 528, 553 (describing the weighty nature of judicial review and courts' general reluctance to declare statutes unconstitutional).

331. *See* Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 315–16 (2000) (describing courts as vindicating the nondelegation doctrine's values through a method of statutory interpretation that closely resembles the major questions doctrine).

332. Sessions v. Dimaya, 138 S. Ct. 1204, 1226 (2018) (Gorsuch, J., concurring in part and concurring in the judgment).

"vagueness-related indeterminacies that effectively delegate the legislative task of crime definition" through statutory interpretation.[333] These efforts may bear a passing resemblance to the use of lenity to construe penal statutes strictly.[334] Whether through vagueness, vagueness avoidance, or lenity, litigants can add individual rights to the lexicon of substantive review in regulatory challenges.[335]

D. Implications of the Civil-Criminal Convergence in Administrative Law: The FTC Non-Compete Rulemaking

To give an example of what this might look like in practice, consider the possible applicability of doctrines like vagueness and lenity to the regulatory power of a familiar agency: The Federal Trade Commission. Congress has endowed the FTC with substantial powers. A recent FTC rulemaking purports to outlaw all employment noncompete agreements across the country.[336] A litigant could try challenging the rule on both vagueness and lenity grounds. These challenges would make for a different framing than would nondelegation and major questions arguments.

The FTC has a broad mandate. The agency's statutory authority extends to preventing "unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce."[337] In a recent notice of proposed rulemaking, the FTC asserted that "it is an unfair method of competition for a person [t]o enter into or attempt to enter into a non-compete clause."[338] As the FTC explains in its rulemaking, the rule outlaws contracts between employers and workers that prevent workers from seeking or accepting other work after concluding their employment.[339] This regulation not only governs future employer-employee contracting but also disturbs existing employment agreements.

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333. Joel S. Johnson, *Vagueness Avoidance*, 109 VA. L. REV. 71, 73 (2024).

334. *But cf. id.* at 74–75 (describing lenity as potentially inconsistent with the modern Supreme Court's textualist methodological commitments).

335. Adding vagueness and lenity to the litigant's toolkit is especially important as the Supreme Court has neutered other review doctrines. To take one example, the Court has suggested that meaningful remedies may not be available in the mine run of challenges based on the presidential removal power. *See* Eli Nachmany, *Remedies and Incentives in Presidential Removal Cases*, 133 YALE L.J.F. 305, 307 (2023). The removal-power arguments also rest on a conception of the separation of powers. So the civil-criminal convergence might add some new and differently themed lines of attack for subjects of agency enforcement actions.

336. *See* Non-Compete Clause Rule, 89 Fed. Reg. 38342 (May 7, 2024) (to be codified at 16 C.F.R. pts. 910, 912).

337. 15 U.S.C. § 45(a)(2).

338. Non-Compete Clause Rule, 89 Fed. Reg. at 38502.

339. *Id.*

Imagine a small business—say, "a local HVAC company . . . [that] hires employees and sends those employees to the homes of its clients in the area for heating and air conditioning installations and repairs."[340] Suppose that this company "makes its employees sign non-compete agreements because it is concerned that an employee would use her affiliation with Company X to build up relationships with Company X's clients (by virtue of the in-home installations), then start her own business and poach the clients."[341] The FTC's rule would likely declare its agreements with its employees to be unlawful. By dint of the rule, the FTC could force the company to rescind a non-compete agreement, even if the agreement predated the rule's compliance date.

Drawing on the civil-criminal convergence, a litigant might raise the following two challenges to the rule: First, Congress passed an unconstitutionally vague law when it outlawed "unfair methods of competition." Second, a court should not interpret "unfair methods of competition" to encompass non-compete agreements. One argument requests that the court exercise its power of judicial review as to the underlying statute, while the other argument seeks merely to declare the non-compete rule to be inconsistent with the statute's text. The relation between these two postures is similar to the relation between nondelegation and major questions challenges in the same litigation.

To begin, a litigant might charge that "unfair methods of competition" is unconstitutionally vague. Setting aside the separation-of-powers issues of delegation, a company could argue that the indeterminate nature of the term "unfair" undermines the company's ability to plan its business affairs, engage in contracting, and know what conduct is prohibited. A helpful case in making this argument might be the Supreme Court's decision in *United States v. L. Cohen Grocery Co.*[342] In *L. Cohen Grocery*, the Court confronted the Lever Act, which made it "unlawful for any person willfully . . . to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries."[343] The government alleged that the Cohen Grocery Company violated this law when—in dealing in certain "necessaries in the City of St. Louis"—the grocer charged "an unjust and unreasonable rate and charge in handling and dealing in" sugar.[344] The Court determined that a criminal indictment against the grocer was invalid because Congress had not set "an ascertainable standard of guilt" that was "adequate to inform persons accused of violation thereof of the nature and cause of the accusation against

340. Eli Nachmany, *FTC's Proposed Rule on Non-Competes May Present Commerce Clause Issue*, YALE J. ON REGUL.: NOTICE & COMMENT (Jan. 9, 2023), https://www.yalejreg.com/nc/non-competes-commerce-clause-issue/.

341. *Id.*

342. 255 U.S. 81 (1921).

343. *Id.* at 86 (quoting Act of Oct. 22, 1919, tit. 1, ch. 80, § 2, 41 Stat. 297).

344. *Id.*

them."[345] In a manner arguably similar to the outlawing of "unfair methods of competition," the Lever Act left "open . . . the widest conceivable inquiry, the scope of which no one can foresee and the result of which no one can foreshadow or adequately guard against."[346]

Indeed, one commentator at the time of the FTC Act's passage observed that "[l]awyers, who delight in certainty in the expression of legal rules, and the administration of the law, will find no settled meanings in this statute."[347] Reflecting on the phrase "unfair methods of competition," the author took the position that the language was "novel and fresh" with "no historic or common law meaning," lamenting "the almost limitless range of information that [would] be needed to define and enforce fair methods of competition in all lines of trade in this country."[348] Indeed, "Senator Newlands, the chief sponsor for the [FTC] bill in the Senate, said that the committee, though composed of able lawyers, had found it impossible to define all the evil and wicked practices covered by unfair methods of competition."[349]

To be sure, *L. Cohen Grocery* was about a criminal indictment. Moreover, a Seventh Circuit case decided around the time of the FTC Act's passage declared that the Act was *not* void for vagueness.[350] But if the civil-criminal distinction melts away in vagueness jurisprudence, the reasoning of *L. Cohen Grocery* could have real force in administrative law. And while the Court decided *L. Cohen Grocery* against the backdrop of limitations on delegation, the Court explicitly rooted its holding in concepts such as fair notice and due process. So instead of attempting to vindicate a structural vision of the separation

345. *Id.* at 89.

346. *Id.*; *see also id.* ("[T]o attempt to enforce the section would be the exact equivalent of an effort to carry out a statute which in terms merely penalized and punished all acts detrimental to the public interest when unjust and unreasonable in the estimation of the court and jury."); *cf.* A.J. Jeffries, *Making the Nondelegation Doctrine Work: Toward a Functional Test for Delegations*, 60 U. LOUISVILLE L. REV. 237, 268 (2021) (describing the FTC's "power to issue rules defining 'unfair or deceptive acts or practices in or affecting commerce'" as likely violative of the nondelegation doctrine).

347. Michael F. Gallagher, *The Federal Trade Commission*, 10 ILL. L. REV. 31, 34 (1915).

348. *Id. But see* Samuel Evan Milner, *Defining Unfair Methods of Competition in the Federal Trade Commission Act*, 2023 WIS. L. REV. 109, 113 (suggesting that the term "unfair methods of competition" has a "clear, yet long since overlooked, legal meaning rooted in the law of intentional torts as it had developed in the late nineteenth and early twentieth century").

349. Gallagher, *supra* note 347, at 34.

350. *See* Sears, Roebuck, & Co. v. FTC, 258 F. 307, 310–11 (7th Cir. 1919); *see also* United States v. Harwin, No. 20-cr-00115, 2021 WL 719614, at *7 (M.D. Fla. Feb. 24, 2021) (describing vagueness caselaw involving antitrust statutes and concluding that Section One of the Sherman Act is not void for vagueness).

of powers, a litigant citing cases like *L. Cohen Grocery* would focus more on the impact that the open-ended nature of "unfair methods of competition" has on the litigant's own attempts to organize its business affairs.

Note that the vagueness challenge does not mention the non-compete rule itself. A vagueness challenge is to the underlying statute, not to the rule promulgated pursuant thereto. That is similar to the nondelegation doctrine. As the Supreme Court explained in *Whitman v. American Trucking Ass'ns*,[351] a nondelegation challenge puts before a court "the constitutional question . . . whether *the statute* has delegated legislative power to the agency."[352] For that reason, an agency cannot "cure an unlawful delegation of legislative power by adopting in its discretion a limiting construction of the statute."[353] So the nature of the non-compete rule would be irrelevant to a vagueness challenge; either "unfair methods of competition" is unconstitutionally vague or it is not.

But this argument asks a lot of a court. While a challenger may make a persuasive case that the "unfair methods of competition" provision is void for vagueness, a court might be reluctant to issue such a ruling. So perhaps instead, a litigant challenging the non-compete rule may default to asking that a court declare the rule inconsistent with the statute. One could make the argument that the plain text of the statute does not admit of a limitation on non-competes. But a challenger might also attempt to make use of the rule of lenity and submit that the statute should not be read to encompass non-compete agreements. This argument could be especially powerful because of the rule's proposed application to existing contracts; given the mass proliferation of non-competes, a litigant would be on strong footing in arguing that contracting parties had no notice that these agreements contravened federal law.

The vagueness-lenity two-step is similar to the nondelegation-major questions order of march in some agency cases. A litigant might urge that a court either declare a statute unconstitutional on nondelegation grounds or interpret that statute not to bar the conduct that the government asserts that it does. Concerned about the "counter-majoritarian difficulty" that inheres in declaring statutes unconstitutional on nondelegation grounds,[354] a court may opt instead to apply the major questions doctrine, leave the statute on the books, and preclude the agency only from enforcing the particular rule at issue in the litigation. As discussed in Subpart III.C, that is what the challengers successfully urged the Supreme Court to do in *West Virginia v. EPA*. In a similar vein, lenity (or vagueness avoidance)

351. 531 U.S. 457 (2001).

352. *Id.* at 472 (emphasis added).

353. *Id.*

354. *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16–17 (1962) (capitalization adapted).

may offer an off-ramp from the high-stakes nature of void-for-vagueness arguments in agency cases, allowing courts to rule for parties challenging agency regulations that present fair-notice issues.

Arguments like these may be available to litigants right now. Courts may apply vagueness and lenity to agency statutes in civil regulatory cases consistent with precedent and without any further word from the Supreme Court. Vagueness may be a bit more difficult for the time being—the vagueness standard remains less exacting in civil cases than it is in criminal cases.[355] But decisions like *Keyishian* show that this lower standard still has "bite."[356] And although a majority of Justices have not joined Justice Gorsuch's efforts to apply lenity in civil cases, he has collected several precedents that a lower-court judge could cite for the argument that lenity does indeed apply in civil cases.[357]

CONCLUSION

The civil-criminal convergence has long been a part of our legal tradition. Even though criminal law is distinct from civil law, jurists often blur the line between the two when the government takes enforcement actions. One can observe this trend in doctrines of both procedural and substantive review. The civil-criminal convergence has been the subject of an unexpected ideological alliance at the current Supreme Court.

Going forward, the civil-criminal convergence could have a substantial impact on administrative law. Substantive review doctrines have dominated the administrative law discourse in recent years—consider doctrines like nondelegation and major questions. But if the civil-criminal convergence in substantive review makes its way into regulatory litigation, it could shuffle the deck in agency cases. Doctrines like vagueness and lenity offer the prospect of shifting the framing of some agency cases to being about individual

355. *But cf.* Sessions v. Dimaya, 138 S. Ct. 1204, 1229 (2018) (Gorsuch, J., concurring) ("[A]ny suggestion that criminal cases warrant a heightened standard of review does more to persuade me that the criminal standard should be set *above* our precedent's current threshold than to suggest the civil standard should be buried *below* it.").

356. *Cf.* Steven Menashi & Douglas H. Ginsburg, *Rational Basis with Economic Bite*, 8 N.Y.U. J.L. & LIBERTY 1055, 1066 (2014) (describing "rational basis with bite" in constitutional law).

357. *See, e.g.*, Bittner v. United States, 143 S. Ct. 713, 724 (2023) (first citing FCC v. Am. Broad. Co., 347 U.S. 284, 296 (1954); then citing Keppel v. Tiffin Sav. Bank, 197 U.S. 356, 362 (1905); then citing Tiffany v. Nat'l Bank of Mo., 85 U.S. (18 Wall.) 409, 410 (1874); and then citing ANTONIN SCALIA & BRYAN GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 297 (2012) for the proposition that "the rule of lenity applies 'to civil penalties'"); *cf.* Pulsifer v. United States, 144 S. Ct. 718, 737 n.8 (2024) (declining "to address the Government's argument that the rule of lenity does not apply to [a given statute] because it is not properly considered a 'penal law'").

rights. That would be a stark contrast from the separation-of-powers focus that animates a good deal of substantive review in administrative law today.