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CHRISTIANITY AND THE (MODEST) RULE OF LAW

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INTRODUCTION

Legality is the central commitment of American government. Ours is a country where law rules, and law rules *everyone*—law's empire extends to governors as well as those they govern, as our massive body of constitutional law attests.

That commitment is supposed to mean five things. First, when the state deprives one of its citizens of life, liberty, or property, the deprivation is primarily the consequence of a legal rule, not a discretionary choice. Obviously, discretion exists, and it matters, but the key policy judgments that lead to prison terms and damages bills should be made by those who *define* legal rules, not by those who *enforce* such rules. The second implication follows from the first: the rules in question must have a reasonable measure of specificity.[1] If state or federal codes made it a crime to "cause harm" or "do wrong," and if defendants were convicted and punished for such crimes, the criminal justice system could not claim to follow the rule of law: such vague commands do not genuinely command anything. For law to rule, it must define the line between behavior that is subject to legal penalty and behavior that isn't—not simply declare that the line exists and leave its definition to law enforcers.

Third, the rules must be defined in advance of the penalized conduct. Officials cannot target some unpopular person and send her up the river for behavior that, at the time she engaged in it, was reasonably understood to be permissible. Nor can officials gin up the "crime" after the investigation has begun in order to ensure that they will have something to prosecute.

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[1] Note that we are using the term "rule" broadly here to encompass any legal regulation, rather than in the narrower sense that scholars have in mind when they distinguish between rules and standards.

Fourth, the law must be the same law in different sorts of neighborhoods. Some legal wrongs may by their nature be limited by class, as Anatole France's famous line about sleeping under bridges illustrates.[2] Securities violations are committed by people who buy and sell stock, just as election law crimes are committed by those who run for office or those who help them get elected. But when it comes to temptations that apply to rich and poor alike, the law must treat violators at least roughly the same, regardless of where they hail from and how expensive the real estate is there.

Fifth, the law must not punish intent divorced from conduct. No one can know the disposition of another's heart, so law that seeks to punish that disposition would inevitably be un-law-like.

All these commitments apply in theory to civil and criminal justice alike, but they apply with special force in criminal cases. Legality is supposed to be honored in all the government does, but there is some room for play in the joints in civil regulatory systems. This is not so in criminal cases. If there is one key condition that must be satisfied for a country to call itself free, it is that no one can be thrown in prison for no better reason than because it pleased some government official to put him there. Legality requires that the *law* put him there.

That is the way things are supposed to work. The reality of the American legal system is different. Civil liability "rules" are often no more specific than the principle that regulated actors should behave reasonably. What reasonableness means depends on which jury or which regulatory agency made the judgment and when. Criminal justice is worse. Criminal codes cover a mountain of conduct, much more than any prosecutor's office could hope to punish. Police and prosecutors pick and choose, and they apply legal rules to one case that they would never apply to another. In federal cases, when officials suspect someone of crimes that *are* regularly enforced, they often target him for "crimes" that are virtually never punished. Federal agents and prosecutors thought Martha Stewart was guilty of criminal insider trading and misdisclosure. The misdisclosure charge was dismissed, and insider trading was never actually charged, but Stewart went to prison anyway for lying to federal agents and obstructing justice—crimes that are committed every day without legal consequence. Sometimes officials generate the crimes in question—just as Kenneth Starr's prosecutors and Paula Jones's lawyers created the "perjury trap" that almost cost President Bill Clinton his job seven years ago. People like Stewart go to prison for being famous and unpopular.

[2] "The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread." JOHN BARTLETT, FAMILIAR QUOTATIONS 655 (Emily Morison Beck ed., 15th ed. 1980) (quoting ANATOLE FRANCE, LE LYS ROUGE (1894)).

People like Clinton go to prison (when they do) just for being famous—a headline for the agents and prosecutors who take them down.[3]

Lawlessness is not merely the lot of rich celebrities. Drug crimes in poor city neighborhoods regularly lead to long prison terms.[4] Upper-class drug crime is treated more generously.[5] Often it is simply ignored since ferreting it out costs more than police have to spend.

In short, the rule of law is honored in theory but widely ignored in practice. Discretion mostly rules in America's justice system, especially its criminal justice system—the place where legality is supposed to be most sacred. Why?

We believe the answer comes in two steps. Step one has to do with law's ambition. Judging from appellate opinions and law reviews, American law is supposed to do a great deal more than define conduct rules and determine litigation outcomes. It is supposed to inspire, to express our deepest values, to shape our identity. Above all, it is supposed to *teach*. The various bodies of law that regulate commercial dishonesty seem designed to define a moral code for business and finance. Criminal codes likewise look like moral codes, and, like moral codes, they are comprehensive: no petty wrong, no act of selfishness is too trivial to escape their notice. But misbehavior, selfishness, and dishonest business practices are too common; the legal system cannot deal with them all. So, law enforcers must be selective, and their selections end up defining the *real* line between punished and permitted behavior. The rule of law becomes a veneer that hides the rule of discretion. Notice the relationship: the more law seeks to do, the farther it strays from the modest goal of resolving litigation outcomes, the bigger the role discretion plays in the actual operation of the legal system. The rule of law works only if law does not seek to rule too much.

The second step has to do with an unlikely subject: Christian theology. Christianity too sees law as a beautiful thing that delights the soul and serves as a source of inspiration and wise teaching on how to live life well. But the law that does all these good things is not meant for code books and courtrooms; it exists to govern the hearts

[3] For a more detailed discussion of pretextual prosecutions like Martha Stewart's and (if impeachment counts as a prosecution) Bill Clinton's, see Daniel C. Richman & William J. Stuntz, *Al Capone's Revenge: An Essay on the Political Economy of Pretextual Prosecution*, 105 COLUM. L. REV. 583 (2005).

[4] *See* William J. Stuntz, *Race, Class, and Drugs*, 98 COLUM. L. REV. 1795, 1832 (1998) [hereinafter Stuntz, *Race, Class, and Drugs*] (explaining how the criminal justice system targets drug markets in poor city neighborhoods for a variety of often defensible reasons, but the disproportionate presence in poor neighborhoods produces a perception of discriminatory treatment).

[5] *See id.* at 1821–22 (discussing the costs and burdens of investigating upper-class drug crime).

of the men and women God made in His image. Jesus' discussion of adultery and murder in the Sermon on the Mount proves the point: as He defines them, the prohibitions against these acts are ones that no legal system, ancient or modern, could possibly enforce.[6]

Christianity also contains the seeds of the rule of law: the ideas that all men and women have dignity in God's eyes, and that all need governing because all are prone to sin.[7] Yet, different rules exist for Martha Stewart than for the rest of us; different rules exist for the teenage boys who deal crack in city neighborhoods than for their counterparts who sell cocaine powder in the suburbs; different rules exist for cases that land on different prosecutors' desks. These things are not consistent with the Christian conception of who we are: men and women made in the Father's image, all of whom have strayed from His ways like lost sheep.[8] Christianity seems to require the rule of law, yet its vision of law is one that cannot function without massive, un-law-like discretion—discretion that violates all five of the traditional rule-of-law principles. The solution to this seeming inconsistency is the rule of *two kinds* of law: one for hearts and minds, and the other for code books and courtrooms. Only God's law is fit for the former purpose. Law that operates in the latter territories must have more humble ambitions.

To put the point more simply, the bodies of law that govern twenty-first-century America generally draw lines between good and bad, proper and improper behavior. Such laws cannot possibly govern; there is simply too much bad conduct. Good *moral* codes make for bad *legal* codes. Laws that aspire to teach citizens how to live and at the same time seek to govern the imposition of tangible legal penalties are likely only to teach lessons in arbitrary government and the rule of discretion. Perhaps God intended that His law should be the exclusive source of such moral teaching. If laws that govern men's and women's affairs are to function as law, and not as a cover for official discretion, they need to pursue a more modest agenda.

Part I of this essay briefly explores the Christian conception of law. The various restrictions that travel under the label of legality follow naturally from Christian premises. But God's law violates all those restrictions. And God's law is likewise seen in Christian scripture as a source of inspiration, joy, and wisdom. It could not provide those benefits if it remained within rule-of-law boundaries. Law can teach

[6] The most detailed account of the Sermon on the Mount is recorded in *Matthew* 5 (English Standard). Christ's teachings about adultery and murder appear at *Matthew* 5:27–28 (adultery) and *Matthew* 5:21–26 (murder). Unless otherwise noted, all subsequent translations of the Bible are from the English Standard Version, which is available at http://www.gnpcb.org/esv/.

[7] *See, e.g.*, *Romans* 3:23 (stating that "all have sinned and fall short of the glory of God").

[8] *See, e.g.*, *Isaiah* 53:6 ("All we like sheep have gone astray . . . ."); 1 *Peter* 2:25 ("For you were straying like sheep . . . .").

us how to live or it can send us to prison when we live especially badly. It cannot do both.

Part II takes up the laws that *do* send people to prison, along with the civil laws that govern business relationships. Here we explore why, as law covers ever more territory, it must become ever less law-like. And twenty-first-century American law covers a very broad territory indeed. We suggest that its broad scope follows naturally from its high ambition. If our society is to recover the rule of law, it must be a more modest law that rules.

I. THE RULE OF GOD'S LAW

There is no Equal Protection Clause in the Bible, no guarantee that God will treat all His creatures the same. Nor is there any explicit command that earthly governments do so. C.S. Lewis, perhaps the most broadly influential Christian thinker of the twentieth century, argued that equality is no part of God's world, that Heaven is a place of radical *in*equality. "Why else were individuals created," Lewis asked, "but that God, loving all infinitely, should love each differently?"[9] Even so, there are important family resemblances between the teachings of Christian scripture, on the one hand, and equal protection and other rule-of-law principles on the other. These resemblances follow directly from two of the Bible's central themes.

First, the Bible teaches that each of us is made in God's image. "And God created the human in his image," we read in the account of creation in the Bible's very first chapter.[10] "[I]n the image of God He created him, male and female He created them."[11] This theme runs through all of the Christian scriptures, Old and New Testaments alike. When the Jews were tempted to worship the idols of the nations that surrounded them, the prophets reminded them that, whereas idols are fashioned by the hands of men, they had been made by and in the image of God.[12] The Apostle Paul declares that "we are [God's] workmanship, created in Christ Jesus for good works, which God prepared beforehand, that we should walk in them."[13] When Jesus was asked whether it was proper for observant Jews to pay taxes to Caesar, he noted that Caesar's image was on the questioner's coins and then said: "[t]herefore render to Caesar the things that are

[9] C.S. LEWIS, THE PROBLEM OF PAIN 150 (MacMillan 1962) (1940).

[10] This quotation is taken from Robert Alter's splendid new translation of the five books of Moses. ROBERT ALTER, THE FIVE BOOKS OF MOSES: A TRANSLATION WITH COMMENTARY 19 (2005) (citing *Genesis* 1:27).

[11] *Id.*

[12] *Isaiah* 46:1–4.

[13] *Ephesians* 2:10.

Caesar's, and to God the things that are God's."[14] This is a clear reference to the image of God stamped on us all.

The second theme is as disheartening as the first is uplifting. The Bible tells us that each one of us has sinned—even more, that the desire to sin is woven into our very being. "[T]here is none who does good, not even one," David says in the Psalms.[15] "They have all turned aside . . . ."[16] Picking up on this theme, the New Testament pronounces that "all have sinned and fall short of the glory of God."[17] None of us is perfect or anywhere close to it. More than that, we are all radically *im*perfect—prone to selfishness and exploitation, ready to seize opportunities for our own advancement even if doing so brings injury and injustice to others. Sin is not just what we do (though we do a lot of it); it is who we are.

The first of these themes suggests that everyone deserves to be treated with dignity. Caesar's image stood for Rome's power; the face on a coin in the ancient world was a sign of the respect that power commanded.[18] God's image in each of us likewise commands respect. And since the image is shared by rich and poor alike, so too is the dignity that the image conveys. That is one respect in which the Bible definitely *is* egalitarian. Again and again, we are told to care for the poor, widows, and strangers—those who lack the means to care for themselves or the networks to get others to care for them. The Psalms pray for a king who "delivers the needy when he calls, the poor and him who has no helper."[19] And Jesus told his followers that whatever they do to care for "the least of these [his] brothers," they do for him: a clear statement that he identifies with those at the bottom of the ladder, not those at the top.[20]

An obvious implication of the second theme—that all of us are sinners—is that we need to be governed, restrained from acting on our worst impulses. If we were simply left to our own devices, our sin would produce chaos. It is important to underscore, moreover, that since all of us sin, the need for government is universal; no one is exempt from this need for oversight. Those who govern—the lawmakers who make the laws and the police, prosecutors, regulators, and judges who enforce them—do not stand outside and apart from sin;

[14] *Matthew* 22:21.

[15] *Psalm* 14:3.

[16] *Id.*

[17] *Romans* 3:23.

[18] It is for this reason that the early Christian pronouncement that "Jesus is Lord" was a radical political statement, a challenge to Caesar's claim of ultimate authority. This theme is explored in detail in OLIVER O'DONOVAN, THE DESIRE OF THE NATIONS: REDISCOVERING THE ROOTS OF POLITICAL THEOLOGY (1996).

[19] *Psalm* 72:12.

[20] *Matthew* 25:40.

they too are in its grasp. It follows that the governors need to be governed, just like the rest of us.

Weave these two threads together and one sees a familiar fabric. Government is essential to avoid lives that are, in Hobbes' famous phrase, "nasty, brutish, and short."[21] But that government should treat even those it punishes with the dignity and respect due to creatures made in God's image. If anything, that requirement is heightened when the government's wrath is visited on the poor, who are usually the recipients of criminal punishment. And, since sin is universal and since those who govern must themselves be governed, law (not government officials) must do the restraining. Rulers must submit to the same rules they apply to others. There is one more reason why law rather than discretion must be the driving force behind official punishment. If discretion governs, those who punish must have clean hands; they must stand in a superior moral position relative to those they condemn. But the Bible teaches that no one has clean hands; none of us can fairly claim moral superiority.[22] So no one can pass judgment. Only the law itself can do so.

These Biblical principles lead, in other words, to the same rule-of-law principles that our legal system purports to honor. Clearly articulated rules,[23] not jurors' or judges' whims, should be the basis for decisions that impose criminal or civil liability on the state's citizens. This principle follows from the proposition that those whims are in part the product of sin: discretionary power means the power to oppress, something all power-holders are tempted to do. So, too, the rules must have a reasonable measure of specificity. While no legal system can define permissible and impermissible behavior in intricate detail, the line between the two should be reasonably clear. Otherwise, we are right back in the world of unbounded discretion, with prosecutors and regulators holding all the cards. For the same reason, the rules should be specified in advance; if not, officials will be tempted to apply different and harsher rules to those they target than to the rest of the population. Likewise, the same rules must apply to rich and poor alike, if all are to be treated with the dignity and respect that is due to creatures made in God's image. And since that image does not vary with skin color or neighborhood, the same rules should apply to all races, ethnicities, and social classes. Finally, because none of us is in a position to judge another's thoughts or incli-

[21] THOMAS HOBBES, LEVIATHAN 96 (A.P. Martinich ed. Broadview Literary Texts 2002) (1651).

[22] *See Psalm* 14:3 ("They have all turned aside; together they have become corrupt; there is none who does good, not even one."); *Romans* 3:23 ("[F]or all have sinned and fall short of the glory of God . . . .").

[23] Note once again that we are using the term "rule" broadly here to encompass any legal regulation.

nations—only the Lord, as God told Samuel, can look on a person's heart[24]—the law should punish conduct, and never intent alone.

The rule of law thus follows quite naturally from Christian premises. But how can this be reconciled with God's law itself? Consider how God's law is portrayed in the New Testament. The most familiar summary of God's law is the Golden Rule: Christ's command that we love God with all of our heart, soul, and mind, and that we love our neighbors as we love ourselves.[25] Whatever else one can say about this twin command, it does not conform to the principle that rules must be defined with reasonable specificity. On the contrary, one can barely imagine a more vague and open-ended legal requirement. Perhaps the vagueness is nothing more than the inevitable consequence of the fact that Jesus is summarizing God's law, rather than spelling it out in detail. But Christ's more detailed pronouncements are likewise at odds with traditional rule-of-law principles. In the Sermon on the Mount, Jesus defines as murderers "everyone who is angry with his brother," even those who say, "'You fool!'"[26] Adulterers include not only those who have sexual relations with others' spouses, but "everyone who looks at a woman with lustful intent."[27] Plainly, these broad definitions violate the principle that punishment should be based on conduct, not intent alone.

Their breadth also violates the principle that rules, not discretion, should determine who pays legal penalties. No legal system that defined murder and adultery as Jesus did could enforce those offenses with any consistency. Such laws would function like highway speed limits—all drivers violate them, so the *real* law is whatever state troopers decide. And Jesus himself applied God's law differently to different people, violating the principle that all should be bound by the same rules. Recall the rich young ruler who asks Jesus what he must do to obtain eternal life.[28] Jesus first tells the wealthy man that he must "keep the commandments" if he wants to "have eternal life."[29] When the man says "[a]ll these I have kept," Jesus instructs the man to sell everything he owns, give it to the poor, and follow him.[30] Nowhere else in the New Testament does Jesus impose this obligation on his followers generally, or indeed on anyone else.

[24] *See* 1 *Samuel* 16:7 ("[M]an looks on the outward appearance, but the LORD looks on the heart.").

[25] *See, e.g.*, *Matthew* 7:12 ("So whatever you wish that others would do to you, do also to them, for this is the Law and the Prophets.").

[26] *Matthew* 5:22.

[27] *Matthew* 5:28.

[28] *See Matthew* 19:16.

[29] *Matthew* 19:16–17.

[30] *Matthew* 19:20–21.

God's law, as Jesus teaches and applies it, violates every single principle that flies under the banner of the "rule of law." If the state tried to replicate this law in a legal code, police and prosecutors would have total, absolute discretion to choose who should be sent to prison and who should go free; and civil law regulators could pick their least favorite CEO and punish him or her whenever they chose. In practice, the discretionary choices of the governors, rather than God's law itself, would govern the people. Yet the same Bible that seems to flout rule-of-law norms also seems to require those norms. How is the circle to be squared?

The answer is that two different kinds of law are at issue. Rule-of-law norms derive from the practical realities of controlling wrongdoing in a world filled with wrongdoing—a world in which all sin but only some sinners can be punished, where rulers are prone to favoritism and exploitation while those they rule need wise laws to protect them from one another. In such a world, law must play a double game: restraining the worst wrongs by the citizenry without empowering judges and prosecutors to do wrong themselves. The key to playing that double game well is to limit law's reach. Only the most destructive and most readily verifiable wrongs should be forbidden, because forbidding more would turn punishment over to the discretion of law enforcers.

God's law is not bound by those limits, because it plays no double game. The Lawmaker need not restrain Himself. He is not the problem. We are. His law can therefore be comprehensive, covering all wrongs, not just those that a given society can afford to punish. His law is not limited to conduct, because the God in whose image we are made sees the thoughts that lie behind conduct. Nothing is hidden from Him. His law covers everything, all of life—it is not law *defined by* its limits, but law *without* limits.

That limitless, comprehensive quality is closely tied to another feature that receives a great deal of comment in scripture: law's delightfulness. The beauty of God's law, and the sheer joy it imparts, is a frequent theme of the Psalms. "The law of the LORD is perfect," David marvels, "reviving the soul . . . the rules of the LORD are true, and righteous altogether. More to be desired are they than gold, even much fine gold; sweeter also than honey and drippings of the honeycomb."[31] Another psalmist proclaims, with evident relish, that "I will meditate on your precepts and fix my eyes on your ways. I will delight in your statutes; I will not forget your word."[32] "Your testimonies are wonderful," he goes on to say, therefore my soul keeps them. The unfolding of your words gives light; it imparts understand-

[31] *Psalm* 19:7, 9–10.

[32] *Psalm* 119:15–16.

ing to the simple. I open my mouth and pant, because I long for your commandments."[33]

This language sounds strange to twenty-first-century American ears: delight and longing are hardly the first things that come to mind for most of us when we think about law. But the responses are not as strange as they first seem. Most of us have had, at one time or another, great teachers who inspired and delighted their classes. The best teachers and the best teaching do that. It should come as no surprise that God's wisdom—better teaching than one finds in the best-run classroom—prompts the same reaction. And wisdom is precisely what a comprehensive moral law provides. C.S. Lewis put it well, though incompletely, when he called God's law "the 'real' or 'correct' or stable, well-grounded, directions for living."[34] "Directions for living" sounds prosaic, but the portions of scripture that provide those directions most explicitly are anything but. The Ten Commandments and the Sermon on the Mount are, among other things, great literature, more poetry than prose. That, too, should come as no surprise. A well-lived life is a beautiful thing to behold, a source of delight and inspiration to those fortunate enough to see it. The principles that define such a life are likewise beautiful to behold, and they are natural subjects for great literature.

Legal codes are *not* natural subjects for great literature, which is why *Exodus* 22:1–15, the passage that defines punishments for various offenses against property rights, reads so differently than *Exodus* 20:1–17, the passage that defines both God's relationship with us (the first four commandments) and our relationships with one another (the last six). *Exodus* 22 reads like what it is: a legal code, designed to specify conduct rules and punishments to be imposed by human beings on other human beings. *Exodus* 20 reads like what *it* is: a code for the life of the soul, not merely the life of buying and selling.

Notice that the very features that make God's law delightful—its depth and comprehensiveness, the way it addresses both the worst wrongs and the deepest longings of our hearts and minds—also make it impossible to use as a code to be enforced by, and against, sinful men and women. The principle of legality exists to constrain the power of human beings: police officers, prosecutors, and judges. God's law has no human law enforcers, so it needs no such constraint.

This sounds like dualism. God's law, we seem to be suggesting, is made for another world, whereas our legal codes operate in *this* world. The truth is otherwise. God's law is likewise made for this world, for *His* world; otherwise it would not be so concerned with

[33] *Psalm* 119:129–31.

[34] C.S. LEWIS, REFLECTIONS ON THE PSALMS 60 (1958).

teaching us how to live. But the Ten Commandments and the Sermon on the Mount are not made for the world of prosecutors' offices and prisons, courtrooms and jury boxes. No comprehensive moral code, no system of law that judges thoughts as well as deeds, no law that forbids not just adultery but lust and not just murder but unjustified anger, can serve as a code for judges and juries.

II. THE RULE OF MAN'S LAW

Judged by the sheer volume of legal doctrine, twenty-first-century America is among the most law-bound societies in human history. Judged by common legal practice, it is not a society that regularly honors principles of legality—notwithstanding our purported commitment to those principles. The second statement follows naturally from the first: the law of code books and case reporters cannot rule when it covers too much territory. And our law covers a great deal of territory.

Consider first the civil justice system. Individuals must behave reasonably, meaning they must obey the Golden Rule (i.e., take account of the costs of their activity to others as they take account of costs to themselves) or risk tort liability when they cause harm. Of course, the negligence standard has been around for a very long time. But it has not always taken its present form. The common law bounded negligence liability with defenses like contributory negligence and assumption of risk, with narrow causation doctrines and with limited duties of care. The few plaintiffs who could overcome those obstacles faced strict limits on remedies: damages for physical injury but not for physical or emotional pain, damages for property damage but not for economic loss. The Golden Rule was not enforced across the board; liability was much more limited than that. Today, liability is a great deal broader and, not coincidentally, its boundaries are a great deal less certain and less law-like.

That is just tort law. Similar stories can be told about other common-law liability regimes. And a host of statutory systems establish civil liability in areas that were unknown at common law. Many of those liability regimes are good and useful. Rules that limit or forbid pollution and securities fraud, dangerous workplaces and discriminatory hiring practices are all signs of legal progress. But progress has come at the price of broad, negligence-like liability regimes that mean whatever juries or government regulators decide they mean.

Civil liability regimes often seem in tension with rule-of-law norms, but the degree of the tension is limited by the nature of the liability. If all manufacturers of dangerous products are liable for damages (generously defined) to those who suffer injuries attributable to those products, a large fraction of serious injuries will prompt lawsuits, because plaintiffs and their lawyers stand to make money from those

lawsuits. The law will be litigated to the margin, or nearly so.[35] If liability is grossly excessive, courts will see the consequences of the excess and (one hopes) take steps to remedy the problem. At least to some degree, the system is self-correcting.

That is not true of *criminal* liability rules. The state has a practical monopoly on enforcing such rules and no one wins a bounty when the rules are successfully enforced. Because no one has an incentive to enforce those rules across the board, there is no self-correcting mechanism. Indeed, legal excess is actually self-*reinforcing*. If Congress passes an overbroad criminal statute, one of two things is likely to happen. Federal agents and prosecutors may use the statute only occasionally, as a means of inducing guilty pleas from defendants suspected of other crimes. That use is largely invisible: its effect is to make criminal convictions cheaper, which is something both Congress and prosecutors want. The other possibility is that a few prosecutors will use the statute against defendants who do not deserve to be punished, much like the independent counsels of the 1990s tried to enforce overbroad federal crimes against the politicians caught in their crosshairs.[36] Those investigations ruined the reputations of the prosecutors who pressed them. But they did not lead to demands that Congress narrow the relevant federal statutes.[37] The contrast is telling.

The result is that criminal law proliferates. Legislatures regularly add crimes and rarely remove them. Criminal codes become ever broader and ever more cluttered with obscure, outmoded prohibitions just waiting for some entrepreneurial prosecutor to use them to extract a more favorable plea bargain.[38] The fraction of the population that is guilty of one or another jailable offense grows ever larger.[39] The discretionary power of police officers and prosecutors grows with it.

[35] This is the intuition behind the longstanding debate over the efficiency (or not) of the common law. For a good recent survey of the debate, see Paul H. Rubin, *Micro and Macro Legal Efficiency: Supply and Demand*, 13 SUP. CT. ECON. REV. 19 (2005).

[36] *See* Richman & Stuntz, *supra* note 3, at 590–94 (describing the various ways in which independent counsels used broadly defined crimes to pursue either innocent or only marginally guilty politicians).

[37] *See* William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 HARV. L. REV. 2548, 2557 (2004) [hereinafter Stuntz, *Plea Bargaining*] (explaining that the public blamed Congress only for its prosecutorial role in Clinton's impeachment, not for its original passage of the law giving rise to the impeachment). The discussion that follows in the text draws in the reasoning in this Article.

[38] *See id.* at 2558 (describing the legislature's tendency to gradually add new criminal prohibitions without deleting any of the old ones).

[39] Notice that the share of the population that is guilty of violating the criminal code is independent of the inmate population. The former depends on the scope of criminal codes. The latter depends primarily on prosecutors' charging decisions.

Broad as it is, that discretionary power is substantially constrained when the police officers and prosecutors work for city or county governments. Those governments operate under severe budget constraints; the last thirty years have seen massive docket increases with only modest increases in personnel.[40] The consequence is that, at least in high-crime jurisdictions, prosecutors lack the time to go after the kinds of offenses the pursuit of which made Ken Starr infamous.[41] The many rococo crimes that litter state codes do not matter much; prosecutors focus instead on core violent crimes, major thefts, and drug deals.[42] Drug crime aside, the rule of law functions better than one would suspect from a glance at the code books.

In federal court, by contrast, the rule of law barely functions at all. Federal prosecutors are much better funded than are their local counterparts.[43] And they have a much smaller range of responsibilities—if murderers or rapists go unpunished, the local district attorney may lose his job, while United States attorneys are free to go after the cases they think matter most or the cases most likely to yield headlines. The federal code gives them an enormous array of charging options. There are hundreds (literally) of fraud and misrepresentation statutes, covering a large fraction of the lies and almost-but-not-quite lies anyone might tell.[44] Very little dishonesty is actually punished. During Clinton's impeachment hearings, people scoured the case reporters looking for examples of sex-related lies during depositions that led to criminal charges. The lies themselves are surely common (consider how many civil cases involve allegations of sexual misconduct), but only a handful of cases were found, with none being factually similar to Clinton's case.[45] Yet, if federal fraud

[40] Stuntz, *Plea Bargaining*, *supra* note 37, at 2555–56 & nn.9–13, and sources cited therein.

[41] *See* Richman & Stuntz, *supra* note 3, at 600–08, (discussing the reasons behind prosecutors' inability to pursue these cases).

[42] *See id.* at 600.

[43] *See generally* Richman & Stuntz, *supra* note 3, at 607 (noting the severe budgetary constraints facing local officials as compared with federal officials).

[44] As of 1998, one scholar counted a total of 325 fraud and misrepresentation statutes. *See* Jeffrey Standen, *An Economic Perspective on Federal Criminal Law Reform*, 2 BUFF. CRIM. L. REV. 249, 289 (1998).

[45] During the House impeachment hearings, Alan Dershowitz testified that "the false statements of which President Clinton is accused fall at the most marginal end of the least culpable genre of this continuum of offenses and would never even be considered for prosecution in the routine case involving an ordinary defendant." *The Consequences of Perjury and Related Crimes: Hearing Before the H. Comm. on the Judiciary*, 105th Cong. 87 (1998) (statement of Alan M. Dershowitz, Felix Frankfurter Professor of Law, Harvard Law School), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=105_house_hearings&docid=f:53247.wais. In the same hearing, Jeffrey Rosen testified that "neither the independent counsel nor anyone else, to my knowledge, has been able to identify a case where a defendant was prosecuted, let alone convicted, for peripheral statements in a civil proceeding that he or she did not initiate in order to derive some kind of benefit." *The Consequences of Perjury and Related*

statutes occasion few prosecutions, collectively those statutes have large effects. They function as a kind of menu—a list of charging options a prosecutor may pursue once she decides to focus her attention on a particular suspect.

Often the targeting comes first, and the charges are an afterthought. Starr's investigation began as an effort to uncover crimes related to the looting of an Arkansas savings and loan. But Monica Lewinsky fell into Starr's lap (so to speak), and the rest is history.[46] So, too, federal agents set out to nail Martha Stewart for insider trading, but when that didn't work, got her for lying during the course of the investigation.[47] In *Brogan v. United States*,[48] agents suspected the defendant of labor racketeering but were uncertain that they could gain a conviction for that crime. So the agents showed up at Brogan's home, asked him whether he had taken money from the relevant companies (the agents knew that the answer was yes and that taking the money was not necessarily a crime), and when a startled Brogan said no, the agents told him—correctly—that he had just violated the federal false-statements statute.[49] Brogan's conviction under that statute was not primarily a consequence of the law; agents' and prosecutors' discretion mattered much more. In that respect, *Brogan* is typical of federal criminal prosecutions.

The requirement that law be primary, and discretion secondary, is not the only rule-of-law principle that the federal criminal justice system regularly violates. Many federal crimes, including ones that are frequently prosecuted, are defined in the vaguest possible terms. No one knows what a "scheme or artifice to deprive another of the intangible right of honest services" is,[50] but thousands of people sit in federal prison convicted of intangible-rights mail fraud. Brogan's crime, like Clinton's and Martha Stewart's, was not truly a crime before Brogan committed it; the decision to target Brogan came first, after which agents maneuvered him into saying the wrong thing, in effect talking himself into a prison sentence.[51] Furthermore, no one familiar with federal drug laws would say that the law means the same thing in different neighborhoods. Crack cocaine is often sold in outdoor street markets in poor inner-city neighborhoods. Cocaine powder is sold more discreetly, usually in wealthier communities.[52] Selling crack is vastly more likely to lead to a prison sentence than selling cocaine powder because the crack markets are more easily identified by the police. And federal sentencing rules ensure that crack dealers pay a much bigger price for their crimes than dealers in cocaine powder.[53] Although poor whites are much more numerous, their population is more dispersed; African Americans are a large fraction of the urban poor. The upshot is that many young black men are treated very differently and much more harshly than young white men who commit similar crimes.

Finally, a number of federal criminal statutes seem to attach criminal liability to intent divorced from conduct. The most famous example of this phenomenon is the Travel Act, which makes it a federal felony to cross a state line with the intent to commit any of a long list of crimes, including some trivial ones like gambling.[54] The only conduct element in Travel Act prosecutions is crossing a state line—hardly a sign of a deep moral failing. It should come as no surprise that the Travel Act is largely strategic: it was proposed by then Attorney General Robert Kennedy in order to give federal prosecutors a more effective means of nailing Mafia defendants.[55] Today, the federal government uses the same tactics against suspected terrorists, as then-Attorney General John Ashcroft proudly stated:

> Attorney General [Robert] Kennedy made no apologies for using all of the available resources in the law to disrupt and dismantle organized crime networks. Very often, prosecutors were aggressive, using obscure statutes to arrest and detain suspected mobsters. One racketeer and his father were indicted for lying on a federal home loan application. A former gunman for the Capone mob was brought to court on a violation of the Migratory Bird Act. Agents found 563 game birds in his freezer—a mere 539 birds over the limit.
>
> . . . .

Crimes: Hearing Before the H. Comm. on the Judiciary, *supra*, at 97 (statement of Jeffrey Rosen, Associate Professor of Law, George Washington University Law School).

[46] For a good (and scathing) account of the story, see Robert W. Gordon, *Imprudence and Partisanship: Starr's OIC and the Clinton-Lewinsky Affair*, 68 FORDHAM L. REV. 639, 672–73 (1999).

[47] On the charges against Stewart, see Constance L. Hays, *Martha Stewart Indicted by U.S. on Obstruction*, N.Y. TIMES, June 5, 2003, at A1. For a defense of the government's tactics, see Scott Turow, Op-Ed., *Cry No Tears for Martha Stewart*, N.Y. TIMES, May 27, 2004, at A29.

[48] 522 U.S. 398 (1998).

[49] *See id.* at 409–10 (Ginsburg, J., concurring).

[50] *See* 18 U.S.C. § 1346 (2000) (defining "scheme or artifice to defraud" as including the quoted phrase).

[51] In her concurring opinion in *Brogan*, Justice Ginsburg explained the danger of this type of maneuvering: "if an investigator finds it difficult to prove some elements of a crime, she can ask questions about other elements to which she already knows the answers. If the suspect lies, she can then use the crime she has prompted as leverage or can seek prosecution for the lie as a substitute for the crime she cannot prove." *Brogan*, 522 U.S. at 411 (quoting Giles A. Birch, Comment, *False Statements to Federal Agents: Induced Lies and the Exculpatory No*, 57 U. CHI. L. REV. 1273, 1278 (1990)).

[52] *See* Stuntz, *Race, Class, and Drugs*, *supra* note 4, at 1808–09 & nn.24–29 (1998), and sources cited therein (describing the differences between markets for crack and cocaine powder).

[53] For the classic (and still the best) discussion of how those rules came to be, see David A. Sklansky, *Cocaine, Race, and Equal Protection*, 47 STAN. L. REV. 1283, 1285–97 (1995).

[54] 18 U.S.C. § 1952 (2000).

[55] *See* NANCY E. MARION, A HISTORY OF FEDERAL CRIME CONTROL INITIATIVES, 1960–1993, at 28–30 (Steven A. Egger ed., 1994) (stating that Kennedy proposed eight new laws to fight organized crime).

> Robert Kennedy's Justice Department, it is said, would arrest mobsters for "spitting on the sidewalk" if it would help in the battle against organized crime. It has been and will be the policy of this Department of Justice to use the same aggressive arrest and detention tactics in the war on terror.[56]

Why does federal criminal law so thoroughly violate rule-of-law principles? One reason is institutional. Congress criminalizes broadly because doing so is cheap; members know that the laws they pass will rarely be enforced (and when they *are* enforced, they will often be used against people suspected of other, more serious crimes—like the terrorists and mobsters in Ashcroft's examples). New criminal prohibitions are inexpensive ways of taking a stand against one or another type of crime. The federal Violence Against Women Act ("VAWA"), passed in 1994,[57] produced zero prosecutions in 1997.[58] In a system like that, proliferation of new crimes is natural. The same is true of harsh sentencing laws. Tens of thousands of men and women sit in federal prison on drug charges; the drug laws are not as cheap as VAWA. But those laws are not exactly expensive either: the total federal prison population is about 170,000, compared to 1.9 million inmates incarcerated on state-law charges.[59] Predictably, state legislatures pay some attention to the consequences of harsh sentencing rules, since those rules cost a great deal of money.[60] Congress has much more money to spend and its sentencing rules cost less. There is little incentive to worry about whether sentencing rules are too harsh.

Institutional incentives go some distance toward explaining the gap between rule-of-law norms and federal criminal practice, but not the whole distance. Another explanation has more to do with ideology than institutions. Federal criminal law has a long history of moralism, dating to the days of the Mann Act[61] and Prohibition. The small size of the federal enforcement bureaucracy (the FBI has fewer than 12,000 agents, compared to 700,000 state and local police officers)[62] makes the federal criminal code an attractive vehicle for taking symbolic moral stands. Members of Congress can please constituents who wish to condemn the relevant conduct, without paying either the fiscal or political price of *stopping* that conduct. In contrast to legislation that embodies compromises and tradeoffs, federal criminal law is a land of broad "thou shalt nots," leaving the compromises and tradeoffs for law enforcers. That is why vice has long played such a key role in the field: the Mann Act's emphasis on sexual immorality, Prohibition, a succession of bans on other narcotics, the Travel Act, and other federal gambling prohibitions.[63] Whatever moral debate currently occupies national attention, such as partial birth abortion or human cloning, generally ends up adding a crime to Title 18. (Perhaps conspiracy to commit gay marriage will soon be a federal felony.) Although the federal government played a large role in enforcing Prohibition, for the rest of the crimes mentioned in this paragraph, federal cases have been a small share—ten percent or less—of total prosecutions.[64] The laws in question are means of sending messages to voters, not sending offenders to prison.

Something similar happens in the sphere of white-collar crime. Consider the large body of criminal law governing corporate and commercial misconduct. That law looks like a comprehensive code of business morality. Each new corporate scandal creates both institutional incentives to act and the urge to send a moral message. The first major securities laws, and the civil and criminal antifraud provisions that came with them, were inspired by the scandals of the 1930s. Stock "pumping," "corners," and insider trading were all thought to have been rife on Wall Street, so Congress outlawed manipulation, "schemes or artifices to defraud," and the like.[65]

In the early 1970s, during the Watergate investigations, the special prosecutor discovered that many of America's best-known corporations kept slush funds to bribe foreign officials and for other sorts of influence-peddling. "The public," observe Bill Bratton and Joe McCahery, "already disgusted with corruption in government and agitated by the media, now demanded a clean up of corruption in

[56] Attorney General John Ashcroft, Prepared Remarks for the U.S. Mayors' Conference (Oct. 25, 2001) (transcript available at http://www.usdoj.gov/archive/ag/speeches/2001/agcrisisremarks10_25.htm).

[57] Pub. L. No. 103-322, 108 Stat. 1902 (codified as amended in scattered sections of 42 U.S.C.).

[58] *See* JAMES A. STRAZZELLA, AM. BAR ASS'N, THE FEDERALIZATION OF CRIMINAL LAW 20 (1998) (stating that there were no federal prosecutions for "interstate domestic violence" in 1997).

[59] BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 2003, at 479 tbl.6.2, *available at* http://www.albany.edu/sourcebook/pdf/t62.pdf.

[60] For an excellent discussion of the decision-making dynamics in states with sentencing guidelines, see Rachel E. Barkow, *Administering Crime*, 52 UCLA L. REV. 715 (2005).

[61] The Mann Act made it a crime to knowingly transport any individual for the purpose of prostitution or any sexual activity which is forbidden by federal, state, or local law. *See* 18 U.S.C. §§ 2421–23 (2000).

[62] *See* BUREAU OF JUSTICE STATISTICS, *supra* note 59, at 42 tbl.1.27 (providing numbers of state and local police officers), *available at* http://www.albany.edu/sourcebook/pdf/t127.pdf; *id.* at 69 tbl.1.72 (providing numbers of federal agents), *available at* http://www.albany.edu/sourcebook/pdf/t172.pdf.

[63] The history of gambling regulation is chronicled in exhaustive detail in NAT'L INST. OF LAW ENFORCEMENT AND CRIMINAL JUSTICE, U.S. DEP'T OF JUSTICE, THE DEVELOPMENT OF THE LAW OF GAMBLING: 1776–1976 (1977).

[64] *See, e.g.*, Stuntz, *Plea Bargaining*, *supra* note 37, at 2565–66.

[65] The relationship between scandal and corporate reform initiatives is discussed at length in DAVID A. SKEEL, JR., ICARUS IN THE BOARDROOM: THE FUNDAMENTAL FLAWS IN CORPORATE AMERICA AND WHERE THEY CAME FROM (2005).

corporate America."[66] Congress responded by enacting the Foreign Corrupt Practices Act, which included sweeping new provisions outlawing payments by a firm or any of its representatives to foreign officials.[67]

In response to the institutional pressure to step in once again after the recent Enron and WorldCom scandals, Congress further augmented the long list of corporate crimes by enacting the Sarbanes-Oxley Act.[68] In addition to sharply increasing the punishments under numerous existing provisions, the legislation added a slew of new penalties for "any person who attempts or conspires to commit" a securities offense (punishable to the same extent as the offense in question);[69] for tampering with a record (up to twenty years in prison);[70] for destroying, altering, or falsifying records and documents to impede or obstruct any federal investigation (twenty years);[71] and for retaliating against informants (ten years).[72] In effect, these provisions announce that any future corporate executive who does any of the bad things Enron's executives did will have violated the criminal code. Congress completed the sweep by adding a broad new catch-all provision that makes it a crime (punishable by up to twenty-five years in prison) to "knowingly execute[], or attempt[] to execute, a scheme or artifice . . . to defraud any person in connection with any security."[73]

Many of the other provisions in the corporate responsibility legislation are civil in form, including provisions requiring the company's executives to certify its financial statements[74] and to establish an internal compliance program.[75] But these, too, expand the scope of potential criminal liability, due to the fact that section 21 of the 1934 Securities Act defines every knowing and willful violation of the securities laws as a crime.[76] As a result, every time Congress adds a new civil liability provision, it automatically adds another crime to the federal code. Together, the explicit crimes in title 18 of the U.S. Code and the implicit ones hidden in the securities laws comprise a vast, ongoing effort to define the contours of business morality.

[66] William W. Bratton & Joseph A. McCahery, The Content of Corporate Federalism, UCLA Law & Econ. Workshop 45 (discussion draft Aug. 30, 2004), *available at* http://repositories.cdlib.org/cgi/viewcontent.cgi?article=1091&context=berkeley_law_econ.

[67] Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, sec. 102, § 13(h), sec. 103, §§ 30A, 32, 91 Stat. 1494 (1977) (codified as amended at 15 U.S.C. §§ 78m(b), 78dd-1 to -2, 78ff (2000)).

[68] Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified as amended in scattered sections of 11, 15, 18, 28, and 29 U.S.C. (Supp. II 2002)).

[69] Sec. 902, § 1349 (codified as amended at 18 U.S.C. § 1349 (Supp. II 2002)).

[70] Sec. 1102, § 1512 (codified as amended at 18 U.S.C. § 1512 (Supp. II 2002)).

[71] Sec. 802, § 1519 (codified as amended at 18 U.S.C. § 1519 (Supp. II 2002)).

[72] Sec. 1107, § 1513 (codified as amended at 18 U.S.C. § 1513 (Supp. II 2002)).

[73] Sec. 807, § 1348 (codified as amended at 18 U.S.C. § 1348 (Supp. II 2002)).

[74] § 302 (codified as amended at 15 U.S.C. § 7241 (Supp. II 2002)).

[75] § 404 (codified as amended at 15 U.S.C. § 7268 (Supp. II 2002)).

[76] Securities Exchange Act of 1934, 15 U.S.C. § 78u (2000).

As with federal vice laws, most of these provisions will be enforced both rarely and idiosyncratically. After an initial flurry of activity, companies and their executives will adjust to the new provisions. Companies and executives that are inclined to push the envelope or cheat will invariably find ways to maneuver around the new rules, much as Enron did in designing the off-balance-sheet partnerships it used to hide liabilities.

When regulators do try to enforce the morality reflected in the corporate misconduct provisions of the federal code, the result is often chaos. Martha Stewart's brush with the insider trading rules is a telling illustration. As construed by the SEC and Supreme Court, even if the defendant owes no duty to the company whose stock is being traded, she is liable if she buys or sells stock in violation of any kind of duty to anyone.[77] In Stewart's case, the theory was that her broker violated his duties as a broker when he told Stewart that the founder of ImClone was selling his stock, and that Stewart inherited this duty because she was a "tippee." What Stewart did was immoral, but it did not fit within any coherent, realistically enforceable theory of insider trading.[78] Regulators could never enforce these standards against more than the tiniest percentage of violators, which means that the real moral of the Stewart saga is this: don't be Martha Stewart—don't be the kind of famous, controversial person whom regulators might single out for enforcement. Moralist criminal law turns out not to be particularly moral.

As the law has grown more moralist, academic legal literature has devoted ever more attention to expressive theories of law, particularly criminal law. Expressivism and moralism are a natural pair: both hold that law exists not just to *govern*, but to *teach*.[79] Robert Ellickson

[77] *See* United States v. O'Hagan, 521 U.S. 642, 653 (1997) (endorsing a "misappropriation" theory of insider trading liability).

[78] In Stewart's case, the difficulty was compounded by the perception that her broker's behavior was not unusual—that is, that many brokers tell their clients about developments such as a sale of stock by a high-level executive of a company in which the client owns stock. If this perception is accurate, the brokers' duty is a duty in name, but not one that is followed in practice.

[79] *Compare* Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349, 351 (1997) ("Given the power of social influence, laws that shape individuals' perceptions of each others' beliefs and intentions . . . may often turn out to be the most cost-effective means of deterring crime."), Richard H. McAdams, *A Focal Point Theory of Expressive Law*, 86 VA. L. REV. 1649, 1691 (2000) [hereinafter McAdams, *Focal Point Theory*] (discussing the "labeling power" of law), *and* Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 341 (1997) [hereinafter McAdams, *Norms*] (advocating "the use of norms in economic analysis of law"), *with* William J. Stuntz, *Christian Legal Theory*, 116 HARV. L. REV. 1707, 1733–34 (2003) (reviewing CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT (Michael W. McConnell et al.

famously wrote about the way the farmers of Shasta County, California generated a system of "order without law"—the title of Ellickson's wonderful book—through the inculcation and application of social norms.[80] An important strand of legal scholarship has turned Ellickson's insight on its head, arguing that while social norms govern private conduct, legal rules shape social norms. These law-and-norms scholars, led by Dan Kahan and Richard McAdams, have focused much of their attention on criminal law and on the way different legal rules can produce healthier norms.[81]

This is moralism with different terminology. Instead of saying that criminal law does and should teach good morals, norms scholars say that the law should promote healthy norms—different language but the same concept. Also, norms theories face the same basic problem as moralist theories of criminal law: there is too much immorality. When legal codes try to play the role of moral codes, the result is that law ceases to function as law. We do not mean to suggest that the criminal law has no role to play in reinforcing healthy moral values. But purely symbolic laws have a very different effect. The more space the federal criminal code covers, the greater the ratio of crimes to prosecutions; the greater that ratio is, the more prosecutors—not the law—define the bounds of criminal liability. This might not be so if prosecutors simply prosecuted violators randomly, but enforcement discretion never works that way. Law enforcers draw the lines they like, or use their line-drawing power to extract information or to "take down" famous defendants.[82] Whatever the enforcement pattern, the message the law sends is bound to be different than the message embodied in the relevant statute. That is not likely to teach good morals or promote healthy norms, and it is not likely to delight anyone's soul.

Fraud prosecutions send the message that leading politicians, like Clinton or Henry Cisneros,[83] and celebrities like Stewart, are subject

eds., 2001)) (discussing a kind of moralism that "begins with the claim that law's highest goal is to identify classes of behavior that are not just socially wasteful or inefficient but *evil*, and then to stamp them out"), *and* Stuntz, *Race, Class, and Drugs*, *supra* note 4, at 1840–41 ("The great difficulty with [morals crimes] may be too little moralism. As the name suggests, morals crimes . . . depend more than do other crimes on the strength of the norms that undergird them. At the same time, those norms are more fragile than for other crimes.").

[80] ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES 13–120 (1991).

[81] *See, e.g.*, Kahan, *supra* note 79; McAdams, *Focal Point Theory*, *supra* note 79; McAdams, *Norms*, *supra* note 79. For an excellent critique of expressive theories of law, see Matthew D. Adler, *Expressive Theories of Law: A Skeptical Overview*, 148 U. PA. L. REV. 1363 (2000).

[82] *See, e.g.*, Richman & Stuntz, *supra* note 3 (discussing the prosecutions of Al Capone, Martha Stewart, Bill Clinton, and other prominent defendants).

[83] For a discussion of the prosecution of Cisneros, see William J. Stuntz, *Reply: Criminal Law's Pathology*, 101 MICH. L. REV. 828, 833 & n.24 (2002).

to one standard (anything we can prove, we prosecute), while the rest of the population is subject to another, or to no standard at all. Prosecutions for immigration violations send the message that those *suspected* of terrorism will be *convicted* of anything the government can pin on them. Drug prosecutions send the message that one norm applies on city streets and another in suburban malls—and, to a large extent, that one norm applies to African-Americans and another to whites. Those messages do indeed teach, but what they teach most effectively is cynicism about legal institutions.

Notwithstanding legal theorists' optimism about law's ability to teach wisdom or express our society's highest ideals, there is no reason to believe that criminal codes can accomplish these goals. When lawmakers try, the effort usually backfires. Prohibition did not produce an alcohol-free culture any more than contemporary law enforcement crusades have produced a culture that is drug-free. (It seems closer to the truth to say that our culture is drug-*obsessed*, perhaps in response to the law's ceaseless efforts to fine-tune what substances Americans can and cannot consume.) Criminal bans on abortion did not reinforce the social norm against that practice; on the contrary, the norm fell apart while those bans were still in place.[84] Even in the realm of civil justice, legal rules do not seem to move the culture in productive directions. As Michael Klarman's fine book on race and the Supreme Court shows, the greatest effect of *Brown v. Board of Education*[85] was to prompt still greater intransigence on the part of Southern segregationists.[86]

That last example deserves a little elaboration. Plainly, law played a central role in the civil rights movement; equally plainly, law made a difference—a large difference—in American life. It seems fair to say that, at least to some degree, the landmark civil rights legislation of the 1960s taught racial toleration. All of which sounds inconsistent with the claim that law governs best when it seeks *only* to govern, not to teach people how to live. The inconsistency is smaller than it first appears. Neither *Brown v. Board of Education* nor the Civil Rights Act of 1964[87] is chiefly responsible for teaching white Americans to treat

[84] Common estimates of the number of illegal abortions during the 1960s, before *Roe v. Wade*, 410 U.S. 113 (1973), range from 500,000 to 1.5 million. *See* GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 353–55 & tbl.A1 (1991) (analyzing the impact of *Roe v. Wade*, taking into account historical estimates of illegal abortions).

[85] 347 U.S. 483 (1954).

[86] *See* MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 385–421 (2004) (discussing and analyzing the rightward movement in the post-*Brown* Southern politics of race, and noting the tendency of previously moderate politicians to embrace racial extremism).

[87] Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 2000a to h-6 (2000)).

their black neighbors like equals. The key teaching was done in the decade between those two legal events by Martin Luther King, Jr. and by the movement that he led. King and other civil rights leaders gave violent white segregationists the opportunity to show the world who and what they were. The world watched, and the result was an emerging national consensus in favor of civil rights for African-Americans.[88] The civil rights legislation of the 1960s did not cause that consensus. Actually, causation ran the other way: changed minds and hearts among Northern whites (and more than a few Southern whites, as well) led Congress to conclude that support for civil rights was both morally sound and politically advantageous.

To be sure, civil-rights legislation mattered; it was a strong force for good. But the reasons why it worked so well do not suggest optimism about contemporary efforts to use law to advance moral agendas. The most important reason is that the key pieces of legislation—the 1964 Act and the Voting Rights Act of 1965[89]—had direct, tangible consequences that did not depend on discretionary decisions of police officers or prosecutors. Jim Crow laws were invalidated.[90] Voting rules had to be pre-cleared with the Justice Department.[91] Most important of all, victims of discrimination could sue and seek monetary relief from their victimizers.[92]

These tangible consequences meant that the law in action—the law that ordinary citizens experienced, the law that redressed wrongs and punished wrongdoers—was, in all essentials, the same as the law on the books. For the most part, civil rights law functioned as law: defining rights, wrongs, and remedies. That is very different from the role law plays in most regulatory regimes, civil as well as criminal. Not coincidentally, civil rights law also reinforced healthy moral messages that the larger society had already begun to absorb. Perhaps the lesson is this: law can indeed teach, but only when its chief object lies elsewhere. In governance as in life, most people learn by example. Moral messages are more likely to be received, and less likely to

[88] One of the best accounts is Taylor Branch's monumental three volume history of the King years. *See generally* TAYLOR BRANCH, PARTING THE WATERS: AMERICA IN THE KING YEARS 1954–63 (1989); TAYLOR BRANCH, PILLAR OF FIRE: AMERICA IN THE KING YEARS 1963–65 (1998); TAYLOR BRANCH, AT CANAAN'S EDGE: AMERICA IN THE KING YEARS 1965–68 (2006).

[89] Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1971–74e (2000)).

[90] *See* Civil Rights Act § 202 (codified as amended at 42 U.S.C. § 2000a-1 (2000)) (prohibiting discrimination and desegregation "purport[ing] to be required by any law, statute, ordinance, regulation, rule, or order of a State or any agency or political subdivision thereof").

[91] *See* Voting Rights Act § 5 (codified as amended at 42 U.S.C. § 1973c (2000)) (barring changes in voting rules by covered jurisdictions absent either judicial review or advance permission from the Justice Department).

[92] *See, e.g.*, Civil Rights Act § 706(g) (codified as amended at 42 U.S.C. § 2000e-5 (2000)) (granting courts discretion to fashion equitable relief, including monetary back-pay awards, for employment discrimination).

be garbled, when the message is acted out, not just written in code books and case reporters.

All of which is to say that law works best when its ambitions are modest. Humility turns out to be a better regulatory strategy than arrogance. Identifying the most destructive wrongs, doing so in terms that allow for fair, accurate adjudication, matching the scope of the criminal code to the resources of the police forces and prosecutors' offices that must enforce it—these are achievable goals. They are also worthy goals: a society whose criminal law meets these objectives is likely to have a criminal justice system that controls crime and does justice. The grander ambitions our law seems to have—to define a code of proper business practice or proper alcohol and drug use and to shape moral norms more generally—are *not* achievable. They are proper jobs for ethicists and philosophers, or perhaps doctors and economists, but not for lawyers and judges.[93]

Not coincidentally, they are also proper subjects for the moral law about which Jesus preached in the Sermon on the Mount. That law makes for very good morals, but very bad positive law. It is a lesson our secular legal system would do well to learn.

III. THE RELATIONSHIP BETWEEN GOD'S LAW AND MAN'S

Conservative Christians could stand to learn the same lesson. The New Testament makes abundantly clear that law cannot save souls; salvation must come through other means and from another Source. In the apostle Paul's letters, law is not the mechanism of salvation; rather, law shows the need of it.[94] Paul repeatedly warns Christians about the dangers of converting their faith into a moral code,[95] just as Jesus condemned the Pharisees for doing the same thing to their own faith and thus weighing down the people with burdens too heavy to

[93] Noah Feldman's recent proposal to "offer greater latitude for religious speech and symbols in public debate, but also impose a stricter ban on state financing of religious institutions and activities," is problematic for closely related reasons. Noah Feldman, *A Church-State Solution*, N.Y. TIMES, July 3, 2005, § 6 (Magazine), at 28; *see also* NOAH FELDMAN, DIVIDED BY GOD: AMERICA'S CHURCH-STATE PROBLEM—AND WHAT WE SHOULD DO ABOUT IT (2005) (providing historical context for the conflict over the proper line between church and state and proposing reconciliation between the positions of "values evangelism" and "legal secularism" through expanding acceptance of symbolic religious expression while enforcing rigid formal separation between religious institutions and the state). As a resolution of the First Amendment culture wars, Feldman's proposal seems to us exactly backwards. Because symbolic legislation (such as putting "In God We Trust" on coins) does not have tangible consequences, lawmakers are far too quick to embrace it. In the absence of real consequences, there is simply not enough of a check on bad lawmaking.

[94] *E.g.*, *Romans* 7:7–25 (elaborating on the difference between God's law and man's law).

[95] *E.g.*, *Galatians* 3:10–29 (distinguishing the law from the covenant between God and Abraham).

carry.[96] One might expect professing Christians to be especially attuned to the dangers of legal moralism. Judging from contemporary culture-wars debates, we are not. The heart of the problem is a tendency to confuse God's law with man's. Those of us who believe in a divine moral law are regularly tempted to try to write that law into our much-less-than-divine code books.

Among American evangelicals, this tendency was reinforced by the judicially mandated legalization of abortion in 1973, which galvanized theologically conservative Catholics and Protestants alike and spurred a long, still-ongoing campaign to flip the legal switch back.[97] The reasoning was and is quite straightforward: abortion is a serious wrong. It should therefore be outlawed, not legally protected. Whether or not one finds this logic persuasive, it is bedeviled by a striking irony in the practical world of American politics: the campaign against abortion seems to have been strengthened, not weakened, by the fact that pro-life evangelicals no longer have the law on their side. In the 1960s, abortion was a crime, and its public image was largely defined by the gruesome deaths that women risked when they sought illegal, black-market abortions.[98] Thanks in large part to that image, the campaign to liberalize abortion laws prospered. Since *Roe v. Wade*,[99] the public face of abortion has switched sides. In place of deaths from back-alley abortions, public attention focuses on deaths of almost-born infants in partial birth abortions.[100] Just as the first set of deaths were not representative of ordinary experience under the law that preceded *Roe v. Wade*, partial birth abortions are not representative of the mass of abortions that have taken place since that case. But different laws produce different public scandals.

Different scandals produce different politics. When the public is sharply divided about the rights and wrongs of some class of conduct, both sides of the debate will strive to use extreme and inflammatory cases against one another. But only one side will succeed. The law gives that devastatingly powerful weapon to the side that *loses* the legal debate, be they abortion rights proponents in the 1960s or pro-life advocates today. When even first-trimester abortions were crimes,

[96] *Matthew* 23:2–36 (quoting Jesus' condemnation of the teachers of the law and Pharisees).

[97] The argument in this paragraph is developed in greater detail in William J. Stuntz, *Self-Defeating Crimes*, 86 VA. L. REV. 1871, 1886–89 (2000).

[98] *See id.* at 1887–88 ("In 1960, *Newsweek* ran a story titled *The Abortion Racket*, estimating that five thousand women died each year from illegal abortions. . . . Th[is] and other accounts contributed to the growing sense in some circles that criminal abortion laws were wrong, even barbaric." (internal citations omitted)).

[99] 410 U.S. 113 (1973).

[100] One measure of the comparative salience of back-alley abortions and partial birth abortions is references to each in the print media. A recent search (conducted March 22, 2006) of Westlaw's "All News" database found 1801 stories mentioning back-alley abortions since January 1, 1990. With partial birth abortion, the database stopped counting at 10,000 stories.

partial birth abortions did not exist. Now that abortion is a constitutional right, deaths from back-alley abortions are much less common than they once were.[101] (Even in the 1960s, they were less common than the popular press led people to believe.[102]) Both times, the weapon—the ability of a vocal minority to reference cases or statutes to inflame citizens—played a large role in turning public opinion. Support for legalized abortion grew in the 1960s, just as opposition to it has grown since the early 1990s.[103] The consequences can be seen not just in political rhetoric, but also in practical conduct. The number of abortions rose steeply in the years leading up to *Roe*.[104] That number has *declined* steeply in the years since 1980.[105] The abortion rate could well be lower today than it was the year before *Roe* was decided. When the relevant legal territory is morally contested, the law's weaponry tends to wound those who wield it. Legal victory produces cultural and political defeat.

Evangelicals—especially conservative evangelicals—have been similarly united in opposing gambling and have treated legal prohibitions as the principal tool in the cultural debate on that subject. Evangelicals have comprised much of the opposition to lottery initiatives in South Carolina, Alabama, and elsewhere; they are the most visible opponents of the recent movement to allow racetracks to introduce slot machines.[106] The cover of a recent issue of a publication of the evangelical group, the Pennsylvania Family Institute, warned of the "false promises of funding schools and social programs with casino gambling" and urged its members to circulate citizens' petitions

[101] Lucinda M. Finley, *The Story of* Roe v. Wade*: From a Garage Sale for Women's Lib, to the Supreme Court, to Political Turmoil*, *in* CONSTITUTIONAL LAW STORIES 359, 401 (Michael C. Dorf ed., 2004) ("The principal practical consequence of *Roe* was to dramatically increase the safety of abortion.") (citing Center for Disease Control statistics).

[102] *See* Jeffrey Rosen, *The Day After Roe*, ATLANTIC MONTHLY, June 2006, at 56, 62 (suggesting that articles in Newsweek and The Saturday Evening Post exaggerated by "at least a factor of ten" the number of deaths from abortions).

[103] The debate over partial birth abortion is not the only source of the change in public attitudes. The increasingly widespread availability of sonograms has likewise been used by anti-abortion groups in attempting to strengthen opposition to abortion. *See, e.g.*, Neela Banerjee, *Church Groups Turn to Sonogram to Turn Women from Abortion*, N.Y. TIMES, Feb. 2, 2005, at A1 (discussing church groups' purchases of ultrasound machines).

[104] *See* ROSENBERG, *supra* note 84, at 353–55 (listing and discussing the estimated number of illegal abortions performed each year up until the *Roe* decision).

[105] *See* Lawrence B. Finer & Stanley K. Henshaw, *Abortion Incidence and Services in the United States in 2000*, PERSP. ON SEXUAL & REPROD. HEALTH, Jan.–Feb. 2003, at 6, 8 tbl.1 (showing a twenty-seven percent decline in the abortion rate between 1980 and 2000), *available at* http://www.guttmacher.org/pubs/journals/3500603.pdf.

[106] Evangelical opposition to gambling is discussed in more detail in David A. Skeel Jr., *When Gambling and Markets Converge*, *in* THEOLOGY AND THE LIBERAL STATE (forthcoming 2006).

and lobby their lawmakers to oppose Pennsylvania legislation that would authorize racetrack slots.[107]

Judging by the last century of criminal law enforcement, gambling's religious opponents may have bet on the wrong horse. At least since the early twentieth century, federal and state criminal codes have banned most forms of gambling. Those criminal prohibitions may have taught some Americans that gambling is wrong, but they seem to have taught millions of others to ignore the law's commands. Far from disappearing in the face of such proscriptions, gambling simply went underground. Bookmakers and numbers rackets took the place of casinos and legal lotteries.[108] Gambling was too ubiquitous for the government to punish across the board, so the line between what was forbidden and what was tolerated was a matter of prosecutors' discretion.[109] In practice, the line differed depending on the class of the customers. Police might raid the numbers rackets that flourished in poor immigrant and working-class neighborhoods, but they mostly left upscale bookmakers alone.[110] This class-based discrimination was a rational response to limited enforcement resources: it was far easier to police numbers games, which were often out in the open, than to track down more discreet bookmakers and their well-heeled clients. Going after lower-class gambling made sense as a way to get the biggest bang for the buck. But the bang turned out not to be as big as it seemed: the perception that gambling was a crime if you lived in the wrong neighborhood bred contempt for the laws that did the criminalizing.[111] In turn, this contempt eroded the very moral principles on which the prohibition was based.

If evangelicals could assemble a majority coalition in the current environment—resisting or even reversing the expansion of racetrack gambling, for instance, or heading off new lottery initiatives—we might see a similar dynamic at work. Millions of Americans do not believe gambling is immoral,[112] and a wave of new gambling prohibitions could increase that number if those on the margin recoil at the effort to legislate morality or the inconsistent enforcement of the prohibition. This points to another danger in trying to make the statute books mirror the law of God: the enterprise distracts religious believers from other, more limited efforts that might command widespread support. If they were not so closely linked with the campaign to prohibit gambling, evangelicals might speak with greater moral authority when criticizing, say, state governments' all-out efforts to promote their own lotteries. The same states that force welfare recipients to work for their bread also run advertisements featuring lottery winners bragging that "I'll never have to work another day in my life."[113] Religious believers sometimes criticize these cynical campaigns to put more cash in government coffers, but the message is muddled by the not-unfounded perception that their real goal is to use the law's sword to outlaw *all* gambling.

The tendency of legal moralism to backfire extends beyond culturally contentious issues like abortion and gambling. The world of corporate finance tends to prompt a moralism of the left, with politically liberal Christians seeking to enforce God's law in corporate boardrooms. Jim Wallis, editor of the liberal evangelical magazine *Sojourners* and author of the best-selling book *God's Politics*, praises Congress for its recent efforts to promote corporate responsibility:

> The Senate finally passed unanimously a series of accounting and corporate regulatory measures considerably tougher than what the president had suggested. They included, by a 97-to-0 vote, a new chapter in the criminal code that makes any "scheme or artifice" to defraud stockholders a criminal offense.[114]

Wallis then quotes and endorses Senator Patrick Leahy's assessment:

> If you steal a $500 television set, you can go to jail. Apparently if you steal $500 million from your corporation and your pension holders and everyone else, then nothing happens. [The corporate responsibility legislation] makes sure something will happen . . . .[115]

[107] Clem Boyd, *Slots for Tots Would Gamble Away Our Future!*, PA. FAMS. & SCHOOLS, Spring 2002, at 4. The campaign was to no avail, as the legislation passed. *See, e.g.*, Editorial, *Pennsylvania's Slots Sleaze*, WASH. POST, Mar. 3, 2005, at A24 (describing and criticizing the effects of the legislation).

[108] *See* Stuntz, *Race, Class, and Drugs*, *supra* note 4, at 1804 & nn.11–12 (discussing persistent trends in gambling over time).

[109] *See id.* at 1819–24 (discussing the peculiar policing and prosecutorial concerns involved in consensual crimes like gambling).

[110] *See id.* at 1804–19 (discussing the different effects of consensual crimes on neighborhoods of different classes).

[111] *See id.* at 1804, 1807, 1825–26.

[112] *See, e.g.*, Skeel, *supra* note 106 (manuscript at 14 n.29, on file with University of Pennsylvania Journal of Constitutional Law) (citing a 2003 Barna poll finding that sixty-one percent of all Americans, but only twenty-seven percent of evangelicals, approve of gambling).

[113] The "never work another day" ad ran in Pennsylvania. In a notorious New York ad, a mother made fun of her daughter for studying so hard to try to earn a college scholarship. No need to worry, the mother suggested; she'd taken care of the family's financial problems by buying a lottery ticket. JOHN R. HILL & GARY PALMER, S.C. POLICY COUNCIL EDUC. FOUND., GOING FOR BROKE: THE ECONOMIC AND SOCIAL IMPACT OF A SOUTH CAROLINA LOTTERY 26 (Gerry Dickinson ed., 2000) (describing the New York ad).

[114] JIM WALLIS, GOD'S POLITICS: WHY THE RIGHT GETS IT WRONG AND THE LEFT DOESN'T GET IT: A NEW VISION FOR FAITH AND POLITICS IN AMERICA 263 (2005). This is the catch-all criminal antifraud provision discussed earlier. *See* Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, Sec. 807, § 1348, 116 Stat. 745 (codified as amended in 18 U.S.C. § 1348 (Supp. II 2002)); *supra* text accompanying note 68.

[115] WALLIS, *supra* note 114, at 263 (quoting Senator Leahy as reported in Sean Gonsalves, *WTO Protesters Appear Prophetic*, SEATTLE POST-INTELLIGENCER, July 16, 2002, at B5). Wallis's discussion of the corporate scandals draws on and develops a commentary he wrote at the height

The suggestion is that laws can be used as an instrument to teach the next generation of corporate executives how to behave and reshape corporate culture.

It isn't likely to work out that way. Title 18 of the United States Code already includes several hundred laws banning various kinds of fraud and misrepresentation.[116] Adding a few more is like adding new rules to the tax code: corporate crooks, like rich taxpayers, will pay their lawyers to find new ways to maneuver around the rules. Nearly everyone agrees that there was a serious breakdown in corporate America at the outset of the twenty-first century and that corporate ethics were a large part of the problem. But new criminal prohibitions are more likely to undermine managers' sense of moral responsibility than to promote it. Every parent understands this point: given a choice between saying "don't hurt your sister" and "here is a list of fifteen ways you might hurt your sister—don't do any of these," wise parents opt for the first approach. Most children, when they are presented with a list of fifteen things not to do, will quickly come up with a sixteenth that is not on the list.[117] Detailed codes that try to define misconduct comprehensively tend to produce the same reaction. Complying with the law becomes an exercise in ticket-punching, following mechanical legal formulae. Regulated actors exercise their creativity by looking for ways to *evade* legal norms—like taxpayers filling out their tax forms every April 15, trying all the while to hold on to every penny they can.

When corporate regulation looks like the tax code, corporate executives respond like taxpayers. Given a list of dos and don'ts, many will find themselves thinking more about what they can get away with and less about what is honorable and right. Rather than cultivating a sense of moral responsibility, a comprehensive set of rules may simply function as an obstacle course, a set of barriers around which corporate officers must maneuver.[118] As with legal efforts to resolve contentious issues in our social life, legal efforts to define and enforce a code of economic morality produce a kind of reverse alchemy, turning the gold of good morals into dross.

of the scandals. Jim Wallis, *Hearts & Minds: The Sin of Enron*, SOJOURNERS MAG., Mar.–Apr. 2002, at 7, 8 ("Maybe this time we will demand that stronger stock trading regulations, accounting regulations, and a complete campaign finance reform overhaul be at the top of the political agenda.").

[116] *See supra* note 44 and accompanying text.

[117] Note that the opposite strategy—the one used by parents—is problematic when transplanted to the law. Vague prohibitions like "cause no harm" grant broad discretion to prosecutors and regulators. That is as likely to backfire as is a long list of irregularly enforced rules. The lesson is not that law regulates best through standards rather than rules, but that law makes a poor parent. The best parents are good moral educators, which legislators and judges are not.

[118] The most widely debated provision of the recent corporate responsibility reforms—a requirement that companies put an extensive internal control system in place and that the CEO certifies the firm's efforts to do so—is a good illustration. *See* Sarbanes-Oxley Act, 15 U.S.C. § 7262 (Supp. II 2002) (establishing the requirements for internal control provisions). Much of the discussion has centered on the cost of implementing internal controls, but the more lasting concern is that the requirement will simply function as another hoop through which corporate managers must jump. There is a danger that many companies will simply hire a new executive, the "corporate compliance officer," but that nothing else will change. Indeed, in some companies, the formal procedures could be used to mask a poisonous corporate culture.

It gets worse. Prosecutors cannot hope to enforce white-collar criminal law across the board; they must be selective. The most obvious way to select targets is to investigate every high-profile corporate bankruptcy. The moral message becomes not "don't lie" but "don't fail"—not the best message to send budding entrepreneurs.

Why do evangelical Christians find it so hard to resist the attractions of legal moralism? One answer is historical. Early in the twentieth century, evangelicals disengaged from American politics, partly in response to the spread of secular modernism[119] and partly in reaction to the debacle of Prohibition and its repeal. Starting in the 1940s, evangelical leaders, many of them connected to *Christianity Today*, the principal voice of conservative evangelicalism, began calling for a renewed commitment on the part of believers to engage and influence the culture around them. "From Carl Henry and Harold Ockenga in the 1940s and 1950s," as Christian Smith puts it, "to Francis Schaeffer and Mark Hatfield in the 1960s and 1970s, to Charles Colson and Anthony Campolo in the 1980s and 1990s, evangelicals have been driven by a vision of redemptive world transformation."[120] If the end is to transform a law-saturated culture like contemporary America's, legal reform seems a natural means. Debates over legal limits on abortion, gambling, and Enron-style corporate immorality become tools for healing a spiritually diseased society.

But the cure risks worsening the disease. A legal culture that invites selective enforcement (or no enforcement at all) of controversial laws makes it all too easy to enact such laws. Religious moralists need not win the culture in order to enact their preferred moral vision into law; on the contrary, culture and law can follow separate paths. Law becomes largely symbolic: the vast federal criminal law of misrepresentation goes unenforced, save for the occasional Martha Stewart or Scooter Libby on whom ambitious prosecutors train their sights.[121] That state of affairs pleases neither moralists nor libertari-

[119] For an excellent account that emphasizes the effects of this development on evangelical politics, see GEORGE M. MARSDEN, FUNDAMENTALISM AND AMERICAN CULTURE: THE SHAPING OF TWENTIETH-CENTURY EVANGELICALISM 1870–1925 (1980).

[120] CHRISTIAN SMITH, AMERICAN EVANGELICALISM: EMBATTLED AND THRIVING 178–79 (1998).

[121] Scooter Libby, the Chief of Staff to Vice President Dick Cheney, was indicted in 2005 for allegedly lying to prosecutors about the leaked identity of CIA employee Valerie Plame.

ans. The controversy that surrounded Terri Schiavo's death in the spring of 2005, together with the federal legislation and litigation that preceded it, is the latest example of the phenomenon.[122] It will not be the last.

The problem with the Schiavo legislation was not that the subject matter—the circumstances under which doctors may remove feeding tubes from comatose patients—is inherently inappropriate or incompatible with wise legal regulation. Rather, the problem was that even those supporting the regulation did not wish to apply it to any cases but Schiavo's. That is a recipe for bad lawmaking. If those of us who believe that Terri Schiavo deserved better than she got cannot persuade our fellow citizens to require that *all* those in Schiavo's circumstances receive better treatment, we should not seek, and lawmakers should not offer, "rules" that are not rules at all, but merely symbolic ("hypocritical" might be a better word) affirmations of norms that the citizenry is unwilling to live by.

The Schiavo case is an extreme version of a sadly common phenomenon. Legal moralists seek to ban some class of conduct that most of the population either wishes to engage in or is happy to tolerate. In a society that truly honored the rule of law, such bans could not pass muster, because the laws in question could never be fully enforced. In our system, such bans are a common means of political market segmentation, an attempt to mollify religious conservatives without offending secular libertarians. That result should displease both groups. Legal moralism does not, in the end, advance the interests of moralists—or anyone else, for that matter.

In short, legal moralism is nearly always counterproductive. In Christian terms, it is also deeply wrong. Jesus' definitions of adultery and murder proved that immorality and illegality cannot and must not be coextensive.[123] God's law reigns over a broad empire that man's law cannot hope to govern. Good moral principles are often vague and open-ended, and they reach into every nook and cranny of our lives and our thoughts. Legal principles that have these qualities only serve to invite arbitrary and discriminatory enforcement. Arbitrariness and discrimination in turn invite contempt for the law. Moral education becomes an exercise in educating the public in bad morals. The same thing happens if lawmakers choose a long list of rigid rules in place of vague moral principles, as our experience with

[122] The Schiavo case has already generated an enormous amount of writing. For one of the better arguments in favor of keeping Schiavo alive and for federal intervention to that end, see Peggy Noonan, *In Love With Death*, OPINION J., Mar. 24, 2005, http://www.opinionjournal.com/columnists/pnoonan/?id=110006460. For a discussion of how that case is likely to prove a self-inflicted wound for conservative Christians, see John C. Danforth, *In the Name of Politics*, N.Y. TIMES, Mar. 30, 2005, at A17.

[123] *See Matthew* 5:21–22 (discussing murder); *Matthew* 5:27–28 (discussing adultery).

trying to define and enforce corporate morality proves. Targets of those rules focus on the rules themselves, on maneuvering through legal minefields instead of exercising moral judgment. The law deters the very thing it seeks to promote. It is hard to avoid the conclusion that the law must draw lines not between right and wrong but between the most destructive and verifiable wrongs, and everything else.

And mixing God's law and man's law may have other unfortunate consequences: distorting religious believers' understanding of the divine law even as it distorts the public's approach to the laws of code books and court decisions. Distortion runs, in other words, in both directions. Even as we try to write morality into the statute books, we may be tempted to turn God's law into a list of purposeless rules, a kind of Biblical version of the Internal Revenue Code. That is precisely the tendency that Christ criticized in the Pharisees of his time—the tendency to focus on rules rather than relationship with the one true God, a tendency that robbed God's law both of its vastness and of its delight.

Conflating God's law and man's law thus does violence to both. It makes far too much of man's law, and far too little of God's. This realization leads to a surprising implication about contemporary American politics: the deep divide between moralists and libertarians may be needless, the result more of theological error than of spiritual disagreement. Libertarians seek to minimize formal legal restraints on private conduct. That agenda should hold some appeal for wise moralists, at least if the moralists are Christian. After all, the rule of law is a moral good in Christian terms. And the rule of law is likely to be honored best where legal restraints are most modest. The rule of good morals, meanwhile, must be honored—if it is to be honored at all—in the hearts and minds of the citizenry. Not in its courthouses.