

CRACKDOWNS

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The crackdown is the executive decision to intensify the severity of enforcement of existing laws or regulations as to a selected class of offenders or offenses. Each year, federal, state, and local prosecutors and agencies carry out thousands of crackdowns on everything from trespassing to insider trading to minimum-wage violations at nail salons. Despite crackdowns' ubiquity, legal scholarship has devoted little attention to the crackdown and to the distinctive legal and policy challenges that crackdowns can pose.

This Article offers an examination and a critique of the crackdown as a tool of public law. The crackdown can be a benign and valuable law enforcement technique. But crackdowns can also stretch statutory authority to the breaking point, threaten to infringe on constitutional values, generate unjust or absurd results, and serve the venal interests of the law enforcer at the expense of the interests of the public. Surveying a spectrum of crackdowns from the criminal and administrative contexts, and from local, state, and federal law, this Article explores

* Associate Professor, University of San Diego School of Law. For helpful comments and conversations, many thanks to Larry Alexander, Kate Andrias, Jordan Barry, Charles Barzun, Eric Biber, Josh Bowers, Laurence Claus, Kevin Cole, Adam Cox, Donald Dripps, Chris Egleson, Connie Egleson, Bill Eskridge, Richard Fallon, Miranda Fleischer, Victor Fleischer, Dov Fox, Michael Gilbert, Karl Gruben, Dave Han, John Harrison, Andrew Hayashi, Adam Hirsch, David Jaros, Michael Kelly, Thad Kousser, Anita Krishnakumar, Maggie Lemos, Ron Levin, Daryl Levinson, David McGowan, Miranda McGowan, Caleb Nelson, Anne Joseph O'Connell, Daniel Ortiz, David Pozen, Sai Prakash, Zach Price, Lisa Ramsey, Michael Ramsey, Daphna Renan, Christopher Robertson, Richard Seamon, David L. Shapiro, Kate Shaw, Ted Sichelman, Matthew Stephenson, Amanda Tyler, Urska Velikonja, Donald B. Verrilli, Lou Virelli, John Yoo, Adam Zimmerman, Evan Zoldan, and participants in the Public Law Workshop at Berkeley Law School, the Cardozo-St John's Legislation Roundtable, the Pepperdine Law School Faculty Workshop, the Southern California Law and Social Science Forum, the University of Arizona Law School Faculty Workshop, the University of San Diego Law School Faculty Workshop, and the University of Virginia Law School Faculty Workshop. I am also grateful to Scott Dansie for his capable research assistance, to the University of San Diego School of Law for supporting this project with a generous summer research grant, and to the editors of the *Virginia Law Review* for their thoughtful insights and suggestions. This Article was awarded the AALS Section on Criminal Justice's Junior Scholar Award for 2017 and the Honorable Mention in the 2017 AALS Scholarly Papers Competition.

the many ways that crackdowns may quietly subvert democratic values.

The obvious challenge, then, is to discourage the implementation of pathological crackdowns, while also preserving the needed flexibility to enforce the law, within the context of a legal and political system that imposes sparse restraints on the crackdown choice. This Article locates a foundation for tackling this challenge in the requirement of “faithful” execution in Article II’s Take Care Clause and its cognate clauses in the state constitutions. The crackdown decision should be faithful—to statutory text and context, to the interests of the public, and to constitutional and rule-of-law values. By elaborating the content of this obligation, this Article supplies a novel normative framework for evaluating the crackdown—and a much-needed legal platform for governing it. Cutting sharply against the grain of modern law, this Article calls for a broad rethinking of the principles and constraints that should frame the executive’s power to selectively and programmatically augment enforcement.

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INTRODUCTION

*[Y]our scope is as mine own
So to enforce or qualify the laws
As to your soul seems good.¹*

IMAGINE a town with a nominal speed limit of 25 mph. For decades, the town's police have tacitly permitted drivers to drive at 35 mph on the town's streets. One day, the mayor announces a "crackdown" on speeding, and instructs the town's officers to ticket any driver who goes 26 mph or higher and to make catching speeders their top enforcement priority.

Viewed from one perspective—from the perspective of legal rules—nothing noteworthy has occurred. The formal speed limit has remained unchanged at 25 mph. All that has happened is that the town's executive has chosen to ensure that the announced speed limit will be enforced to the hilt. It is well understood that the executive branch has the discretion to make this kind of reallocation of enforcement resources. On this view, as one of the town's police officers might say, "move along, there's nothing to see here, folks."

Viewed from another perspective, though—from the perspective of reality—everything has changed. In a legal realist sense, the speeding crackdown effectively reduced the speed limit by 10 mph; the town's residents will drive with that in mind for as long as the crackdown lasts. This change in these residents' lived experience did not come about as a matter of happenstance or coincidence—or as the result of an accumulation of individualized discretionary choices by individual police officers—but rather as a result of an explicit choice made by the town's mayor. She made that choice without public airing or advance discussion. Nor will her decision be subject to any institutionalized review or check.

This is the crackdown: an executive decision to intensify the severity of enforcement of existing regulations or laws as to a selected class of offenders or a selected set of offenses. Three features of the crackdown, as I define and use that term here, are important. First, it is *voluntary*. Prosecutors and agencies do not have to "crack down" on anything. They could allocate resources to cases randomly, introducing an element

¹ William Shakespeare, *Measure for Measure*, act 1, sc. 1, ll. 64–66 (J.W. Lever ed., 1965).

of surprise. They could do so algorithmically (say, by the date of a reported offense), or simply by inertia (by continuing on an existing pattern of enforcement efforts inherited from a prior administration). In contrast, to execute a concerted push in a particular selected area is a volitional act. Second, the decision to crack down is *internal* to the executive branch. A crackdown may require a change to an enforcement manual, to charging guidelines, or to policy guidance—but the threshold decision to crack down is one that can be made within the four walls of the executive branch, without the need for authorization or action by the other branches and without advance public airing. Third, and relatedly, a crackdown does not denote the formal creation of new laws or regulations (activities more properly called “lawmaking” or “regulating”). Instead, as the speeding ticket example reveals, a crackdown results in the *functional* creation of a new rule of primary conduct by making a shift in how stringently the rules “on the books” are enforced. Indeed, the mere announcement of a crackdown can affect primary conduct, as regulated entities alter their behavior to avoid potential liability.

The crackdown is a distinctively interesting species of enforcement power. Juxtapose it with a garden-variety individual enforcement action. Such an action involves a rather particular exercise of judgment: the determination that law applied to fact equals a violation in a given case. In contrast, the crackdown is neither particularized nor confined. Put another way, even though the particular case of Mr. Jones receiving a speeding ticket for driving at 26 mph may be uninteresting to anyone other than Mr. Jones, the unilateral, voluntary, and executive decision to crack down on *all* drivers going 26 mph or faster will be interesting to the town as a whole.² The choice to shift enforcement resources to make sure a law will be strictly enforced is an act that resembles rulemaking more than adjudication; an act that resembles law creation more than law enforcement.

Of the many questions the crackdown decision may prompt us to consider, the most fundamental is this: what legal principles, institutions, or

² The individual enforcement action and the crackdown mark points on a spectrum or continuum rather than clearly demarcated and separable categories. As Mr. Jones’s neighbors begin to receive their own speeding tickets, the accumulation of individual enforcement actions coalesces into a crackdown—and the degree of interest taken by the town in those enforcement actions will concomitantly increase. Thanks to Professor Maggie Lemos for emphasizing this point. See Margaret H. Lemos, *Accountability and Independence in Public Enforcement* 10 (Mar. 2016) (unpublished manuscript), <http://ssrn.com/abstract=2748720> [<https://perma.cc/RD2G-R3FF>].

checks, if any, should govern the executive's decision to "crack down"? This is a question that has gone largely unasked, let alone been answered. Although the crackdown is a ubiquitous phenomenon in American society,³ it has gone strangely unexamined in legal scholarship. In recent years, scholars have devoted overwhelming attention to conscious *nonenforcement* or announced broad-scale waiver, rather than to crackdowns.⁴ Separately, criminal law scholarship has been preoccupied with the perceived phenomenon of overcriminalization—the passage of “too many” criminal laws⁵—and the vast topic of constraining prosecutorial discretion in individual criminal cases.⁶ This literature omits analysis of the crackdown decision, which sits at the intermediate stage between a law's enactment and its enforcement in a particular case.⁷

³ See *infra* note 122.

⁴ See generally David J. Barron & Todd D. Rakoff, In Defense of Big Waiver, 113 Colum. L. Rev. 265 (2013); Derek W. Black, Federalizing Education by Waiver?, 68 Vand. L. Rev. 607 (2015); Zachary S. Price, Enforcement Discretion and Executive Duty, 67 Vand. L. Rev. 671 (2014); Cass R. Sunstein & Adrian Vermeule, The Law of “Not Now”: When Agencies Defer Decisions, 103 Geo. L.J. 157 (2014). See also Eric Biber, The Importance of Resource Allocation in Administrative Law, 60 Admin. L. Rev. 1, 22 (2008).

⁵ See generally Erik Luna, The Overcriminalization Phenomenon, 54 Am. U. L. Rev. 703 (2005); William J. Stuntz, The Pathological Politics of Criminal Law, 100 Mich. L. Rev. 505 (2001). See also Richard A. Bierschbach & Alex Stein, Overenforcement, 93 Geo. L.J. 1743 (2005) (discussing “overenforcement,” which they define as when the total sanction, both legal and extralegal, suffered by the violator of a legal rule exceeds the amount optimal for deterrence); cf. Mila Sohoni, The Idea of “Too Much Law”, 80 Fordham L. Rev. 1585, 1622–25 (2012) (critiquing the critique of overcriminalization).

⁶ See generally, e.g., William J. Stuntz, The Collapse of American Criminal Justice (2011); Rachel E. Barkow, Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law, 61 Stan. L. Rev. 869 (2009); Darryl K. Brown, Cost-Benefit Analysis in Criminal Law, 92 Calif. L. Rev. 323, 331–33 (2004); James Vorenberg, Decent Restraint of Prosecutorial Power, 94 Harv. L. Rev. 1521 (1981).

⁷ Much legal scholarship evaluates the constitutional problems with specific enforcement pushes, but no holistic evaluation of the crackdown has yet emerged. See, e.g., Tracey L. Meares, Programming Errors: Understanding the Constitutionality of Stop-and-Frisk as a Program, Not an Incident, 82 U. Chi. L. Rev. 159, 162 (2015) (arguing that the “programmatic” quality of the NYPD's stop-and-frisk program requires applying a revised Fourth Amendment approach); Robert D. Richards & Clay Calvert, The Legacy of Lords: The New Federal Crackdown on the Adult Entertainment Industry's Age-Verification and Record-Keeping Requirements, 14 UCLA Ent. L. Rev. 155, 156–57 (2007) (discussing the sudden increase of 18 U.S.C. § 2257 inspections by the FBI and its effect on the adult film industry); Steven Wisotsky, Crackdown: The Emerging “Drug Exception” to the Bill of Rights, 38 Hastings L.J. 889, 891 (1987) (assessing the “War on Drugs” by providing “a somewhat impressionistic sketch of the emerging ‘drug exception’ to the Bill of Rights”). Other scholarship has focused on presidential control over enforcement in the civil, federal, and administrative state, but has not broached the crackdown choice or the criminal arena more generally. See, e.g., Kate Andrias, The President's Enforcement Power, 88 N.Y.U. L. Rev.

This Article cuts across these debates. This Article is about the heightened enforcement of the law, not its nonenforcement. It is about the intensification of existing law, rather than law's proliferation. It is not about the choice to charge the individual, A; instead, it is about the choice to charge the series of A, and B, and C, and the rest of the gang. As Professors Cass Sunstein and Adrian Vermeule might have put it, it is about the law of "that, now!"⁸ It explains the distinctive significance and role of the crackdown, and having done so, constructs and defends a new theory of the principles and constraints that should attach to the wielding of this type of enforcement power.

In our system of law, the ideas of *constraint* and *crackdown* do not comfortably coexist. The ordinary treatment of the crackdown is to leave it largely *unregulated*. Although legal doctrine imposes certain limits on how enforcement discretion can be exercised, these rules set the outer boundaries of a large terrain within which the executive is thought to have *carte blanche* to dial up or dial down its enforcement priorities. As long as constitutional and statutory boundaries are respected, our system treats vigorous enforcement—the executive doing its job, with gusto—as something to be welcomed and lauded, not cabined and constrained.

The reality is more complicated. Consider:

(1) *Leaks and Plants*: An administration cracks down on leaks of government information related to national security. More leakers are prosecuted in fewer than eight years than have ever been prosecuted in the nation's history combined.⁹ At the same time, select government of-

1031 (2013). In addition, two valuable recent contributions to the literature on the discretionary enforcement policy are Lemos, *supra* note 2, and Rachel E. Barkow, Foreword: Overseeing Agency Enforcement, 84 *Geo. Wash. L. Rev.* 1129 (2016). Although neither focuses specifically on crackdowns, they both speak to the foundational problem that this Article likewise seeks to address—the need to articulate principles for governing, and mechanisms for constraining, the exercise of discretionary enforcement policymaking.

Political scientists have long recognized that the crackdown is not always all that it is "cracked up" to be. Indeed, one of the most generative papers in the field of political science was an analysis of a speeding crackdown and an explanation of how not all its purported benefits (in reductions of fatalities) may have in fact been attributable to the crackdown. See Donald T. Campbell & H. Laurence Ross, The Connecticut Crackdown on Speeding: Time-Series Data in Quasi-Experimental Analysis, 3 *Law & Soc'y Rev.* 33, 52 (1968).

⁸ Cf. Sunstein & Vermeule, *supra* note 4 *passim* (describing "the law of not now," which governs when agencies may properly put off or defer acting).

⁹ See David E. Pozen, The Leaky Leviathan: Why the Government Condemns and Condone Unlawful Disclosures of Information, 127 *Harv. L. Rev.* 512, 534, 536 (2013). Of the "roughly a dozen" national security related leaks prosecutions in United States history, *id.* at 534, eight are cases brought during the Obama Administration, *id.* at 536.

officials purposely leak (“plant”) to other reporters equally sensitive information that enhances the administration’s interests.¹⁰ The authorized leakers are not prosecuted.¹¹

(2) *Greasing the Revolving Door*: Federal prosecutors crack down on bribery by U.S. corporations operating abroad by relying on a little-used federal statute, the Foreign Corrupt Practices Act (“FCPA”). The crack-down nets dozens of offenders over several years. Subsequently, former prosecutors who pioneered and pressed for the crackdown leave the Department of Justice (“DOJ”) for lucrative careers as attorneys defending corporate clients against the ongoing surge of FCPA investigations.¹²

(3) *The ‘Kabuki’ Crackdown*: In the wake of a massive financial crisis, the President announces a crackdown on financial crimes.¹³ A senior DOJ official testifies to Congress that a federal task force will spearhead “an aggressive, coordinated, and proactive effort to investigate and prosecute financial crimes.”¹⁴ Two years on, the task force has failed to generate any significant criminal prosecutions relating to the crisis. Five years on, the task force has generated many civil recoveries, but not a single criminal case against a top official of any of the banks responsible for the financial crisis.¹⁵ The administration cites the civil recoveries as evidence of the crackdown’s success.¹⁶

Each of these examples illustrates an elementary point: crackdowns—whether real or ostensible—are opportunities for the executive branch to

¹⁰ Id. at 559–62.

¹¹ Id. at 565.

¹² Wentong Zheng, *The Revolving Door*, 90 *Notre Dame L. Rev.* 1265, 1288–91 (2015).

¹³ See Press Release, U.S. Dep’t of Justice, President Obama Establishes Interagency Financial Fraud Enforcement Task Force (Nov. 17, 2009), <http://www.justice.gov/opa/pr/president-obama-establishes-interagency-financial-fraud-enforcement-task-force> [<https://perma.cc/B3W8-MT27>].

¹⁴ Mortgage and Securities Fraud Prosecutions: Hearing Before the S. Comm. on the Judiciary, 111th Cong. 3 (2009) [hereinafter Breuer testimony] (testimony of Lanny A. Breuer, Assistant Att’y Gen. of the United States).

¹⁵ Todd Haugh, *The Most Senior Wall Street Official: Evaluating the State of Financial Crisis Prosecutions*, 9 *Va. L. & Bus. Rev.* 153, 157–58 (2015) (“[T]he number of criminal convictions of truly high-level executives related to the financial crisis stands at zero.”); Jed S. Rakoff, *The Financial Crisis: Why Have No High-Level Executives Been Prosecuted?*, *N.Y. Rev. Books*, Jan. 9, 2014, at 4.

¹⁶ See Press Release, U.S. Dep’t of Justice, Accomplishments Under the Leadership of Attorney General Eric Holder (Mar. 2015), <https://www.justice.gov/accomplishments> [<https://perma.cc/NZ7R-MNCH>] (citing civil recoveries under the heading concerning the Financial Fraud Enforcement Task Force, which was formed “to hold accountable those who helped bring about the last financial crisis”).

advance its own image and interests. In various ways, each of these crackdowns exploits a principal-agent gap.¹⁷ By collecting examples of crackdowns from local, state, and federal law, and from the criminal, civil, and administrative law, I show how the principal-agent problem can afflict each of the crackdown's key design parameters: the crackdown's *who*, *what*, *when*, *where*, and *why*.

The existence of a thematically unified problem in the design of many crackdowns naturally poses the question whether the problem can be mitigated. The obvious objective is to discourage crackdowns that suffer from principal-agent problems and to encourage crackdowns that do not, while also preserving the flexibility necessary for the executive branch to wisely and sensibly enforce the law. The obvious challenge is to do so within the confines of our existing legal and political system—a system that has long been committed to imposing extremely sparse restraints on the crackdown choice.

This is, in essence, a challenge of good governance—one that calls for the development of standards for distinguishing good crackdowns from bad. This Article introduces that framework. It argues that a good crackdown is not merely any crackdown that hangs from a plausible statutory hook. Rather, a good crackdown is one designed and implemented in such a way that it reflects the enforcer's honest and good faith belief that enforcement at that level is the best way to enforce the law—where “best” is measured against not just the literal text of the statute, but also against the law's purpose and context, the public interest, constitutional rules, and rule-of-law values.

¹⁷ This Article adopts the basic principal-agent frame familiar from much public law scholarship. See generally, e.g., Evan J. Criddle, *Fiduciary Administration: Rethinking Popular Representation in Agency Rulemaking*, 88 *Tex. L. Rev.* 441 (2010); Jacob E. Gersen & Matthew C. Stephenson, *Over-Accountability*, 6 *J. Legal Analysis* 185 (2014); Margaret H. Lemos & Max Minzner, *For-Profit Public Enforcement*, 127 *Harv. L. Rev.* 853, 875–76 (2014); Jonathan R. Macey, *The Distorting Incentives Facing the U.S. Securities and Exchange Commission*, 33 *Harv. J.L. & Pub. Pol'y* 639, 641 (2010); John F. Manning, *The New Purposivism*, 2011 *Sup. Ct. Rev.* 113. Cf. Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 *Harv. L. Rev.* 405, 415 (1989) (“According to the most prominent conception of the role of courts in statutory construction, judges are agents or servants of the legislature.”). But it also refines and retools that frame to center it more squarely on the distinctive obligations of the executive branch in undertaking programmatic enforcement. See *infra* note 125 (describing in detail the principal-agent perspective used here).

This normative principle has a textual correlate in Article II's Take Care Clause,¹⁸ and this provision's cognate clauses in the state constitutions,¹⁹ which contain the qualification that the executive's execution of the law must be *faithful*. The executive is obligated not only to take care that the laws be executed, but also to do so *faithfully*. What might this obligation mean?²⁰ In answering this question, it is worth stressing a threshold point, a distinction that lovers remember but lawyers forget: vigorousness does not always mean faithfulness. As Professor Margaret Lemos has explained, "'good' enforcement is not the same thing as max-

¹⁸ U.S. Const. art. II, § 3, cl. 5 ("[H]e shall take Care that the Laws be faithfully executed . . .").

¹⁹ Norman R. Williams, Executive Review in the Fragmented Executive: State Constitutionalism and Same-Sex Marriage, 154 U. Pa. L. Rev. 565, 639 (2006) ("[E]very state constitution, like the U.S. Constitution, provides in substance that the chief executive shall 'take care' or see to it that the laws are faithfully executed."); *id.* at 639 n.287; see also *infra* note 269 (providing an overview of faithfulness in state constitutions).

²⁰ The extensive scholarship on the Take Care Clause has not grappled with the particular implications of the Clause's "faithfully" requirement for heightened enforcement. Scholars have debated whether the requirement of "faithful" execution permits the President to decline to enforce laws he regards as unconstitutional. Compare, e.g., Eugene Gressman, Take Care, Mr. President, 64 N.C. L. Rev. 381 (1986) (arguing that the Take Care Clause proscribes executive refusal to enforce the law), with Michael Stokes Paulsen, The Most Dangerous Branch: Executive Power to Say What the Law Is, 83 Geo. L.J. 217, 221–22, 261–62 (1994) (arguing that the President is required to exercise legal discretion over congressional acts and may decline to execute those acts on constitutional grounds). This question is obviously distinct from the problem attacked here: how the Clause's "faithfully" requirement shapes the executive's enforcement of concededly constitutional laws. Other scholarship on the Clause has centered on the recently pressing question of whether conscious nonenforcement qualifies as "taking care." See Josh Blackman, The Constitutionality of DAPA Part II: Faithfully Executing the Law, 19 Tex. Rev. L. & Pol. 213, 232 (2015) ("[W]hen the President bypasses a statute by relying on a claim to authority Congress withheld from him, the action is in bad faith—and is therefore unlawful."); Price, *supra* note 4, at 688–716 (noting that our constitutional scheme implies some independent executive authority to assess whether to apply a law to a certain factual circumstance, but questioning the constitutionality of programmatic policies of nonenforcement). Again, this question obviously differs from the one tackled here: once the executive is taking care to enforce, and indeed to do so vigorously, how should the executive do so faithfully? See *infra* notes 90–94 and accompanying text (distinguishing this Article's project from a question left unresolved by *Texas v. United States*, 136 S. Ct. 906 (2016)). Elsewhere, scholars have constructed theories of Article II power that build upon the Take Care Clause along with other constitutional provisions such as the Appointments Clause and the Oath Clause; these accounts rely little upon the particular content of faithfulness. See David M. Dreisen, Toward a Duty-Based Theory of Executive Power, 78 Fordham L. Rev. 71, 80–94 (2009) (arguing that, taken together, the Take Care Clause, the Oath Clause, the Appointments Clause, and the Removal Clause support a duty-based theory of executive power); Gillian E. Metzger, The Constitutional Duty to Supervise, 124 Yale L.J. 1836, 1875–78 (2015) (arguing that the Take Care Clause imparts a duty to supervise).

imum enforcement. . . . [P]ublic enforcers are charged with representing the public interest.”²¹ Whereas self-interested private enforcers may permissibly seek maximum enforcement, public enforcers can and must temper their actions by incorporating considerations of what is good for society as a whole.²² To put it another way, “faithfully” is not synonymous with “fully”; faithfulness should not be defined simply by an objective metric of “how much” enforcement is occurring. Rather, the concept of faithfulness should be defined by reference to the normative principle developed above. The requirement of faithfulness should be regarded as the textual proxy or portmanteau for applying the obligations of interpretive good faith and honesty to enforcers and to the setting of prospective enforcement policy. To “faithfully” enforce the law means to enforce the law not merely according to its literal terms, but rather to enforce the law in the way that serves the best reading of the statute, the public interest, and constitutional and rule-of-law values—not the least of which is the interest, shared by all members of the public, in being able to anticipate the legal consequences of one’s actions.

So understood, the obligation of faithfulness should be the metric against which we evaluate the thousands of crackdowns that occur in America each year, whether that power is wielded by prosecutors, by agencies, by the federal government, or by the states. To be sure, many crackdowns will handily surpass this threshold. But, as explained below, many other crackdowns—perhaps even the crackdown that netted the hapless Mr. Jones²³—will fall short of the mark.

The prescriptive task that remains, then, is a formidable one: to formulate mechanisms to deter “unfaithful” crackdowns and to encourage “faithful” ones. To surmount this challenge entirely would require sudden revisions to long-standing constitutional doctrines and sharp alterations in the institutions of state and federal enforcement—outcomes that are implausible, even if they were desirable. Instead, this Article proposes a more modest revolution. Through tools both familiar and unfa-

²¹ Margaret H. Lemos, *State Enforcement of Federal Law*, 86 N.Y.U. L. Rev. 698, 705 (2011).

²² Tara Leigh Grove, *Standing as an Article II Nondelegation Doctrine*, 11 U. Pa. J. Const. L. 781, 837–38 (2009) (“That may be why the Constitution imposes the duty to ‘take care that the laws [are] faithfully executed’ upon the Executive Branch. . . . Such authority should be ‘lodged’ solely in a governmental entity that is expected—and constitutionally required—to be ‘the guardian of [the] public interest.’” (first and third alterations in original) (citations omitted)).

²³ See *infra* text accompanying notes 246–47.

iar, judges can play a meaningful and legitimate role in augmenting the faithfulness of crackdowns. Though the proposals set forth here are far from watertight—they will leave the faithfulness norm “under-enforced”²⁴—they have a signal advantage: courts can begin to apply these proposals immediately, *today*, without awaiting either drastic changes to entrenched black-letter law or radical reinventions of the criminal and administrative bureaucracies.

A final point is worth emphasis at the outset. This Article urges that the concept of “faithful” execution, an obligation that can be tethered to Article II’s Take Care Clause and its cognates in state constitutional law, should be the organizing principle that shapes our understanding of the executive’s power to augment enforcement prospectively and selectively. Purely as a textual matter, the constitutional obligation of faithfulness would extend to much more than just crackdowns; it would also extend to any and all enforcement choices (for example, the choice to press charges or accept a plea) and indeed to anything else the executive branch may do to carry out the laws—including promulgating regulations, disbursing grants, or painting post offices.

This Article’s focus, however, remains solely on the crackdown, and it reserves for future work an examination of the implications of this requirement of faithfulness for other enforcement choices and for other forms of executive action.²⁵ The crackdown warrants this immediate and exclusive focus. We live in a system of vastly complex and dense criminal and civil laws. There is much law (if not “too much law”²⁶) on the federal and state books and neither the resources nor the political will to ensure that each and every such law is enforced perfectly. Thus, the most critical determinant of the functional rules that actually govern primary conduct will be the executive’s conscious, prospective choices of which laws to enforce vigorously.²⁷ For that reason, this Article devotes to the crackdown and its governance the particularized attention the subject deserves.

²⁴ Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 Harv. L. Rev. 1212 (1978) (defending the validity and status of constitutional norms that courts fail to enforce to their “full conceptual limits”).

²⁵ See *supra* note 20 (discussing scholarship on the Take Care Clause and programmatic nonenforcement); *infra* note 254 (discussing the relationship between “taking care” and faithfulness in assessing programmatic nonenforcement).

²⁶ See generally Sohoni, *supra* note 5 (critiquing the critiques of “too much law”).

²⁷ See also *infra* notes 79–96 and accompanying text (comparing and contrasting the stakes of the crackdown choice with the stakes of programmatic nonenforcement).

The Article proceeds in three Parts. Part I introduces the crackdown and explains how existing law regulates (or, more precisely, avoids regulating) crackdowns. Part II looks behind the slogans of enforcement prioritization and executive discretion to reveal a spectrum of problematic choices in the design and implementation of crackdowns—choices that existing law does little if anything to deter. Part III moves to normative and prescriptive questions. It explains the normative framework that should govern the crackdown choice, anchors this framework in the constitutional requirement of “faithfulness,” and proposes strategies through which the judiciary can help to promote the faithfulness of crackdowns. A conclusion follows.

I. THE LAW OF THE CRACKDOWN

This Part begins by offering an overview of the crackdown’s legal habitat. It surveys the evolution of the law that governs the executive power to set enforcement policy, culminating with the modern-day view that executive power is synonymous with the near-unfettered authority to select enforcement targets and to allocate enforcement resources. Next, it returns to the concept of the crackdown to add additional nuance to that concept and to describe the features that make the crackdown both a highly consequential and also lightly constrained variety of executive power.

A. Enforcement Power and the Crackdown

As a historical matter, enforcement power was not exclusively wielded by the executive. Professors Richard Stewart and Cass Sunstein explain that “[t]raditional public law remedies—criminal prosecutions and actions for injunctions—were frequently supplemented with private remedies, including private prosecutions and tort actions, that enabled citizens to protect their rights even when the government failed to act.”²⁸ As they further note, “legal historians have suggested that the doctrine of prosecutorial discretion developed in England and America largely *because* private prosecutions were also available.”²⁹

With the advent of the regulatory state, this dual-track system started to disintegrate. Both Congress and the U.S. Supreme Court designed the

²⁸ Richard B. Stewart & Cass R. Sunstein, Public Programs and Private Rights, 95 Harv. L. Rev. 1195, 1267–69 (1982) (footnotes omitted).

²⁹ *Id.* at 1267 (emphasis added).

administrative state in reliance on the key assumption that “agencies will be expert in enforcement because they are expert in their statutes, their industries, and their regulatory scheme.”³⁰ Courts were reluctant to “mandate specific enforcement action at a victim’s insistence” in the face of “competing agency priorities and budget constraints,” for fear that “[c]ontrol over the deployment of enforcement resources would thus be remitted to private litigants.”³¹

Prominent scholars resisted this movement, in particular Professors Kenneth Culp Davis and Anthony Amsterdam.³² Davis argued that the courts should “impose a rulemaking requirement on agencies to force them to specify their prosecutorial intentions and facilitate public participation in, and judicial review of, enforcement policies and priorities.”³³ Amsterdam pointed to the “rare unanimity” of opinion that police discretion should be “direct[ed] and confine[d] . . . by the same process of rulemaking that has worked excellently to hold various other forms of public agencies to . . . standards of lawfulness, fairness and efficiency.”³⁴

For a time, these arguments had some traction.³⁵ But in the 1970s, the winds shifted. A new focus on regulatory efficiency, new analyses of regulatory capture, and new doubts about the efficacy of the rulemaking process all combined to undercut enthusiasm for Davis’s proposals to cabin and reform agency prosecutorial discretion.³⁶

Eventually, in *Heckler v. Chaney*³⁷—an opinion that “reads like a barely concealed counter-treatise to Professor Davis’[s]”³⁸—the Court held that private citizens could not force an agency to act.³⁹ Recognizing

³⁰ Max Minzner, *Should Agencies Enforce?*, 99 Minn. L. Rev. 2113, 2119 (2015).

³¹ Stewart & Sunstein, *supra* note 28, at 1268.

³² Kenneth Culp Davis, *Discretionary Justice* 188–214 (1969); Christopher Slobogin, *Policing As Administration*, 165 U. Pa. L. Rev. 91, 123–25 (2016); Richard M. Thomas, *Prosecutorial Discretion and Agency Self-Regulation: CNI v. Young and the Aflatoxin Dance*, 44 Admin. L. Rev. 131, 136–38 (1992).

³³ Thomas, *supra* note 32, at 138.

³⁴ Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 Minn. L. Rev. 349, 423 (1974).

³⁵ Thomas, *supra* note 32, at 138–39 (“[T]he spirit of Davis prevailed during the late 1960s and 1970s, as courts and Congress curtailed agency enforcement discretion in various ways.”); Slobogin, *supra* note 32, at 123–25.

³⁶ Thomas, *supra* note 32, at 139–42.

³⁷ 470 U.S. 821 (1985).

³⁸ Thomas, *supra* note 32, at 142.

³⁹ *Heckler*, 470 U.S. at 831 (noting that agency nonenforcement “often involves a complicated balancing of a number of factors which are peculiarly within [the agency’s] expertise”).

that “choices among competing demands for the agency’s attention and resources have to be made in accordance with ‘overall policies’ that unavoidably privilege certain values at the expense of others,”⁴⁰ *Heckler* presumptively allocated power over enforcement discretion to agencies.⁴¹

On the criminal law side, prosecutorial discretion over enforcement policy also expanded. The power to prosecute was pronounced to be within the “exclusive authority and absolute discretion” of the executive branch.⁴² External checks attenuated. With the disappearance of *private* prosecutions, the prosecutorial power came to be monopolized by the executive branch.⁴³ And in *United States v. Armstrong*,⁴⁴ the Court made it nearly impossible for individual defendants to challenge “selective prosecution” by announcing that to be entitled to discovery from a prosecutor, a defendant must both “present some evidence tending to show both discriminatory effect and discriminatory intent” and also “show that similarly situated offenders who are not members of the disfavored group have not been prosecuted.”⁴⁵ The Supreme Court’s opinion stressed that prosecutorial decisions are entitled to a “presumption of regularity” and—citing *Heckler*—that “[a] selective-prosecution claim asks a court to exercise judicial power over a ‘special province’ of the executive.”⁴⁶

⁴⁰ Thomas, *supra* note 32, at 143 (quoting *Heckler*, 470 U.S. at 831).

⁴¹ *Heckler*, 470 U.S. at 832 (“an agency’s decision not to take enforcement action should be presumed immune from judicial review”); Cass R. Sunstein, Reviewing Agency Inaction After *Heckler v. Chaney*, 52 U. Chi. L. Rev. 653, 659–60, 662–64 (1985).

⁴² *United States v. Nixon*, 418 U.S. 683, 693 (1974) (noting that “the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case”).

⁴³ Stewart & Sunstein, *supra* note 28, at 1267–69.

⁴⁴ 517 U.S. 456 (1996).

⁴⁵ See Anne Bowen Poulin, Prosecutorial Discretion and Selective Prosecution: Enforcing Protection After *United States v. Armstrong*, 34 Am. Crim. L. Rev. 1071, 1076 (1997); *id.* at 1078 (“To explore a claim of selective prosecution, the court may have to give the defendant access to the prosecutor’s files and explore the prosecutor’s thought processes, at least to some extent, but courts do not want to review prosecutors’ files or direct the exercise of executive discretion. As the Court noted in *Armstrong*, too many factors influence the exercise of prosecutorial discretion, and judicial inquiry into the government’s enforcement policy may undermine prosecutorial effectiveness. Courts fear that even the inquiry threatens to inject intolerable delay and, possibly, to chill law enforcement.” (footnotes omitted)).

⁴⁶ *Armstrong*, 517 U.S. at 464 (quoting *Heckler*, 470 U.S. at 832); see also Nathan v. Smith, 737 F.2d 1069, 1078 (D.C. Cir. 1984) (Bork, J., concurring) (“[P]laintiffs’ claim is that Congress, acting upon the Attorney General, has undertaken to control the law enforcement power of the President and has given courts authority to issue appropriate orders to that end at the behest of private persons. On the face of the Constitution, this would be a highly

Today, it is a fixed idea that executive power is synonymous with the power to choose enforcement targets and to formulate enforcement policy.⁴⁷ Both criminal law and administrative law protect that executive discretion with doctrines that shield enforcement policy choices from judicial review.⁴⁸

It is true that various constitutional rules rooted in equal protection, due process, and the First Amendment restrain enforcement decisions, whether made by prosecutors or agencies. Enforcers cannot specially

dubious attempt.”); *Inmates of Attica Corr. Facility v. Rockefeller*, 477 F.2d 375, 379–80 (2d Cir. 1973) (“[A]s an officer of the executive department . . . he exercises a discretion as to whether or not there shall be a prosecution in a particular case. It follows, as an incident of the constitutional separation of powers, that the courts are not to interfere with the free exercise of the discretionary powers of the attorneys of the United States in their control over criminal prosecutions.” (quoting *United States v. Cox*, 342 F.2d 167, 171 (5th Cir. 1965))); *Powell v. Katzenbach*, 359 F.2d 234, 234 (D.C. Cir. 1965) (“It is well settled that the question of whether and when prosecution is to be instituted is within the discretion of the Attorney General. Mandamus will not lie to control the exercise of this discretion.”); *Moses v. Kennedy*, 219 F. Supp. 762, 764 (D.D.C. 1963) (“Such actions on the part of defendants, however, are clearly discretionary, and decisions respecting such actions are committed to the Executive branch of the Government, not to the courts.”).

⁴⁷ See, e.g., Andrias, *supra* note 7, at 1050 (“[T]he notion that enforcement of law is quintessentially a responsibility of the Executive Branch . . . is longstanding and beyond dispute.”); Brianne J. Gorod, *Defending Executive Nondefense and the Principal-Agent Problem*, 106 *Nw. U. L. Rev.* 1201, 1231–32 (2012) (“[E]nforcement inherently necessitates some measure of discretion, requiring decisions to be made about how and when laws should be enforced.”).

⁴⁸ Barkow, *supra* note 7, at 1131–32 (“Most aspects of agency enforcement policy generally escape judicial review. A decision not to enforce is presumptively unreviewable . . . Courts tend to steer clear of second-guessing an agency’s selection of which actors to target and which to ignore. The judiciary takes a similarly hands-off approach to reviewing an agency’s broader plans for how it will proceed with enforcement, changes in its nonbinding enforcement policies, or how it will allocate funds from a lump-sum appropriation for enforcement needs.” (footnotes omitted)); *Brown*, *supra* note 6, at 331 (“[P]rosecutors have essentially no formal external checks on their discretion. . . . Those doctrines that do exist, such as equal protection limits on racially biased prosecutions, serve only to demonstrate the complete lack of judicial scrutiny under which prosecutors work in screening and charging cases.” (footnote omitted)); Ruth Colker, *Essay, Administrative Prosecutorial Indiscretion*, 63 *Tul. L. Rev.* 877, 884 (1989); Bennett L. Gershman, *The Most Dangerous Power of the Prosecutor: James D. Hopkins Memorial Lecture at Pace Law School* (Oct. 25, 2008), in 29 *Pace L. Rev.* 1, 19 (2008); Minzner, *supra* note 30, at 2121 (“At virtually every stage of administrative enforcement, agencies have broad and largely unconstrained authority because courts and Congress assume that their expertise in their subject matter and regulatory mission makes them experts in enforcing their statutes and rules.”); Lemos, *supra* note 2, at 13 (“Agencies do not just make rules and adjudicate disputes. They also act as enforcers. . . . Yet enforcement has inspired far less attention than rulemaking or adjudication. Like other agency functions that fall outside those better-known boxes, enforcement is simply ‘committed to agency discretion’ and left largely unregulated.”).

target offenders based on their race, religion, speech, or for their exercise of constitutional rights.⁴⁹ Enforcers cannot prosecute with “malicious or bad faith intent to injure a person.”⁵⁰ But such violations are exceedingly difficult to establish.⁵¹

The administrative law limits on enforcement policy choices are also capacious. Unless an enforcement (or nonenforcement) policy is sufficiently formalized so as to amount to at least a “binding” requirement on the agency, the requirement of notice-and-comment rulemaking is not triggered.⁵² Sometimes, when an agency announces an interpretation of its authority to enforce the law by issuing an enforcement policy, an agency’s shift in its interpretation may be abrupt enough to constitute a violation of rules against retroactivity,⁵³ or be sufficiently lacking in jus-

⁴⁹ Rachel E. Barkow, Separation of Powers and the Criminal Law, 58 Stan. L. Rev. 989, 1023–25 (2006); Robert C. Farrell, The Equal Protection Class of One Claim: *Olech, Engquist*, and the Supreme Court’s Misadventure, 61 S.C. L. Rev. 107, 114–15 (2009).

⁵⁰ Farrell, *supra* note 49, at 115.

⁵¹ Barkow, *supra* note 49, at 1025 (“[F]or a defendant to obtain discovery on a discrimination claim, much less prevail on the claim itself, he or she must show that the government failed to prosecute similarly situated defendants. The Court has emphasized that there is a “background presumption” that the showing necessary to obtain discovery should itself be a significant barrier to the litigation of insubstantial claims. . . . [I]t should come as no surprise that these claims rarely succeed.” (footnote omitted) (quoting *Armstrong*, 517 U.S. at 463–64)); Jack Goldsmith & John F. Manning, The President’s Completion Power, 115 Yale L.J. 2280, 2293 (2006) (“While a defendant may assert a claim of selective prosecution on the basis of some constitutionally protected criterion, such claims rarely succeed.”); Grove, *supra* note 22, at 801 (“Federal courts rarely review individual nonenforcement decisions, and selective prosecution claims are extremely difficult to prove.” (footnote omitted)). For one unusual success, in litigation that terminated at the trial-court level, see *Floyd v. City of New York*, 959 F. Supp. 2d 540, 661–62 (S.D.N.Y. 2013) (ruling that New York City’s stop-and-frisk policy intentionally discriminates based on race); see also Daphna Renan, The Fourth Amendment as Administrative Governance, 68 Stan. L. Rev. 1039, 1068 n.130 (2016) (describing how the *Floyd* litigation was ultimately terminated by a mayoral campaign promise).

⁵² *Ass’n of Irrigated Residents v. EPA*, 494 F.3d 1027, 1034 (D.C. Cir. 2007) (“EPA has not bound itself in a way that reflects ‘cabining’ of its prosecutorial discretion because it imposed no limit on its general enforcement discretion if the substantive statutory standards are violated.”); *Cnty. Nutrition Inst. v. Young*, 818 F.2d 943, 948 (D.C. Cir. 1987).

⁵³ *Perez v. Mortg. Bankers Ass’n*, 135 S. Ct. 1199, 1209 n.5 (2015) (“[E]ven in situations where a statute does not contain a safe-harbor provision . . . an agency’s ability to pursue enforcement actions against regulated entities for conduct in conformance with prior agency interpretations may be limited by principles of retroactivity.”); *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (requiring more detailed justification when the agency’s earlier policies have “engendered serious reliance interests”); *NLRB v. Guy F. Atkinson Co.*, 195 F.2d 141, 149 (9th Cir. 1952) (“[W]hether we are dealing with an administrative declaration which is required to have prospective effect only, should be judged on the basis of the realities of the situation . . .”).

tification as to be arbitrary.⁵⁴ But, on the whole, the administrative procedural checks on the prospective adoption of enforcement priorities are slight. And, obviously, these administrative law restrictions (such as they are) do not lay a finger on prosecutors or the criminal law.⁵⁵

The overall picture, then, is one in which the executive branch dominates. Instead of a rule-like system of *ex ante* constraint, we have opted for a regime of broad executive-branch discretion subject to *ad hoc* and diffuse *ex post* checks. Congress “may not have the time, the staff, or the political will to hold oversight hearings every time it disagrees with an executive enforcement policy, much less an individual enforcement decision.”⁵⁶ “[G]iven the cumbersome nature of the legislative process (and the possibility of presidential veto),” Congress cannot readily reverse enforcement choices with which it disagrees by amending statutes.⁵⁷ The executive—even assuming it has the “political will” to check the choices it itself made—is subject to inherent “budgetary and time constraints” that restrict its ability to oversee its own enforcement policy choices.⁵⁸ The voting public has many preferences, not just preferences about enforcement,⁵⁹ meaning that electoral resistance to a particular enforcement policy will rarely, if ever, drive election outcomes. In sum, enforcement policy is not *unregulated*; rather, it is regulated by a regime of broad executive discretion subject to loose judicial restriction, looser political checks, and still looser electoral checks.

⁵⁴ *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125–26 (2016) (refusing to defer when the agency failed to supply a reasoned explanation for an announced change in its enforcement policy); *Fox Television*, 556 U.S. at 515.

⁵⁵ See Slobogin, *supra* note 32, at 122 (discussing “why . . . police agencies [have not] been subject to the constraints of administrative law”).

⁵⁶ Grove, *supra* note 22, at 801; see also Lemos, *supra* note 2, at 39–41 (noting laxity, underuse, and bluntness of legislative checks on enforcement activities).

⁵⁷ Grove, *supra* note 22, at 802.

⁵⁸ *Id.*

⁵⁹ Lemos, *supra* note 2, at 32 (“Making matters worse, enforcement is likely to be a relatively low-salience issue for most voters. That is perhaps particularly true of civil enforcement, and even more particularly true of general enforcement policy.” (footnote omitted)); Criddle, *supra* note 17, at 459–60 (“[P]articular questions of regulatory policy tend to have low salience for voters . . .”); *id.* at 459 (describing the “bundled preferences” problem posed by elections: “elections require an up-or-down vote on candidates’ aggregate platform, forcing voters to compromise some personal preferences in order to advance other deeply held commitments”).

B. Locating the Crackdown in the Toolkit of Public Law

The crackdown is a type of enforcement policy decision: a conscious and voluntary policy of heightened enforcement *vis-à-vis* a specified class of offenders or offenses. Crackdowns have certain characteristics that bear particular mention. Not all of these characteristics are unique to the crackdown; they are all, however, noteworthy.

First, crackdowns may depart from, and indeed confound, legislative expectations.⁶⁰ It may be tempting to assume that any crackdown is consistent with legislative expectations because it represents an effort to enforce a given law vigorously. But “more” is not always “better,” at least for a law that does not specify how vigorously it should be enforced—which is to say, almost every law.⁶¹ The gap between the “law on the books” and “the law in action” is often an intentional one, not inadvertent; lawmakers may actively prefer the kind of legal regime that results from imperfect enforcement.⁶² As Professor Michael Gilbert explains, legal rules can be intentionally “insincere,”⁶³ in the sense that lawmakers

⁶⁰ See Jessica Bulman-Pozen & David E. Pozen, *Uncivil Obedience*, 115 *Colum. L. Rev.* 809, 831–32 (2015) (describing the unexpected pattern of enforcing saloon-closing laws by Theodore Roosevelt, then the head of the New York Police Commission). Other kinds of enforcement decisions, including prospective nonenforcement and individual enforcement choices in particular cases, can also be difficult to trace to congressional intent. See, e.g., Adam B. Cox and Cristina M. Rodríguez, *The President and Immigration Law Redux*, 125 *Yale L.J.* 104, 110 (2015) (“We do not think it possible to coherently identify a set of congressional priorities for immigration enforcement through a careful, lawyerly exercise of intertextual fidelity to the 300-page immigration code.”).

⁶¹ Several reasons exist to doubt the supposition that the legislature implicitly intends maximum enforcement, or (put differently) that every law comes packaged with an implicit command to maximize its enforcement. Laws are enacted against a backdrop of facts about the world, and one of those facts is the prevailing or historical level of enforcement activity allocated to a particular type of law. The legislature may assume a continuation of the prevailing level of enforcement activity or the level of enforcement activity that has historically or commonly been devoted to enforcing such a law. A departure from that baseline may well contradict legislative expectations. Separately, legislatures routinely underallocate enforcement resources; from that, one might conclude that the legislature’s default intention is not to have its laws enforced to the hilt.

⁶² Zachary S. Price, *Law Enforcement as Political Question*, 91 *Notre Dame L. Rev.* 1571, 1605 (2016) (recognizing that, because of the “entrenched” nature of enforcement discretion, Congress may enact, “or at least fail to repeal, laws that lack genuine public support. That is to say, once widespread nonenforcement becomes practically inevitable, Congress may enact laws with the expectation that they will not be fully enforced; and by the same token, it may choose not to devote legislative effort to narrowing or repealing existing laws that would be deeply unpopular if fully enforced, precisely because those laws’ nonenforcement reduces the urgency to update them.”).

⁶³ Michael Gilbert, *Essay, Insincere Rules*, 101 *Va. L. Rev.* 2185 (2015).

may consciously enact rules that they do not intend enforcers to enforce perfectly.⁶⁴ For certain regimes, imperfect or “measured” enforcement, as Professors Leandra Lederman and Ted Sichelman demonstrate, might produce the optimal results even when enforcement is cost-free.⁶⁵ In addition, congressional expectations are not static; while legislative preferences at the moment of a new statute’s enactment may enthusiastically favor vigorous enforcement, the subsequent passage of time and the evolution of enforcement priorities may dissipate that enthusiasm, making a later crackdown wholly unexpected and unwelcome to both lawmakers and the public.⁶⁶ On the whole, “maximalist enforcement tactics,” as Professors David Pozen and Jessica Bulman-Pozen remark, “may be seen as upending rather than perfecting the existing sociolegal order” because they may so radically depart from practice and expectations.⁶⁷

Second, crackdowns complicate the standard conception of democratic lawmaking. The latitude accorded to the executive branch in setting the sequence, intensity, and duration of crackdowns makes the executive branch the dominant player in determining how the “law on the books” is translated into the “law in action.”⁶⁸ Through the crackdown, the executive branch acts as the effective writer of the legal rules in our society—the effective setter of speed limits, the effective criminalizer of leaks to the press, or the effective regulator of overseas bribery by American corporations. Put another way, the crackdown is effectively an instrument of *lawmaking*,⁶⁹ not just of law enforcement.⁷⁰ To note this

⁶⁴ *Id.*

⁶⁵ Leandra Lederman & Ted Sichelman, *Enforcement as Substance in Tax Compliance*, 70 *Wash. & Lee L. Rev.* 1679, 1679 (2013).

⁶⁶ This temporal problem will be especially acute when the executive has made assurances of nonenforcement. See Zachary S. Price, *Reliance on Nonenforcement*, 58 *Wm. & Mary L. Rev.* (forthcoming 2017).

⁶⁷ See Bulman-Pozen & Pozen, *supra* note 60, at 831 (“[T]he most easily recognizable form of legal provocation in government may be the maximalist enforcement tactics that have been adopted by certain chief executives. Just as full compliance is not common or desirable in many areas of law, neither is full enforcement. Without a specific legislative instruction to do so, there is little reason to expect that an executive will implement any given authority or prosecute any given prohibition to a T, at the inevitable cost of depleting resources available for other responsibilities. Full enforcement, consequently, may be seen as upending rather than perfecting the existing sociolegal order.” (footnote omitted)).

⁶⁸ Roscoe Pound, *Law in Books and Law in Action*, 44 *Am. L. Rev.* 12 (1910).

⁶⁹ See Lederman & Sichelman, *supra* note 65, at 1687 n.37 (“[C]hanges in agency-level enforcement (not rulemaking) can lead to de facto changes in the law that have the same effect as customization at the substantive lawmaking level.”).

fact is not to condemn it;⁷¹ the point here is only to stress the simple legal realist insight that the crackdown can be just as consequential a tool of public law as the regulation or the statute.

Third, even within the already quite snugly insulated domain of enforcement decisions, crackdowns stand out because of the unusual degree to which they are shielded from external review. Consider how a crackdown compares to an individualized enforcement action—for example, when the FBI busts a drug dealer, or an agency sues a company for polluting a river. A discrete enforcement action of this sort is often subject to procedural checks (for example, a grand jury) in advance of its occurrence. Where it is not (as when, for example, an officer issues an on-the-spot speeding ticket or a prosecutor chooses to press charges) then it is subject, after the fact, to an adversarial process and to judicial review (though that review may be vanishingly slight if the case ends with a plea or settlement).

In contrast, the crackdown eludes these upstream and downstream checks for validity. The top-level choice to crack down—a choice anterior to and distinct from the choice to charge a given individual—is insulated from external challenges. No grand jury or other institutionalized procedural check will monitor whether enforcement efforts should be shifted or narrowed on a wholesale basis. Nor will the choice to crack down undergo judicial vetting; Mr. Jones might challenge his own speeding ticket if he receives one, but standing would stop him at the threshold if he attempted to challenge the validity of the mayor's crackdown on speeding *simpliciter*.⁷² On the administrative law side, the judicial check is likewise absent; a challenge as such to an executive branch

⁷⁰ See Lemos, *supra* note 2, at 18–19 (“If an agency wants to adjust the regulatory status quo in some way—to impose a new demand on regulated entities, for example—it can amend the relevant regulations or it can ramp up its enforcement efforts. As a practical matter, the consequences for regulated parties may be largely indistinguishable, particularly where enforcement actions result in orders or agreements requiring the defendant to change its behavior going forward.”).

⁷¹ For a defense of “a model of the enforcement power according to which executive priorities stand alongside congressional ones,” see Cox & Rodriguez, *supra* note 60, at 110–11.

⁷² *City of L.A. v. Lyons*, 461 U.S. 95, 111 (1983); *United States v. Richardson*, 418 U.S. 166, 176–77 (1974) (finding no Article III standing to sue on a “generalized grievance” of which “the impact on [plaintiff] is plainly undifferentiated and ‘common to all members of the public.’” (quoting *Ex parte Lévit*, 302 U.S. 633, 634 (1937) (*per curiam*))).

crackdown would be beleaguered by problems of standing,⁷³ ripeness,⁷⁴ and/or the requirement of final agency action.⁷⁵ As long as it takes care not to set its enforcement threshold in stone, an agency need not publicly “notice and comment” a crackdown.⁷⁶ Finally, and most obviously, because the law that supplies the authority or “hook” for the crackdown already exists, the crackdown choice is one that can be made without further cooperation by the legislature.

The discussion below will establish why it may be undesirable to leave the executive branch such unfettered latitude over the crackdown choice.⁷⁷ For now, however, the point is simple: the crackdown and the individual enforcement action are different animals. The line that distinguishes them is a cognate of the line that demarcates rulemaking from adjudication, legislation from execution: the crackdown is a policy of enforcement, while an individual enforcement action is (or may be) an application of that policy to a particular instance.⁷⁸

⁷³ Norton v. S. Utah Wilderness All., 542 U.S. 55, 64 (2004) (“[A] claim under [the APA] can proceed only where a plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required to take*. . . . The limitation to discrete agency action precludes the kind of broad programmatic attack we rejected in *Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990).”).

⁷⁴ Am. Paper Inst. v. EPA, 882 F.2d 287, 289–90 (7th Cir. 1989) (“Until the EPA puts polluters under the gun, compelling them to do something they would rather not, the ‘final’ agency action lies ahead. . . . Nothing but grief could come of trying to review an ‘enforcement policy’ without knowing how (or even whether) it would affect any plant.”).

⁷⁵ *Lujan*, 497 U.S. at 890 (holding that challenge to a “land withdrawal review program” was “not an ‘agency action’ . . . much less a ‘final agency action’ The term . . . does not refer to a single BLM [Bureau of Land Management] order or regulation, or even to a completed universe of particular BLM orders and regulations. It is simply the name by which petitioners have occasionally referred to the continuing (and thus constantly changing) operations of the BLM in reviewing withdrawal revocation applications and the classifications of public lands and developing land use plans It is no more an identifiable ‘agency action’ . . . than a ‘weapons procurement program’ of the Department of Defense or a ‘drug interdiction program’ of the Drug Enforcement Administration.”).

⁷⁶ *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1024 (D.C. Cir. 2000); *Cnty. Nutrition Inst. v. Young*, 818 F.2d 943, 945–46 (D.C. Cir. 1987); see also *infra* text accompanying notes 82–83 (elaborating this point).

⁷⁷ See *infra* Part II.

⁷⁸ See *supra* note 2. It is worth emphasizing again that the lines between these categories are blurry. A conscious policy of augmented enforcement—the crackdown—will manifest as an accumulation of individual enforcement actions, and the exact point at which that accumulation of actions can properly be labeled a crackdown may not be susceptible to precise definition in every case. Still, the distinction between the policy and the individual action is conceptually useful, just as the distinction between rulemaking and adjudication is useful. For further discussion of the enforcement continuum, see Lemos, *supra* note 2, at 10.

The crackdown is not, of course, the only type of rule-guided enforcement policy—nor, probably, is it the one at the top of most people’s minds. Like the crackdown, policies of conscious *nonenforcement* allocate enforcement resources in a categorical and prospective manner. Prominent and recent nonenforcement and waiver policies in the areas of education, health care, and immigration law have prompted a flurry of responses from the academy and on Capitol Hill.⁷⁹

Formally, the crackdown and the consciously adopted policy of nonenforcement are inverses. But they resemble each other in certain functional ways. First, crackdowns and announced nonenforcement or waiver policies both shape the effective legal rules of the road in a legal realist sense.⁸⁰ Either an announced crackdown on speeding over 35 mph or an announced policy of nonenforcement *below* 35 mph will effectively set the real speed limit at 35 mph. Second, both crackdowns and conscious nonenforcement policies reduce the exercise of prosecutorial discretion—or, more precisely, centralize its exercise. Whereas formerly an officer in the field may have had the discretion to issue (or not to issue) a ticket to Mr. Jones, a crackdown (or, conversely, a nonenforcement policy) will strip away that discretion. Third, both crackdowns and conscious nonenforcement policies can be formulated within the four walls of the executive branch (assuming that statutory authorization for such policies exists). Criminal law, obviously, does not require prosecutors to publicly air broad-scale enforcement priorities in advance of their pursuit.⁸¹ And in administrative law, the requirement of notice-and-comment rulemaking is not triggered unless an enforcement or nonenforcement policy is sufficiently formalized as to amount at least to a “binding” requirement on the agency.⁸² But boilerplate language has

⁷⁹ See Nicholas Bagley, *The Legality of Delaying Key Elements of the ACA*, 370 *New Eng. J. Med.* 1967, 1968 (2014); Barron & Rakoff, *supra* note 4, at 279; Black, *supra* note 4, at 611; Peter Margulies, *The Boundaries of Executive Discretion: Deferred Action, Unlawful Presence, and Immigration Law*, 64 *Am. U. L. Rev.* 1183, 1194 (2015); Mila Sohoni, *The Administrative Constitution in Exile*, 57 *Wm. & Mary L. Rev.* 923, 949 nn.119–21 (2016).

⁸⁰ See Lederman & Sichelman, *supra* note 65.

⁸¹ Barkow, *supra* note 49, at 1024 (“Although Kenneth Culp Davis argued almost four decades ago that the discretion exercised by police officers and prosecutors should be subject to the same procedural and structural checks as other administrative officials, his calls for reform were not heeded. Political actors did not impose . . . regulation [on police or prosecutors] modeled along the lines of the APA . . .” (footnote omitted)).

⁸² *Ass’n of Irrigated Residents v. EPA*, 494 F.3d 1027, 1034 (D.C. Cir. 2007) (“EPA has not bound itself in a way that reflects ‘cabining’ of its prosecutorial discretion because it im-

long sufficed to avoid this outcome, which makes that procedural check essentially optional.⁸³

On several scores, then, the crackdown and the policy of nonenforcement share commonalities. But they also differ. A key pragmatic respect in which they differ is in their susceptibility to external monitoring. Outside observers, including courts, cannot easily perceive a nonenforcement policy, even when it is purposeful, unless it is formally avouched—which it often is not.⁸⁴ This is because nonenforcement, even consciously adopted or policy-driven nonenforcement, often looks a great deal like the kind of enforcement pattern that one might adopt if one were diligently enforcing a law but with severely limited resources.⁸⁵ The executive branch can therefore relatively easily conceal (or explain away) a practice of nonenforcement, even conscious, policy-driven nonenforcement.⁸⁶ In contrast, crackdowns cannot as readily be hidden behind a claim to “limited resources.” It is difficult to explain an announced or evident policy of devoting special and additional resources to a narrow class of cases *solely* by reference to the fact that one has severely limited enforcement resources; the situation naturally calls for an additional explanation of why enforcement resources are being targeted in *that* way, to *those* cases. Thus, in theory, at least, a crackdown and its justifications ought to be more apparent, more transparent—and there-

posed no limit on its general enforcement discretion if the substantive statutory standards are violated.”); *Cnty. Nutrition Inst. v. Young*, 818 F.2d 943, 948 (D.C. Cir. 1987).

⁸³ See, e.g., *Hazardous Materials Regulations: Penalty Guidelines*, 78 Fed. Reg. 60,726, 60,727 (Oct. 2, 2013) (“As a general statement of agency policy and practice, these guidelines are not finally determinative of any issues or rights and do not have the force of law. They are informational, impose no requirements, and serve only as instruction or a guide. As such, they constitute a statement of agency policy and serve to provide greater transparency for effected entities. For these reasons, they do not establish a rule or requirement and no notice of proposed rulemaking or comment period is necessary.”); *Action Levels for Added Poisonous or Deleterious Substances in Food*, 53 Fed. Reg. 5042, 5043 (Feb. 19, 1988) (“FDA is issuing this notice to state that its current action levels are not binding on the courts, the public (including food producers), or the agency (including individual FDA employees), and that the action levels do not have the ‘force of law’ of substantive rules.”). Recent federal nonenforcement and waiver policies, although they have practical effects on millions of Americans and thousands of entities, were adopted without giving the public either advance notice or an opportunity to comment. See also Sohoni, *supra* note 79, at 951–52 (noting that there was no advance notice for, and no opportunity for public comment on, waivers of requirements of health care, immigration, and education laws).

⁸⁴ See Daniel T. Deacon, Note, *Deregulation Through Nonenforcement*, 85 N.Y.U. L. Rev. 795, 804 (2010).

⁸⁵ See Sunstein, *supra* note 41, at 672–75.

⁸⁶ Thanks to Professor Daryl Levinson for his insights on these points.

fore more amenable to external scrutiny and review—than a nonenforcement policy, even when such a policy is systematic.

In light of this point, it is somewhat ironic that, while the crackdown has been near-universally ignored, nonenforcement policy has become the subject of such a crescendo of scholarly attention, political debate, and litigation.⁸⁷ Opponents to several recent and prominent federal nonenforcement policies mounted legal attacks, and—predictably, given the doctrinal landscape reviewed above⁸⁸—nearly all of these challenges have failed at their inception.⁸⁹ Last year, however, the Supreme Court had the opportunity to consider one such suit. In January 2016, the Supreme Court granted certiorari in *Texas v. United States*,⁹⁰ a challenge to the Obama Administration’s “deferred action” immigration program. In an unusual move, the Court directed the parties to brief a question that the United States’ petition for certiorari did *not* raise: “Whether the Guidance violates the Take Care Clause of the Constitution.”⁹¹ This case thus offered a vehicle for the Court to rule on all three aspects of the particular nonenforcement policy at issue in that case: whether there was statutory authorization for the nonenforcement policy; whether that policy was constitutional; and whether that policy was adopted through the correct administrative procedure.⁹² In June 2016, however, the Supreme Court, in a one-sentence per curiam, affirmed the decision of the U.S. Court of Appeals for the Fifth Circuit by an equally divided vote, thus leaving intact the constitutional law on nonenforcement.⁹³ Litigation in this case is likely to resume in the months to come.⁹⁴

⁸⁷ See sources cited supra note 79.

⁸⁸ See supra Section I.A.

⁸⁹ See, e.g., *Crane v. Johnson*, 783 F.3d 244, 247 (5th Cir. 2015) (dismissing, for lack of standing, lawsuit by Immigrations and Customs Enforcement officers against executive actions deferring deportation of certain classes of undocumented immigrants); *Arpaio v. Obama*, 27 F. Supp. 3d 185, 190–92 (D.D.C. 2014), *aff’d*, 797 F.3d 11 (D.C. Cir. 2015) (dismissing, for lack of standing, county sheriff’s challenge to executive actions deferring deportation of certain classes of undocumented immigrants); *House v. Burwell*, 130 F. Supp. 3d 53, 58 (D.D.C. 2015) (dismissing, for lack of standing, House of Representatives’ challenge to executive branch’s delay of Affordable Care Act’s employer mandate).

⁹⁰ 809 F.3d 134, 146 (5th Cir. 2015), *cert. granted*, 84 U.S.L.W. 3306 (U.S. Jan. 19, 2016) (No. 15-674).

⁹¹ See *United States v. Texas*, 136 S. Ct. 906 (2016) (mem.).

⁹² The case also raised a question of standing. See *Texas*, 809 F.3d at 155.

⁹³ *United States v. Texas*, 136 S. Ct. 2271, 2272 (2016) (mem.) (per curiam).

⁹⁴ *United States v. Texas*, 137 S. Ct. 285 (2016) (mem.).

Nonenforcement, then, not the crackdown, is the topic that has been hogging the limelight. But, knotty though the problem of nonenforcement is, the crackdown raises issues that are an order of magnitude more complex and important. An announced nonenforcement policy—of which there are few—poses one question: whether “the executive may effectively dispense with a law [the legislature] has enacted.”⁹⁵ In contrast, a crackdown—of which there are many—poses a different and much harder question: assuming the executive is enforcing a law that the legislature has enacted, *what are the upper-bound limits on how it may do so?* Both questions matter for structural constitutional law, to be sure—but the latter question also matters for individual rights. A crackdown generates enforcement actions, warrants, arrests, convictions, penalties, and sentences; a policy of nonenforcement does the opposite—it leaves parties unscathed. To the extent that one harbors doubts about the systems either of criminal justice or regulatory enforcement, then, the crackdown has far greater worrisome potential than the conscious non-enforcement policy.

As the foregoing discussion has explained, the law offers only the most rudimentary of tools for arraying crackdowns along the metric of their normative desirability. Today, any crackdown with plausible statutory authorization that does not demonstrably transgress the First, Fifth, or Fourteenth Amendments is available to the executive branch;⁹⁶ is this the way it ought to be? The Supreme Court could not and did not answer these questions in *Texas*—and it is unclear when, if ever, the Court will encounter a vehicle for doing so. The crackdown has remained—and shows every chance of remaining—an executive-branch enforcement technique securely insulated from external checks.

When a system is organized on the principle that a small set of decision makers can exercise wide discretion in making choices with enormous effects on the rest of society, it tends to be prone to certain problems. As the next Part will show, this regime is no exception to that general rule.

II. DESIGNING THE CRACKDOWN

Every crackdown is an enforcer’s answer to a question: how to allocate enforcement resources among competing statutory commands. The

⁹⁵ Barron & Rakoff, *supra* note 4, at 340.

⁹⁶ See *supra* Section I.A.

executive branch has a budget of available resources for enforcement and a menu of available statutes to enforce. Many potential patterns of law enforcement would be consistent with the constraints of that budget and that menu. In choosing the crackdown, the enforcer has selected one of those available patterns.

Ideally, this choice would have been driven by the enforcer's determination that the crackdown was the best utilization of the resources that the enforcer had at its disposal—notwithstanding the presumably increasing marginal costs and decreasing marginal benefits of enforcing a selected law in each additional case. A model enforcer would have concluded that a concentrated enforcement push in a particular domain was the optimal way to maximize the various ends of law enforcement: ensuring compliance, deterring law breaking, effectively carrying out legislative instructions, setting norms of conduct, protecting the public interest, and so forth.⁹⁷

That this determination seems a difficult one to make does not mean we should doubt, in principle, the enforcer's capacity to make that determination correctly. Indeed, under standard assumptions of institutional choice theory, the executive would appear to be the best-equipped of the branches to make that determination. The executive may be more able to access information and to weigh it, with the help of experts, than either courts or legislatures.⁹⁸ In a political climate where gridlock has elevated the costs of lawmaking, the executive branch can respond relatively more quickly than the legislature to external shocks or crises that call for adjusting effective legal obligations or policy experimentation.⁹⁹ The executive, not just the legislature, may also be held democratically accountable for its actions,¹⁰⁰ which somewhat countervails any discomfiture that may trail behind the observation that prospective enforce-

⁹⁷ For a brilliant dissection of the general question of allocating enforcement resources optimally, see Lederman & Sichelman, *supra* note 65.

⁹⁸ See Reuel E. Schiller, *The Era of Deference: Courts, Expertise, and the Emergence of New Deal Administrative Law*, 106 *Mich. L. Rev.* 399, 413–18 (2007); Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 *Colum. L. Rev.* 573, 582 (1984).

⁹⁹ Eric A. Posner & Adrian Vermeule, *The Executive Unbound: After the Madisonian Republic* 42 (2010); Jody Freeman & David B. Spence, *Old Statutes, New Problems*, 163 *U. Pa. L. Rev.* 1, 7 (2014).

¹⁰⁰ See Andrias, *supra* note 7, at 1090–93; David J. Barron & Elena Kagan, *Chevron's Nondelegation Doctrine*, 2001 *Sup. Ct. Rev.* 201, 242–43 (noting the significance of *Chevron's* “claimed connection between agencies and the public,” which occurs because agencies are accountable via the President and Senate).

ment-policy setting enables the executive to alter effective legal obligations. All in all, much can be said in favor of a system (like ours) that is structured to entrust wide discretion to the executive in selecting and designing the crackdown.¹⁰¹

But there is also a considerable downside risk in such a system. The public officials who make crackdown decisions—agency officials, prosecutors, mayors, governors, and presidents—will at times be influenced not just by public-spirited concerns about optimal enforcement, but also by calculations that are self-regarding, venal, or insufficiently attuned to legislative instructions. Cost-benefit calculations and legislative mandates may dictate enforcement priority setting, to be sure, but so might interests in personal advancement that are far less publicly visible and publicly palatable.¹⁰² Because of the sparse checks on crackdowns, one can predict that these dynamics will skew some set of crackdowns away from advancing legislative ends, the public welfare, or other desiderata.

All this is just to point out the obvious fact that—like many aspects of public law—the crackdown choice is susceptible to being inflected and distorted by principal-agent problems.¹⁰³ As Professors Jacob Gersen and Matthew Stephenson point out, the basic principal-agent problem in public law is simple: “[g]overnment officials (the ‘agents’) are supposed to make decisions on behalf of, and for the benefit of, the citizenry (the

¹⁰¹ See Cox & Rodríguez, *supra* note 60, at 111.

¹⁰² See Lemos, *supra* note 2, at 20–21 (noting literature that “emphasizes the risk that government attorneys may prioritize cases that advance their personal or professional interests. Public ‘attorneys, like most people, recognize that their job performance today affects their career opportunities tomorrow.’ The consequences are hard to predict. Depending on their personal preferences and career plans, attorneys may relish the challenge of high-profile cases that are likely to garner attention, or they may prefer to focus on smaller cases that are easy to win and that will fly below the political radar. The important point for present purposes is that there is no necessary connection between the self-interest of enforcement officials and the public interest in effective enforcement.” (footnotes omitted) (quoting Todd Lochner, *Strategic Behavior and Prosecutorial Agenda Setting in United States Attorneys’ Offices: The Role of U.S. Attorneys and Their Assistants*, 23 *Just. Sys. J.* 271, 277 (2002))).

¹⁰³ Gersen & Stephenson, *supra* note 17, at 185 (calling public law “rife with principal-agent problems”); Lemos, *supra* note 2, at 21 (“As is well known in the enforcement literature, various forces can skew public enforcement away from the pursuit of the public interest. Like other government functions, public enforcement may be diverted by enforcement officials’ own self-interest, or by narrow private interests.”).

‘principals’).”¹⁰⁴ But “government agents may have their own interests that diverge from those of the people they represent.”¹⁰⁵

The principal-agent problem in public law takes many guises. For example, the agent may engage in *self-dealing* behavior or *shirking*, by selecting a policy that benefits itself at the expense of the principal.¹⁰⁶ The agent may become *captured*, which is to say, the agent may select a policy in response to pressure by parochial interest groups in a way that reduces aggregate social welfare.¹⁰⁷ The principal-agent relationship may also suffer because of a special class of problem that has only recently drawn scholarly attention—the dynamic of “over-accountability.”¹⁰⁸ Over-accountability problems emerge from the desire of the agent to *appear* competent and unbiased to the principal,¹⁰⁹ and from the fact that agents can often have better information about the consequences of their actions than principals.¹¹⁰ Due to these factors, the agent may take otherwise undesirable action in order to convince the principal that it is competent and unbiased.¹¹¹ Put differently, over-accountability induces the agent to act in a way that avoids the perception of bias or incompetence rather than act straightforwardly to promote the principal’s interests; because the principal is less informed than the agent, the principal cannot tell the difference.¹¹²

¹⁰⁴ Gersen & Stephenson, *supra* note 17, at 185; see also Mark Bovens, Public Accountability, in *The Oxford Handbook of Public Management* 182, 192 (Ewan Ferlie, Laurence Lynne, Jr. & Christopher Pollitt eds., 2005) (“Modern representative democracy can be analyzed as a series of principal-agent relations.”).

¹⁰⁵ Gersen & Stephenson, *supra* note 17, at 186; see also Steven P. Croley, Theories of Regulation: Incorporating the Administrative Process, 98 *Colum. L. Rev.* 1, 23 (1998) (“Because agents have incentives to shirk wherever their own interests diverge from the interests of those they represent, and because agents are seldom perfectly loyal to their principals, principal-agent relationships are not cost free. Instead, they suffer from more or less slack—more or less room for agents to pursue their own interests to the detriment of their principals’ common interests.”).

¹⁰⁶ Samuel Issacharoff & Daniel R. Ortiz, Governing Through Intermediaries, 85 *Va. L. Rev.* 1627, 1638–39 (1999) (“Agents do have costs, however. They seldom work for free, they require continuing supervision, and, worst of all, they often serve themselves at the expense of their principals.”).

¹⁰⁷ Gersen & Stephenson, *supra* note 17, at 187 n.6.

¹⁰⁸ *Id.* at 187.

¹⁰⁹ *Id.* at 194–202.

¹¹⁰ *Id.* at 190.

¹¹¹ *Id.* at 191 (“The action which a perfectly-informed principal would want the agent to take is not necessarily the action that would most effectively convince imperfectly-informed principals that the agent is a good type.”).

¹¹² *Id.*

The crackdown decision is enveloped in a perfect storm of the factors tending to produce principal-agent problems. Enforcers—whether state, federal, civil, or criminal—are making probabilistic judgments about the consequences of enforcement policies, in situations where the results are hard for the principal to discern and even harder to evaluate. Enforcers are relatively more informed about the likely consequences of their decisions than their principals. And enforcers want to appear competent and unbiased to the principals. As a result, in making the crackdown decision, enforcers will be prone to the pathologies of self-dealing and capture, as well as to the various over-accountability pathologies—pandering,¹¹³ posturing,¹¹⁴ persistence,¹¹⁵ populism,¹¹⁶ and political correctness.¹¹⁷

The principal-agent pathology of self-dealing is particularly relevant in this context. One way in which agents can self-deal is by seeking reputational rewards—that is, by taking actions in order to burnish or augment their principals’ perception of them. This kind of self-dealing frequently takes a particular form: placing extra effort behind easy-to-measure tasks at the expense of tasks that are *more* difficult to observe.¹¹⁸ Thus, “agencies seeking to build reputations as effective enforcers will tend to emphasize easily measurable accomplishments,” for example, “quantifiable objectives like win rates and the number of enforcement actions initiated in a given time period,” instead of “more

¹¹³ Id. at 188 (“the selection of a popular policy even when the agent believes the unpopular policy is in the principal’s best interest”).

¹¹⁴ Id. (“taking bold, risky action even when the agent believes the safe, conventional action is likely better”).

¹¹⁵ Id. (“adhering to the policy the agent had originally adopted, even when subsequent evidence indicates the desirability of change”).

¹¹⁶ Id. at 188, 203 (“adopting policies that injure some unpopular group or cause even more than the principal believes is appropriate,” in order to signal to the principal that the agent is not “ill-motivated or biased or captured”).

¹¹⁷ Id. (“adopting policies that benefit some sympathetic group or cause even more than the principal would view as appropriate,” in order to signal to the principal that the agent is not biased against that sympathetic group or cause).

¹¹⁸ While the “[e]ffort placed toward the more easily measured result will produce more apparent successes,” effort devoted toward other results “will frequently be lost in the noise.” Conversely, failure to achieve easily measured goals “will produce clear evidence of failure, while a lack of effort toward the other tasks will not.” Lemos & Minzner, *supra* note 17, at 876.

amorphous forms of success.”¹¹⁹ The related principal-agent pathology of shirking, another well-known type of agency cost,¹²⁰ may also have particular relevance here. One would think that the tendency of agents to shirk would discourage crackdowns, which presumably demand energy and resolve rather than laziness and apathy. But shirking can take many guises. One type of shirking occurs when an agent tries to appear diligent to the principal by a show of activity that might, in fact, accomplish little.¹²¹ If the principal is poorly informed or sufficiently disinterested, the principal will be deceived into thinking its lazy agent is actually a diligent one.

These dynamics help to explain why crackdowns are so ubiquitous.¹²² The mere announcement of a crackdown helps to flag and crystallize the

¹¹⁹ *Id.*; Barkow, *supra* note 7, at 1172 (“[I]n order to demonstrate success and progress, an agency will choose to pursue its more easily measured goals rather than those that are harder to quantify.”).

¹²⁰ Michael A. Livermore, *Reviving Environmental Protection: Preference-Directed Regulation and Regulatory Ossification*, 25 *Va. Envtl. L.J.* 311, 350 (2007).

¹²¹ *Id.* at 351–52 (noting the incentives of agents to engage in “busy work”); Gersen & Stephenson, *supra* note 17, at 198; Barkow, *supra* note 7, at 1170–71 (“If you tell an agency official that his or her budget or career advancement hinges on a particular outcome measure, the official will have an incentive to focus on that measure. . . . [I]f [police officers] are going to be assessed based on crime rates in their precinct, they will try to get those rates down—either by fighting crime in the most effective way they know how or, less appealingly, by fudging the statistics that are reported.”).

¹²² No comprehensive clearinghouse or depot of information on crackdowns exists. Nonetheless, hand-gathered evidence conveys (at least impressionistically) the scale, frequency, and sweep of state and federal crackdowns. See, e.g., I.R.S. News Release IR-2013-17 (Feb. 7, 2013), <https://www.irs.gov/uac/newsroom/irs-intensifies-national-crackdown-on-identity-theft-january-2013> [<https://perma.cc/S5SR-9N4Y>] (“The January crackdown, a joint effort with the Department of Justice and local U.S. Attorneys offices . . . included 109 arrests, 189 indictments, informations and complaints, as well as 47 search warrants.”); Press Release, U.S. Dep’t of Treasury, *FinCEN Takes Aim at Real Estate Secrecy in Manhattan and Miami* (Jan. 13, 2016), https://www.fincen.gov/sites/default/files/news_release/20160113.pdf [<https://perma.cc/MPK4-VMXH>] (“The Financial Crimes Enforcement Network (FinCEN) today issued Geographic Targeting Orders (GTO) that will temporarily require certain U.S. title insurance companies to identify the natural persons behind companies used to pay ‘all cash’ for high-end residential real estate in the Borough of Manhattan in New York City, New York, and Miami-Dade County, Florida.”); Lenny Bernstein & Sari Horwitz, *Government Arrests 243 in Largest Crackdown on Health-Care Fraud*, *Wash. Post* (June 18, 2015), https://www.washingtonpost.com/national/health-science/government-arrests-243-in-largest-ever-crackdown-on-health-care-fraud/2015/06/18/43a6f1be-15e1-11e5-89f3-61410da94eb1_story.html [<https://perma.cc/Q33F-JCJS>] (“In the single largest crackdown in an eight-year campaign against health-care fraud, the Justice Department charged 243 people Thursday with \$712 million in false billings to Medicare”); Zach Brez et al., *FERC Enforcement’s Increased Attention to Market Manipulation Is Coming to a Head*, 207 *Energy & Climate Rep. (BNA)* 20, 23 (Oct. 27, 2015) (noting a “drastic increase” in FERC penalties,

agency's or prosecutor's zeal in netting offenders. If crackdowns are *actually* the best way to target enforcement resources is a separate question, one on which the jury has long been out.¹²³ Whether they are, a

rising from a maximum penalty of \$9 million in 2007 to “multiple civil penalties in the hundreds of millions of dollars” since that time); Alicia A. Caldwell, Federal Agents Launch Nationwide Crackdown on Synthetic Drugs, PBS NewsHour (Oct. 15, 2015), <http://www.pbs.org/newshour/rundown/federal-agents-launch-nationwide-crackdown-synthetic-drugs/> [https://perma.cc/NZ5S-ANE6] (“The DEA and other state and federal agents . . . [S]eized more than \$15 million in cash and assets as part of Project Synergy, an ongoing DEA crackdown on synthetic drugs.”); Deon J. Hampton, Mastic Beach Cracks Down on Squatters Illegally Occupying Abandoned Homes, Newsday (Long Island, N.Y.) (Sept. 3, 2015), <http://www.newsday.com/long-island/suffolk/mastic-beach-cracks-down-on-squatters-illegally-occupying-abandoned-homes-1.10802928> [https://perma.cc/D8YH-FZQK] (“Public safety officers have removed squatters from 13 homes under Operation Take Back”); Gwen Ifill, How Effective Is Justice Department Crackdown on Counterfeit Goods Dealers?, PBS NewsHour (Nov. 29, 2011, 12:00 AM), http://www.pbs.org/newshour/bb/law-july-dec11-counterfeit_11-29/ [https://perma.cc/XVF7-7NWF] (“The Justice Department used Cyber Monday, the biggest online shopping day of the year, to shut down 150 websites that were allegedly peddling fake shoes, sporting goods and handbags.”); Kenneth Lovett, New York State Cracks Down on Landlords Who Illegally Remove Central Heating Systems, N.Y. Daily News (Dec. 22, 2015), <http://www.nydailynews.com/news/politics/n-y-cracks-landlords-remove-central-heating-article-1.2473499> [https://perma.cc/8DLB-2ZCH] (“[New York state] is cracking down on New York City landlords who have illegally removed central heating systems in rent-regulated buildings and replaced them with individual meters, forcing tenants to pay for their own heat.”); Jesse Newman, Criminal Cases Roil Food Industry, Wall St. J. (May 20, 2015), <http://www.wsj.com/articles/more-food-safety-lapses-prosecuted-as-crimes-1432165360> [https://perma.cc/K6RE-DDEX] (reporting that the criminal charges and \$11.2 million in fines against ConAgra Foods is part of a larger campaign, in which “stepped-up enforcement of food-safety laws is shaking up the industry”); Liz Owens, City Cracking Down on Campaign Signs, WRDW/WAGT (North Augusta, S.C.) (Feb. 19, 2016), <http://www.wrdw.com/home/headlines/OYS-City-cracking-down-on-campaign-signs-369474342.html> [https://perma.cc/76R2-LMCE] (“North Augusta code enforcement is cracking down on campaign signs in violation of city code [forbidding temporary signs that might distract motorists].”); Emily Alpert Reyes & Catherine Saillant, L.A. Credits Its Crackdown with Shutting More than 500 Pot Shops, L.A. Times (Apr. 9, 2015), www.latimes.com/. . ./la-me-0409-pot-shops-20150409-story.html (describing a two-year crackdown on medical marijuana shops); Ann Zimmerman, After Huge Raid on Illegals, Wal-Mart Fires Back at U.S., Wall St. J. (Dec. 19, 2003), <http://www.wsj.com/articles/SB107179205612301100> [https://perma.cc/P7QW-X3MC] (“In a series of predawn raids . . . federal agents rounded up 250 illegal immigrants working as cleaning crews in 61 Wal-Marts across 21 states . . . [D]ubbed Operation Rollback.”); Daniel Zwerdling, OSHA Launches Program to Protect Nursing Employees, NPR (June 24, 2015), <http://www.npr.org/sections/thetwo-way/2015/06/24/417186384/osha-launches-program-to-protect-nursing-employees> [https://perma.cc/9KNK-W6F2] (describing OSHA “crack down on hospitals, for the first time ever, to prevent an epidemic of back and arm injuries among nursing employees”).

¹²³ See Campbell & Ross, *supra* note 7, at 35–37, 52. For a sampling of the extensive debate among criminologists on this point, see Raymond Paternoster, *How Much Do We Real-*

crackdown is at least a convenient and salient way for an enforcer to make the case to its overseers that it is doing its job.¹²⁴

The initial decision to crack down, then, may itself be affected by a principal-agent gap.¹²⁵ So, too, can this influence warp the other parame-

ly Know About Criminal Deterrence?, 100 *J. Crim. L. & Criminology* 765, 793–96 (2010); Lawrence W. Sherman, Police Crackdowns: Initial and Residual Deterrence, in *12 Crime and Justice: A Review of Research 1* (Michael Tonry & Norval Morris eds., 1990); Lawrence W. Sherman & John E. Eck, Policing for Crime Prevention, in *Evidence-Based Crime Prevention* 295 (Lawrence W. Sherman et al. eds., 2002).

¹²⁴ See Gersen & Stephenson, *supra* note 17, at 198 (noting the incentive to take “bold, dramatic action” in agents desirous of “being seen as the kind of agent who takes or proposes bold, dramatic action, rather than because the agent actually believes such action is appropriate under the circumstances”); Jonathan R. Macey, The Distorting Incentives Facing the U.S. Securities and Exchange Commission, 33 *Harv. J.L. & Pub. Pol’y* 639, 644 (2010) (“[T]he strategy that the SEC employs to maximize its appeal to Congress, and more generally to maximize the overall notion that it is effectively using the resources that Congress has allocated to it, is to focus on available, salient criteria. In particular, . . . the raw number of cases that it brings and on the sheer size of the fines that it collects.”); Urska Velikonja, Reporting Agency Performance: Behind the SEC’s Enforcement Statistics, 101 *Cornell L. Rev.* 901, 906 (2016) (explaining that because agencies must report to Congress “during budget appropriation season” and because agency officials must testify to congressional oversight committees, agencies have the incentive to inflate enforcement statistics).

¹²⁵ My invocation of the principal-agent model raises an important question: in the context of enforcement, who is the principal? The quest for “the principal” is a classic problem of legal and political theory. Cf. Ethan J. Leib, David L. Ponet & Michael Serota, A Fiduciary Theory of Judging, 101 *Calif. L. Rev.* 699, 708 (2013) (tracing the notion of the sovereign’s fiduciary obligations from Plato, Aristotle, and Cicero to English common law and American constitutional law). One might conceive of the principal in various ways. Executive branch officials derive their ultimate authority from the public, and so, one might argue, the public is ever and always the principal. Cf. Gary Lawson et al., The Fiduciary Foundations of Federal Equal Protection, 94 *B.U. L. Rev.* 415, 435–36 (2014) (“In that context, ‘We the People’ is plural” and “the *principals* to be served by authorized government agents are real life, concrete people. In other words, the Constitution created a regime in which agents were empowered to manage some portion of the affairs of multiple principals.” (footnote omitted)). Alternatively, one might argue, the legislature that enacted the law that the executive is taking care to execute should be treated as the principal. Another option would be to conceive of the legislature as an “intermediate” principal—as a kind of middle management—that sits between the agent and the true principal (the public). See Bovens, *supra* note 104, at 196. The element of time introduces further complications. Voters’ and legislatures’ preferences are not static; should the principal be viewed as the electing polity and the enacting legislature, or the one currently in power? Still more wrinkles arise when one looks up from the confines of a single political unit and considers the layered obligations that our system of federalism imposes on state and local agents. Upon what geographical plane(s) sits the principal (or principals) of, say, a city’s sheriff or chief of police—the plane of the city, the state, or the nation?

In view of these issues, a more fruitful approach is to think of the principal not as a person or as a group of persons, but rather as a purpose or a set of purposes—which, in the context of enforcement, is the purpose of enforcing the law well and justly. See Paul B. Miller &

ters of crackdown design: the *who*, *what*, *when*, *where*, and *why* of the crackdown. The remainder of this Part illustrates this point, by curating various crackdowns spanning state, federal, criminal, and administrative law, and by probing the range of ways in which principal-agent pathologies can permeate and warp the crackdown choice.

One overarching point deserves emphasis at the outset: no legal rules prohibit the mine run of these pathologies; they simply do not register on the radar of existing law. Apart from the singular category of crackdowns that can be *proven* to be animated by “vindictiveness” or by racial or political animus—showings that are well-nigh impossible to make¹²⁶—the crackdowns critiqued below are of *equal legal validity* to crackdowns with no taint of principal-agent pathology. The political pushback prompted by one or two of the crackdowns discussed below only serves to underscore just how little *law* there is here.

A. *Who*

Many a crackdown sets its sights on a particular class of offenders. How should this class be selected? One can imagine answering this question in an abstract or disinterested fashion—in the manner “dispassionate, reasonable and just” urged so eloquently by Justice Robert Jackson in his famous remarks on prosecutorial discretion—so that the chosen offenders are those associated with violations in which “the offense is the most flagrant, the public harm the greatest, and the proof the most

Andrew S. Gold, *Fiduciary Governance*, 57 *Wm. & Mary L. Rev.* 513, 523 (2015) (distinguishing between a class of fiduciary mandates that exist between ordinary people (“service mandates”) and a separate class of fiduciary mandates (“governance mandates”) that can be mandates “for purposes rather than persons”). Put another way, one can conceive of the executive branch as the agent of “the state” or “the government of the United States,” and further imagine that this agent is charged not only with carrying out a particular statutory mandate, but also with the responsibility to behave with the dignity, neutrality, and respect for justice and constitutional values appropriate to a democratic government. The Solicitor General Frederick Lehmann’s famous motto, now carved in the wall of Main Justice in Washington, D.C., might sum it up as well it can be: “The United States wins its point whenever justice is done . . .,” *Brady v. Maryland*, 373 U.S. 83, 87 (1963). This is the conception of the agent adopted by this Article. I am indebted to Professor Richard Fallon for his insights on this point.

¹²⁶ See *supra* text accompanying notes 49–51.

certain.”¹²⁷ Alternatively, one can imagine selecting *whom* to crack down on for quite different, and more unsavory, reasons.¹²⁸

The “old-school” crackdown is the type of crackdown at which one tut-tuts when it is featured on the evening news; the type that seems to happen with alarming frequency in other countries. In the last few years, China has cracked down on bloggers, human rights lawyers, and activists;¹²⁹ Egypt has cracked down on journalists;¹³⁰ and so on.

The old-school crackdown occurs when the reigning regime seeks to use its crackdown power to disarm or mute its opposition in order to preserve or enhance its own political power. In America, the old-school crackdown would be illegal, straightforwardly barred by First Amendment principles that prohibit targeting enforcement on the basis of speech or political activities.¹³¹ It is the rare example of a crackdown that the law forbids, at both the federal and state levels. But that does not mean it never happens.

Consider the long-festering investigation into the IRS and its investigation of tax-exempt political groups. The IRS allegedly gave special scrutiny “to organizations seeking tax-exempt status if they had ‘tea party’ or ‘patriot’ in their name.”¹³² In 2013, Lois Lerner, the IRS official responsible for overseeing tax-exempt groups, acknowledged the agency “had targeted for special review groups promoting limited government.”¹³³ Following her confession and apology, Ms. Lerner took the Fifth when called to testify before Congress and then promptly retired from her position.¹³⁴ An ongoing congressional investigation is mired in

¹²⁷ Robert H. Jackson, *The Federal Prosecutor*, 31 *J. Am. Inst. Crim. L. & Criminology* 3, 4–5 (1940).

¹²⁸ *Id.* at 5 (noting that the realm “in which the prosecutor picks some person whom he dislikes or desires to embarrass, or selects some group of unpopular persons and then looks for an offense” is the realm wherein “the greatest danger of abuse of prosecuting power lies”).

¹²⁹ See *China’s Crackdown*, *Economist*, Apr. 14, 2011, <http://www.economist.com/node/18560351> [<https://perma.cc/8XDC-TY6R>].

¹³⁰ See D.H., *Let Them Out: Protesting Against Egypt’s Crackdown on the Press*, *Economist*, Feb. 5, 2014, <http://www.economist.com/blogs/pomegranate/2014/02/protesting-against-egypts-crackdown-press> [<https://perma.cc/W8XT-XNAD>].

¹³¹ See Poulin, *supra* note 45, at 1116.

¹³² Kathleen Hunter & Richard Rubin, *Obama Calls IRS Targeting of Tea Party Groups Outrageous*, *Acct. Today*, May 13, 2013, 2013 *WLNR* 11744601.

¹³³ *Id.*

¹³⁴ Ed O’Keefe & William Branigin, *Lois Lerner Invokes Fifth Amendment*, *Wash. Post* (May 22, 2013), https://www.washingtonpost.com/politics/lois-lerner-invokes-fifth-a...argeting/2013/05/22/03539900-c2e6-11e2-8c3b-0b5e9247e8ca_story.html [<https://perma.cc/AR9D-6NM2>]; Stephen Dinan, *Lois Lerner, IRS Official in Tea Party Scandal, Forced Out for*

trying to establish “how high it goes.”¹³⁵ It may well go no higher than Ms. Lerner. Even assuming it stops with her, however, the IRS scandal is still an example of a politically motivated use of the agency’s enforcement power.

In the typology of principal-agent problems, the old-school crackdown can be conceptualized as an example of self-dealing—of an agent acting contrary to the public interest in order to serve the agent’s own venal interest in accumulating power. As noted, the First Amendment forbids the old-school crackdown at both the federal and state levels.¹³⁶ Take a step away from the core of the old-school crackdown, however, and the law is much more lax. Consider the pattern of leak prosecutions in recent years. Prosecutions of leakers have jumped sharply.¹³⁷ But while it has prosecuted some leakers, the government has permitted certain officials to purposely leak or “plant” equally sensitive classified information that enhances the administration’s interests to other reporters.¹³⁸ The authorized leakers have *not* been prosecuted.¹³⁹

This selective crackdown is an example of principal-agent pathology. The public has an interest in having undistorted information about what the administration is doing. Selective prosecution of *unfavorable* leaks betrays that interest—but it does serve the agent’s interest in improving its reputation by disseminating helpful information about itself. No doctrine forbids this brand of selective prosecution.

B. What

In the 1990s, Rudy Giuliani was the mayor of New York City. Upon taking office, he proclaimed: “New York City is poised for dramatic change. The era of fear has had a long enough reign.”¹⁴⁰

“Neglect of Duties,” Wash. Times (Sept. 23, 2013), <http://www.washingtontimes.com/news/2013/sep/23/lois-lerner-irs-official-tea-party-scandal-retires/> [<https://perma.cc/43ST-YL47>].

¹³⁵ Michelle Cottle, *The Conservative Crusade Against the IRS Commissioner*, Atlantic (Oct. 7, 2016), <http://www.theatlantic.com/politics/archive/2016/10/the-conservative-crusade-against-the-irs-commissioner/503375/> [<https://perma.cc/6KZD-YPRB>].

¹³⁶ See supra note 131.

¹³⁷ See Pozen, supra note 9, at 536.

¹³⁸ Id. at 559–62.

¹³⁹ Id. at 565 (“By increasing criminal enforcement against suspected leakers . . . , [the] DOJ has ‘exposed the White House to accusations . . . that it clamps down on whistleblowing when the disclosures undermine its agenda but eagerly volunteers anonymous “senior administration officials” for interviews when politically expedient.’” (citation omitted)).

¹⁴⁰ Katharyne Mitchell & Katherine Beckett, *Securing the Global City: Crime, Consulting, Risk, and Ratings in the Production of Urban Space*, 15 Ind. J. Global Legal Stud. 75, 85

Whether the “era of fear” was ending or beginning depended, of course, on one’s point of view. Before Giuliani took office, the city had already commenced a program of aggressive enforcement of rules against turnstile jumping in the subway. “Subway misdemeanor arrests and ejections tripled within a year, with arrestees booked quickly on a mobile ‘Bust Bus.’”¹⁴¹ Four years later, the crackdown on order-maintenance crimes “moved above ground,”¹⁴² with a crackdown on “fairly minor, if quite visible, misdemeanors and ordinance violations,” including “graffiti, littering, panhandling, public drunkenness, public urination, and prostitution.”¹⁴³

The premise of these crackdowns was what is called the “broken windows theory.”¹⁴⁴ The core idea of the theory is that “the appearance of disorder suggests to observers that disorder is uncontrolled, and this perception prompts some people toward even greater disorder that is, in fact, not controlled.”¹⁴⁵ By policing the visible disorder—even if it is as minor as graffiti on a subway car—the government can suppress the rates of violent crimes, such as homicide, armed robbery, and rape.¹⁴⁶

Or so the theory goes. Scholars continue to debate whether the Giuliani crackdowns were actually effective in bringing down the major crimes rate.¹⁴⁷ But, as Professor Adam Samaha writes, “[o]n the available evidence, a sensible conclusion is that [the probable benefit of] broken windows policing is uncertain, low, or confined in important ways.”¹⁴⁸ This reality, as he goes on to note, sharply differed from the public portrayal of broken windows’ efficacy.¹⁴⁹ Public officials proclaimed broken windows policing “an effective technique for reducing

(2008) (quoting Mayor Rudolph W. Giuliani, Inauguration Speech (Jan. 2, 1994) (transcript available at <http://www.nyc.gov/html/records/rwg/html/96/inaug.html> [<https://perma.cc/4W BX-CAB6>])).

¹⁴¹ Adam M. Samaha, *Regulation for the Sake of Appearance*, 125 *Harv. L. Rev.* 1563, 1621 (2012).

¹⁴² *Id.*

¹⁴³ *Id.* at 1621–22.

¹⁴⁴ See James Q. Wilson & George L. Kelling, *Broken Windows: The Police and Neighborhood Safety*, *Atlantic Monthly*, March 1982, at 29.

¹⁴⁵ Samaha, *supra* note 141, at 1621.

¹⁴⁶ *Id.* at 1621–22.

¹⁴⁷ *Id.* at 1623 (“No scholarly consensus has emerged on either broken windows theories of misconduct or their affiliated policing strategies.”).

¹⁴⁸ *Id.* at 1629.

¹⁴⁹ *Id.* at 1630.

violent crime, not just urinating in public.”¹⁵⁰ Citizens took them at their word: a poll “found over seventy percent support for a broken windows theory of crime.”¹⁵¹ As Samaha concludes, “[s]uch promotion and credit attribution indicates a transparency problem, to the extent that ordinary people became overly persuaded that broken windows policing drove violent crime down.”¹⁵²

This “transparency problem” is just another way of describing an agent exploiting its principal’s relative lack of information in order to serve the agent’s own interest in accumulating public support. If broken-windows policing was *not* as effective in reducing serious crime as it was advertised to be, the public may have preferred to live without it. The crackdowns were costly—to black men in particular,¹⁵³ and to rule-of-law values more generally.¹⁵⁴ The broken-windows crackdown exploited this information gap.

Another factor that might affect the choice of *what* to crack down upon is the “revolving door” effect. Because “the heads of agencies often anticipate entering or returning to employment with the regulated industry once their government service terminates,” these officials “do not want to make enemies within the industry by regulating with what the industry will view as a heavy hand.”¹⁵⁵ Lax enforcement, then, not strin-

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 1630–31.

¹⁵² *Id.* at 1630.

¹⁵³ K. Babe Howell, *Broken Lives From Broken Windows: The Hidden Costs of Aggressive Order-Maintenance Policing*, 33 *N.Y.U. Rev. L. & Soc. Change* 271, 291–92 (2009); Alexandra Natapoff, *Misdemeanor Decriminalization*, 68 *Vand. L. Rev.* 1055, 1075–76 (2015) (“Minor offenses are prone to racialized enforcement; order-maintenance crimes like loitering, trespassing, and marijuana possession have become infamous as police tools for controlling and criminalizing black men.”).

¹⁵⁴ See Stuntz, *supra* note 6, at 292; Natapoff, *supra* note 153, at 1075 (“Scholars have long noted that the moral authority of the justice system suffers when it criminalizes behaviors in which many people nevertheless engage. . . . [A]ggressive enforcement of minor offenses can undermine public respect for and obedience to criminal laws where enforcement is perceived as unfair or disrespectful.” (footnote omitted)); Stephen J. Schulhofer et al., *American Policing at a Crossroads: Unsustainable Policies and the Procedural Justice Alternative*, 101 *J. Crim. L. & Criminology* 335, 346–47 (2011) (“[W]here arrest rates for these offenses rise or where other ‘crackdown’ tactics are implemented, approval of the police has declined. . . . [T]ough measures, if implemented without fairness, are likely to arouse resentment rather than appreciation.”); William J. Stuntz, *Essay, Local Policing After the Terror*, 111 *Yale L.J.* 2137, 2173–74 (2002).

¹⁵⁵ Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 *Tex. L. Rev.* 15, 23 (2010).

gent enforcement, is the result generally associated with revolving doors.

Recently, however, Professor Wentong Zheng has argued that the revolving door “may lead to more aggressive, not less aggressive, regulatory actions.”¹⁵⁶ Why? Because “revolving-door regulators have incentives to be more aggressive toward the regulated industry as a way of signaling their qualifications to prospective industry employers.”¹⁵⁷ On this “human capital” theory, regulators are trying to enhance their own future employment prospects once they leave government by demonstrating expertise in areas where the law is being vigorously enforced. Relatedly, regulators have an incentive to “grow the pie” of enforcement to “expand the market demand for services they would be providing when they exit the government.”¹⁵⁸ By pursuing more enforcement actions, seeking broader jurisdiction, and recovering higher penalties, regulators may make more private employers interested in their personal expertise when they ultimately go through the revolving door.¹⁵⁹

As an example, Professor Zheng points to the recent crackdown in FCPA enforcement. In 2010, the Deputy Assistant Attorney General announced “a new era of FCPA enforcement.”¹⁶⁰ Indeed, FCPA enforcement “spiked” in the late 2000s.¹⁶¹ These FCPA prosecutions have resulted in a proliferation of “actual jail sentences being handed down for corporate executives found guilty of violating the FCPA,” as well as set-

¹⁵⁶ Zheng, *supra* note 12, at 1277.

¹⁵⁷ *Id.* at 1265.

¹⁵⁸ *Id.* at 1269.

¹⁵⁹ *Id.* at 1281; see also Jeffrey Toobin, *The Showman*, *New Yorker*, May 9, 2016, at 39 (“Eric Holder, who, as Attorney General, was Bharara’s boss for six years, made a similar point. ‘Do you honestly think that Preet Bharara and all those hotshots in the U.S. Attorney’s office would not have made those cases if they could?’ he said. ‘*Those are career-making cases. Those cases are your ticket.* The fight would have been over who got to try them. We just didn’t have the evidence.’” (emphasis added)).

¹⁶⁰ Press Release, U.S. Dep’t of Justice, Assistant Attorney General Lanny A. Breuer Speaks at the 24th National Conference on the Foreign Corrupt Practices Act (Nov. 16, 2010), <https://www.justice.gov/opa/speech/assistant-attorney-general-lanny-breuer-speaks-24th-national-conference-foreign-corrup> [<https://perma.cc/4ZWT-CMMT>].

¹⁶¹ Zheng, *supra* note 12, at 1289; see also Mike Koehler, *Big, Bold, and Bizarre: The Foreign Corrupt Practices Act Enters A New Era*, 43 *U. Tol. L. Rev.* 99, 100–05 (2011); William D. Wilmoth & William J. O’Brien, *White Collar Crime with Your Company as the Victim: Conducting a Fraud Investigation*, 32 *Energy & Min. L. Inst.* 1, 11 (2011) (“There was an average of six proceedings brought per year under the FCPA from 2002 till 2005. Between 2006 and 2008, the average more than doubled to 14 per year.”).

tlements with the federal government totaling hundreds of millions of dollars.¹⁶²

Why the boom? One explanation is Professor Zheng's: "if their goal is to maximize their exit opportunities," then "FCPA regulators at least have *incentives* to increase FCPA enforcement Since the FCPA does not authorize private actions, the only demand for FCPA regulators' post-government services would come from the enforcement actions brought by the regulators."¹⁶³ Moreover, FCPA regulators may also be incentivized to ramp up enforcement "because there are not many alternative uses—or at least not many equally profitable uses—of their specialized knowledge and skills in bribery investigations."¹⁶⁴ Professor Zheng concludes, "[i]t is completely rational, therefore, for a regulator contemplating a postgovernment career in the private sector to maximize enforcement to the extent permitted by his or her discretion."¹⁶⁵

Turnstile jumpers in Brooklyn and well-heeled corporate executives in Belarus may not seem to share much in common. But, in both instances, the crackdowns that netted them may owe as much to the personal interests of politicians and prosecutors as to the intrinsic blameworthiness of their offenses.

C. When

In May 2015, the *New York Times* ran a pair of articles on the plight of nail salon workers in New York.¹⁶⁶ Manicurists—overwhelmingly women—were being paid a pittance (if they were being paid at all); they were forced to work without breaks or food; they were subjected to a ruthless "ethnic caste system" in the workplace.¹⁶⁷ Even worse, the articles claimed, manicurists of childbearing age were frequently suffering

¹⁶² Wilmoth & O'Brien, *supra* note 161, at 11–12 ("Compliance with the FCPA and, in turn, increased attention to corrupt practices, has only been heightened by . . . settlement conditions requiring disgorgement of profits, totaling over \$376 million in 2008.").

¹⁶³ Zheng, *supra* note 12, at 1292.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ See Sarah Maslin Nir, Perfect Nails, Poisoned Workers, *N.Y. Times* (May 8, 2015), [hereinafter Nir, Perfect Nails, Poisoned Workers] <http://www.nytimes.com/2015/05/11/nyregion/nail-salon-workers-in-nyc-face-hazardous-chemicals.html> [https://perma.cc/B49V-8VB5]; Sarah Maslin Nir, The Price of Nice Nails, *N.Y. Times* (May 7, 2015), [hereinafter Nir, The Price of Nice Nails] <http://www.nytimes.com/2015/05/10/nyregion/at-nail-salons-in-nyc-manicurists-are-underpaid-and-unprotected.html> [https://perma.cc/V5SW-34MV].

¹⁶⁷ Nir, The Price of Nice Nails, *supra* note 166.

miscarriages or giving birth to children with health problems because of their daily prolonged exposure to toxic chemicals.¹⁶⁸

The *Times*'s reporting prompted an immediate crackdown.¹⁶⁹ Within a week, Governor Cuomo convened a new “multiagency task force” to “conduct salon-by-salon investigations, institute new rules that salons must follow to protect manicurists from the potentially dangerous chemicals found in nail products, and begin a six-language education campaign to inform them of their rights.”¹⁷⁰ The Governor invoked emergency powers to make the new rules effective immediately. His chief counsel said that “[a] decision was made to take emergency measures rather than go through the usual route by which policies are updated, which involve time-consuming steps like periods of public comment,” because “[w]e cannot wait to address the problem.”¹⁷¹

So, an intrepid journalist discovers abuse and the government acts surely and swiftly to stamp it out—what could be wrong with that? Well, some reasons exist to be skeptical. Why, for example, require manicurists to wear masks, when “occupational health experts say [the masks] give only the *appearance* of safety” and “do almost nothing to prevent exposure to chemicals, such as dibutyl phthalate, toluene and formaldehyde, that are used in nail products and have been linked to leukemia and fetal defects”?¹⁷² Why focus the crackdown only on wage theft and ignore the blatant racial and ethnic discrimination that the articles also lambasted?¹⁷³

¹⁶⁸ Nir, *Perfect Nails, Poisoned Workers*, supra note 166.

¹⁶⁹ See Sarah Maslin Nir & Paige Pagan, *Benefits, and Some Resistance, as New York Cracks Down on Nail Salon Abuses*, N.Y. Times, (July 16, 2015), <http://www.nytimes.com/2015/07/17/nyregion/benefits-and-some-resistance-as-new-york-cracks-down-on-nail-salon-abuses.html> [<https://perma.cc/HBE3-QWYM>] (“The city’s Department of Consumer Affairs has also been visiting salons to educate them on regulations. Officials there said they will have visited some 2,900 salons by early August.”); *id.* (“Besides the several hundred inspections that have been conducted by the new state task force, the Labor Department has opened investigations in response to 63 complaints of unpaid or underpaid workers in the last month. In the past, the department typically opened only two or three dozen nail salon cases a year across the state in response to complaints.”).

¹⁷⁰ See Sarah Maslin Nir, *Cuomo Orders Emergency Measures to Protect Workers at Nail Salons*, N.Y. Times (May 11, 2015), <http://www.nytimes.com/2015/05/11/nyregion/cuomo-orders-emergency-measures-to-protect-workers-at-nail-salons.html> [<https://perma.cc/MAM9-SJ2X>].

¹⁷¹ *Id.* (second internal quotation marks omitted).

¹⁷² *Id.* (emphasis added).

¹⁷³ See Nir, *The Price of Nice Nails*, supra note 166.

Perhaps most central, however, is the timing question. Why *now*? A full year before the *Times* ran the two stories, the New York State Labor Department had conducted an investigation into nail salons—“its first nail salon sweep ever”¹⁷⁴—and found 116 violations in just twenty-nine salons. (Even that initial investigation may have occurred in response to the *Times*.¹⁷⁵) Yet the crackdown—emergency enforcement measures for which “[w]e cannot wait”—did not happen until *after* the *Times* ran its front-page features.¹⁷⁶

The timing of the crackdown suggests two types of principal-agent problems. One is that the agent may be slacking off except when the media places the agent’s actions in the spotlight. With public attention focused on nail-salon abuses, the agent makes a great show of announcing bold steps. But before the media limelight shines on the agent, it takes no action, and after it inevitably shifts away, the agent may not follow through.

A second potential principal-agent problem may arise if the agent *does* follow through on its announced plans. As noted, the state Labor Department had completed an investigation that revealed abuses in the industry a whole year before the articles ran. Assume that state officials had a good reason for not doing anything substantive in the subsequent year to respond to that finding—for, in the jargon, allocating their enforcement resources elsewhere in that period. What, precisely, changed by virtue of the articles’ publication? The risk here is one of *pandering*—that the agent may select a policy because it is popular even when the agent really believes a less popular policy is in the principal’s best interest.¹⁷⁷

What it boils down to is whether the state should determine how to allocate its enforcement resources based on what is printed on a given day on the front page of the *New York Times*. (This is a concern sharpened, in this instance, by the fact that other news outlets have thrown substantial doubt upon the accuracy of some of the most sensational claims in the *Times*’s reporting.¹⁷⁸) Throwing massive enforcement resources into

¹⁷⁴ Id.

¹⁷⁵ Id. (noting that the sweep occurred “about a month after The Times sent officials there an inquiry regarding their enforcement record with the industry”).

¹⁷⁶ Nir, *supra* note 170.

¹⁷⁷ Gersen & Stephenson, *supra* note 17, at 188.

¹⁷⁸ See Richard Bernstein, What the Times Got Wrong about Nail Salons, N.Y. Rev. Books, July 25, 2015, <http://www.nybooks.com/daily/2015/07/25/nail-salons-new-york-times-got-wrong> [<https://perma.cc/R5B2-GYUK>]; Jim Epstein, The *New York Times*’ Nail Sa-

a ripped-from-the-headlines crackdown will doubtless reap immediate political dividends, but at the expense of other enforcement efforts that state officials might, in a vacuum of publicity, have deemed more pressing (for example, enforcing labor laws to protect day laborers or janitors). From the perspective of the principal, the agent would seem to have delegated the application of its expertise and the exercise of its discretion to the media outlet.¹⁷⁹

D. Where

Crackdowns can be localized to a single city, a single neighborhood, or a single stretch of road. Sometimes, these geographically targeted efforts implicate more than just crime fighting.

In the 1980s and 1990s, public housing developments nationwide were caught up in a crime wave.¹⁸⁰ The response was various types of crackdowns with both administrative and criminal aspects. In federal administrative law, the crackdown took the form of evicting innocent residents of public housing units. In 1991, the U.S. Department of Hous-

lon Series Was Filled With Misquotes and Factual Errors. Here's Why That Matters (Part 1), Reason.com (Oct. 27, 2015, 12:01 AM), <http://reason.com/blog/2015/10/27/new-york-times-nail-salon-unvarnished> [<https://perma.cc/C6YY-W3ET>] (introducing a three-part series debunking the *Times's* nail-salon stories). The *New York Times's* public editor subsequently acknowledged that the *Times's* reporting “went too far in generalizing about an entire industry” and “[i]ts findings, and the language used to express them, should have been dialed back—in some instances substantially.” See Margaret Sullivan, New Questions on Nail Salon Investigation, and a Times Response, N.Y. Times (Nov. 6, 2015), <http://publiceditor.blogs.nytimes.com/2015/11/06/new-questions-on-nail-salon-investigation-and-a-times-response> [<https://perma.cc/3KBP-XE7L>].

¹⁷⁹ For a different sort of example of a crackdown problematic because of “when” it occurred, see *Cole v. City of Memphis*, Nos. 15-5725/5999, 2016 WL 6068911 (6th Cir. Oct. 17, 2016). The city of Memphis had a policy of sweeping a popular downtown entertainment district at 3 a.m. (and always 3 a.m.) on weekend nights. The plaintiffs alleged, and the district court jury agreed, that the policy was enforced “without consideration to whether conditions throughout the [area] pose[d] an existing, imminent or immediate threat to public safety.” *Id.* at *6 (alteration in original) (quoting district court document) (internal quotation marks omitted). The district court found, and the Sixth Circuit affirmed, that this regular crackdown violated the plaintiffs’ right to *intrastate* travel, a constitutional right recognized by Sixth Circuit precedent and the precedent of a few sister circuits. See *id.* at *2 & n.3; see also *id.* at *6 (“[T]he evidence adduced at trial and the jury’s factual findings show that the timing and execution of the Sweep policy was tied to an arbitrary time, not to existing conditions on the ground. And without the requisite connection to public safety, the policy fails under intermediate scrutiny.”).

¹⁸⁰ See *Rucker v. Davis*, 203 F.3d 627, 631 (9th Cir. 2000), *rev’d sub nom. Dep’t of Hous. & Urban Dev. v. Rucker*, 535 U.S. 125 (2002).

ing and Urban Development (“HUD”) issued regulations that required leases with public housing tenants to specify that “[a]ny drug-related criminal activity on or near” the public housing project by the tenant, any member of the tenant’s household, or any guest or other person under the tenant’s control would constitute cause for eviction.¹⁸¹ The regulations authorized eviction, but did not *mandate* evictions whenever there was cause to evict; rather, the regulations and policy statements of the agency initially gave local public housing authorities discretion on whether to evict in particular cases.¹⁸²

These regulations were not enforced until 1996,¹⁸³ when President Clinton called for a crackdown. Following a ringing statement in the State of the Union Address,¹⁸⁴ he sent a policy memorandum to HUD urging adoption of a “One Strike and You’re Out” policy for public housing residents.¹⁸⁵ Subsequently, HUD began “an intensive effort” to train local public housing authorities to apply the policy strictly, and it also gave monetary incentives to public housing authorities who could demonstrate their “vigor” in enforcing One Strike.¹⁸⁶

The product of the crackdown was what one might predict: an uptick in evictions.¹⁸⁷ Many of those evicted had poignant stories; the named plaintiff in *Department of Housing & Urban Development v. Rucker*, for example, was a sixty-three-year-old grandmother who was evicted,

¹⁸¹ Id. at 632; see 24 C.F.R. § 966.4(f)(12)(i)(B) (1991).

¹⁸² See *Rucker*, 203 F.3d. at 632; 24 C.F.R. § 966.4(f)(12)(i)(B).

¹⁸³ Wendy J. Kaplan & David Rossman, Called “Out” at Home: The One Strike Eviction Policy and Juvenile Court, 3 Duke F.L. & Soc. Change 109, 112 n.11 (2011) (“Actually, the law that allowed a public housing authority (PHA) to evict a tenant for the type of criminal activity that President Clinton stressed was already on the books, it was just not enforced.”).

¹⁸⁴ President William J. Clinton, Address Before a Joint Session of the Congress on the State of the Union (Jan. 23, 1996), <http://www.presidency.ucsb.edu/ws/?pid=53091> [<http://perma.cc/7XMX-RRA2>] (“Criminal gang members and drug dealers are destroying the lives of decent tenants. From now on, the rule for residents who commit crime and peddle drugs should be ‘one strike and you’re out.’”).

¹⁸⁵ Memorandum from President Bill Clinton to Sec. of Hous. and Urb. Dev. (Mar. 28, 1996), <http://clinton6.nara.gov/1996/03/1996-03-28-memo-on-one-strike-and-you-re-out-gui-delines.html> [<https://perma.cc/9898-YVBU>].

¹⁸⁶ Kaplan & Rossman, *supra* note 183, at 114–15 (“HUD backed up its message about the need for strict enforcement of One Strike with concrete incentives. PHAs that could demonstrate the vigor with which they had embraced the policy of One Strike evictions got bonus points in competitions for grant money and qualified for fewer HUD reviews and less monitoring of their operations.” (footnote omitted)).

¹⁸⁷ Id. at 116 (“In the first six months after its implementation in 1996, drug-related evictions from PHAs went up forty percent. In Chicago, one of the nation’s largest PHAs, the number went from 49 to 157.” (footnote omitted)).

along with her family, because her mentally-disabled daughter was smoking crack three blocks away from her apartment.¹⁸⁸ Nonetheless, a unanimous Court in *Rucker* upheld the policy of evicting “so-called ‘innocent tenants,’” reasoning that a rule of “[s]trict liability maximizes deterrence and eases enforcement difficulties.”¹⁸⁹ The One Strike policy had a long reign, “absurd results” and all, despite persistent doubts on whether it reduced crime in public housing or in society generally.¹⁹⁰

A crackdown comparable in scale—Operation “Clean Halls”¹⁹¹—was undertaken in New York City, home to the nation’s largest public housing network.¹⁹² New York law prohibits entering or remaining in public housing without permission.¹⁹³ To enforce the trespass law, police engage in what are called “vertical” patrols, where they check the roof, landings, and stairwells of buildings.¹⁹⁴ Police can question any individual they encounter to determine if he is authorized to be in the building; if the individual cannot prove he is authorized, he can be arrested for trespass. The trespassing crackdown has been enormous: “hundreds of thousands of *Terry* stops” have been made, resulting in “more than 35,000 trespass arrests each year since 2006.”¹⁹⁵

Operation Clean Halls exacted an obvious toll on constitutional values. Residents in NYC public housing could expect to be stopped and questioned by police two or three times per week.¹⁹⁶ The crackdown’s racially disparate impact was also deeply troubling.¹⁹⁷

¹⁸⁸ 535 U.S. 125, 128 (2002); see Regina Austin, “Step on a Crack, Break Your Mother’s Back”: Poor Moms, Myths of Authority, and Drug-Related Evictions from Public Housing, 14 *Yale J.L. & Feminism* 273, 278 (2002).

¹⁸⁹ 535 U.S. at 130, 134.

¹⁹⁰ Kaplan & Rossman, *supra* note 183, at 135 (collecting examples of absurd results produced by the One Strike policy).

¹⁹¹ M. Chris Fabricant, Rousting the Cops, *Village Voice* (Oct. 30, 2007), <http://www.villagevoice.com/news/rousting-the-cops-6419395> [<https://perma.cc/K2UZ-LKPM>].

¹⁹² Jeffrey Fagan et al., Race and Selective Enforcement in Public Housing, 9 *J. Empirical Legal Stud.* 697, 698 (2012).

¹⁹³ *Id.* at 701.

¹⁹⁴ *Id.* at 701–02.

¹⁹⁵ *Id.* at 698 (discussing *Terry v. Ohio*, 392 U.S. 1 (1968)); Fabricant, *supra* note 191 (“Trespassing arrests are up a staggering 25 percent since 2002—and this is no crime wave, no trespassing epidemic. The Clean Halls program is a major component of ‘Operation Impact,’ which was launched by the NYPD in 2003 In the 28-month period following the launch of the operation, 72,000 arrests were made in the targeted areas.”).

¹⁹⁶ See Fagan et al., *supra* note 192, at 722.

¹⁹⁷ *Id.* at 702 (“In 2008, 91 percent of public housing residents were African American or Latino, and only 4.3 percent were white. . . . The demography of public housing makes racial

Advocates of such policing strategies have “claimed the strategy was justified in part because a portion of the residents in the projects welcomed the searches.”¹⁹⁸ On this view, such a crackdown calls for balancing the constitutional costs to many against the benefits of the crackdown to a few. The question is how adept an enforcer will be at performing that kind of balancing. The enforcer may have the incentive to portray the policies as more socially beneficial than they really are, and the incentive to resist abandoning the crackdown policy, because of the agent’s desire to appear competent to the principal.¹⁹⁹ These factors may result in a crackdown that produces too small a benefit, at too dear a cost to constitutional values. Each individual trespassing arrest or eviction may be legally defensible. The problem arises at the programmatic level. But neither Fourth Amendment nor equal protection law polices this kind of programmatic tradeoff.²⁰⁰

E. Why

The *why* of any crackdown seems to be written on its face. Why crack down on pickpockets, or on water pollution, or on owning secret Swiss bank accounts? The question seems to answer itself—to deter and punish those offenses. But sometimes the agent’s motive for pursuing a crackdown may be more complicated than a simple ambition to curb a given class of offenses.

The tiny towns of Hampton and Waldo sit on a stretch of Highway 301 between Gainesville and Jacksonville that tourists frequently use to head to South Florida for the winter. These towns were zealous enforcers of speed limits.²⁰¹ Indeed, in 2003, the American Automobile Association (“AAA”) erected its first-ever billboards warning of speed traps

disparity in the [vertical patrol] tactic’s implementation inevitable, regardless of legal or policy justifications . . .”).

¹⁹⁸ Wayne A. Logan, *The Shadow Criminal Law of Municipal Governance*, 62 *Ohio St. L.J.* 1409, 1455 n.254 (2001).

¹⁹⁹ See Gersen & Stephenson, *supra* note 17, at 188, 200–02 (describing incentives for persistence).

²⁰⁰ See Meares, *supra* note 7, at 162–65, 172–73; see also Renan, *supra* note 51, at 1068 n.130 (“Real questions persist as to the availability of a Fourth Amendment claim to address the programmatic harms of stop-and-frisk.”).

²⁰¹ Ron Word, *Residents Divided Over AAA’s Billboard Warning*, *Fla. Times-Union* (Jacksonville, Fl.) (Aug. 13, 2003), <http://jacksonville.com/tu-online/apnews/stories/081303/D7SSN9T80.html> [https://perma.cc/4W46-BEFA].

along Highway 301 at those towns.²⁰² The group similarly flagged Lawtey, another small town also on Highway 301, as a speed trap.²⁰³ The billboards were of little avail: “Between 2011 and 2012, Hampton’s officers issued 12,698 speeding tickets to motorists, many most likely caught outside Hampton’s strip of county road.”²⁰⁴

The primary motivation for the speeding crackdown was budgetary.²⁰⁵ Hampton’s former mayor admitted to a newspaper that “he helped Hampton annex the tiny slice of 301 in the mid-1990s simply to help fill city coffers.”²⁰⁶ Lawtey’s tickets paid for “34 percent of the town budget and 98 percent of the police department budget.”²⁰⁷

Eventually, the Florida towns’ crackdowns backfired. The Hampton police ticketed “legions of University of Florida Gator fans making game-day pilgrimages from Jacksonville to Gainesville,”²⁰⁸ as well as the town’s own state representative in the Florida Legislature.²⁰⁹ The state legislature, which was already in the process of auditing Hampton, began to consider dissolving the town.²¹⁰ In addition, the state legislature enacted a law prohibiting local law enforcement from using ticket quotas and requiring local governments to submit a report to a state legislative committee if traffic-ticket revenues covered more than a third of the costs of operating their police departments.²¹¹ In an apparent sign of con-

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ Lizette Alvarez, *A Dot on the Map, After the Scandal, Could Be Wiped Off*, N.Y. Times (Mar. 10, 2014), <http://www.nytimes.com/2014/03/11/us/need-for-speeders-puts-tiny-florida-city-on-brink-of-erasure.html> [<https://perma.cc/H3KP-6PHT>].

²⁰⁵ See Word, *supra* note 201 (“For fiscal year 2001-2002, traffic fines were 38.7 percent of the [Waldo] town budget, according to AAA. Traffic fines represented 105 percent of the police budget.”). A separate study has revealed similar dynamics at work in a set of small Massachusetts towns. Michael D. Makowsky & Thomas Stratmann, *More Tickets, Fewer Accidents: How Cash-Strapped Towns Make for Safer Roads*, 54 *J.L. & Econ.* 863, 865 (2011) (“When towns are in fiscal distress, government officials have an incentive to seek extra revenues not only through an increase in property taxes but also by increasing fines. One potential source of fines is traffic tickets. We document that when towns seek extra revenues through override referenda, police officers in that town issue more traffic fines and that our instrument has a statistically significant effect on traffic tickets.”).

²⁰⁶ Alvarez, *supra* note 204.

²⁰⁷ Word, *supra* note 201.

²⁰⁸ Alvarez, *supra* note 204.

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ See Comm. Substitute S.B. 264, 2015 Leg. (Fla. 2015) (“A traffic enforcement agency may not establish a traffic citation quota.”); *id.* (“If the total revenue from traffic citations that a county or municipality receives in a fiscal year exceeds 33 percent of the total expens-

fidence that the crackdown has finally ended, AAA is not renewing its years-old contracts for the billboards on that stretch of Highway 301.²¹²

The pecuniary motives that animated the Florida towns' crackdown have been evident in other crackdowns by local law enforcement departments across the country. This topic is part and parcel of the broader subject of "for-profit public enforcement,"²¹³ or "policing for profit," a subject that has captured increasing attention after protests in Ferguson, Missouri.²¹⁴ One example is the use of so-called "forfeiture corridors" along interstate highways. By cracking down on drivers passing through the state on these thoroughfares, local police forces have been using routine traffic stops as a leverage point to invoke generous federal civil-forfeiture laws that empower police to take, with a low burden of proof, the assets the motorists have with them—everything from money and cars to a single gold crucifix.²¹⁵ Enforcement on "forfeiture corridors" is lucrative for local law enforcement; it earns enforcers millions of dollars in assets.²¹⁶ But these profits are earned in a way that is not only unfair (to the motorists), but that also eludes the checks of political accountability that form perhaps the most substantial constraint on enforcement policy choices. Because a large share of the targeted motorists are not local voters but are instead simply transiting through the jurisdiction, the financial incentives to crack down will drown out the pressure from voters to back down.

es that the county or municipality incurs to operate a law enforcement agency in the same fiscal year, the county or municipality shall submit a report to the Legislative Auditing Committee detailing its total revenue from traffic citations and its total expenses for law enforcement within 6 months after the end of the fiscal year.").

²¹² John Pacenti, Speed Trap Stretch of U.S. 301 Prompts Bill Banning Ticket Quotas, *Palm Beach Post* (Apr. 24, 2015), <http://www.mypalmbeachpost.com/news/state-regional-govt-politics/speed-trap-stretch-301-prompts-bill-banning-ticket-quotas/6RexmNnY1W8hN8cqZ9y0aK/> [<https://perma.cc/S2NK-XEGF>].

²¹³ Lemos & Minzner, *supra* note 17, at 857, 863–64.

²¹⁴ Developments in the Law: Policing, Chapter One: Policing and Profit, 128 *Harv. L. Rev.* 1706, 1723–26 (2015); Matt Apuzzo, Justice Dept. Condemns Profit-Minded Court Policies Targeting the Poor, *N.Y. Times* (Mar. 14, 2016), <http://www.nytimes.com/2016/03/15/us/politics/justice-dept-condemns-profit-minded-court-policies-targeting-the-poor.html> [<https://perma.cc/8YRN-6SDD>]; see also Michael Martinez et al., Policing for Profit: How Ferguson's Fines Violated Rights of Americans, *CNN* (March 6, 2015), <http://www.cnn.com/2015/03/06/us/ferguson-missouri-racism-tickets-fines/> [<https://perma.cc/7ZRF-67G4>].

²¹⁵ See Sarah Stillman, Taken, *New Yorker*, Aug. 12 & 19, 2013, <http://www.newyorker.com/magazine/2013/08/12/taken> [<https://perma.cc/HZ3Q-RNBW>].

²¹⁶ *Id.*

The federal government has egged on local law enforcement's use of this crackdown technique. Under a program called Equitable Sharing, "local and state police [can] make seizures and then have them 'adopted' by federal agencies, which share in the proceeds."²¹⁷ The program "allowed police departments and drug task forces to keep up to 80 percent of the proceeds of adopted seizures, with the rest going to federal agencies."²¹⁸ Since 2008, "thousands of local and state police agencies have made more than 55,000 seizures of cash and property worth \$3 billion."²¹⁹

In 2015—after the *Washington Post* ran a five-part series on the abuse of civil-forfeiture laws by state and local law enforcement—the DOJ announced a pullback on Equitable Sharing: it would no longer permit "local and state police [to use] federal law to seize cash, cars and other property without warrants or criminal charges."²²⁰ State and local police could continue to use federal law to seize "illegal firearms, ammunition, explosives and property associated with child pornography, a small fraction of the total."²²¹ The DOJ's evident hope was to curb the use of forfeiture corridors.²²² But the crackdown was not so easy to halt.²²³ In March 2016, in response to concerns from local officials over the loss of funds from the program, the DOJ announced it was reinstating Equitable

²¹⁷ Robert O'Harrow, Jr. et al., Holder Limits Seized-Asset Sharing Process that Split Billions with Local, State Police, *Wash. Post* (Jan. 16, 2015), https://www.washingtonpost.com/investigations/holder-ends-seized-asset-sharing-process-that-split-billions-with-local-state-police/2015/01/16/0e7ca058-99d4-11e4-bcfb-059ec7a93ddc_story.html [<https://perma.cc/HY64-P52U>]; see 21 U.S.C. § 881(e)(1)(A) (2012).

²¹⁸ O'Harrow et al., *supra* note 217.

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ *Id.*

²²² Leon Neyfakh, Helicopters Don't Pay for Themselves: Why Eric Holder's Civil Forfeiture Decision Won't Stop Civil Forfeiture Abuse, *Slate* (Jan. 16, 2015, 7:36 PM), http://www.slate.com/articles/news_and_politics/crime/2015/01/will_eric_holder_s_civil_forfeiture_announcement_change_anything.html [<https://perma.cc/5C4H-W6DK>].

²²³ Dozens of states now have state civil-forfeiture laws that permit police departments to keep all the assets they seize, and many others allocate more than half of seized assets to police. In those places, the federal drawback would not have alleviated the crackdown in any event. *Id.*

Sharing.²²⁴ Thus, enforcement policy continues to abet, rather than restrict, “policing for profit” along forfeiture corridors.²²⁵

F. Crackdown’s Foil: The Kabuki Crackdown

Regulators can burnish their reputations by undertaking crackdowns. But there is a kicker to that: regulators can burnish their reputations merely by *announcing* crackdowns that have little to no effect. The announced crackdown signals that the agent is serious and dedicated; even better, it accomplishes that goal without the agent having to actually expend resources on difficult enforcement efforts. As long as a sufficiently wide information gap exists between the principal and an agent, an ostensible or “kabuki” crackdown will be an attractive possibility. As a principal-agent problem, this is an instance of slack: an agent reaping benefits for accomplishing a difficult task when in fact the task that has been accomplished is much less impressive.

Consider, for example, the level of enforcement undertaken by the Securities and Exchange Commission (“SEC”). As Professor Urska Velikonja demonstrates, the SEC has publicly reported record levels of enforcement in recent years—but it has largely been double- and triple-counting its enforcement actions, while “core SEC enforcement did not increase between 2002 and 2014.”²²⁶

The federal government’s response to the financial crisis also fits this bill. In 2009, President Obama announced the creation of a task force that would hold accountable those who caused the financial meltdown.²²⁷ A senior DOJ official proclaimed that the task force would “lead an aggressive, coordinated, and proactive effort to investigate and prosecute [financial] crimes.”²²⁸ But, in the three years that followed, no significant criminal cases were commenced.²²⁹ In his 2012 State of the Union Address, the President seemed to call for the creation of a task force that already existed—a “special unit of federal prosecutors and

²²⁴ Christopher Ingraham, *The Feds Have Resumed a Controversial Program that Lets Cops Take Stuff and Keep It*, Wash. Post (Mar. 28, 2016), <https://www.washingtonpost.com/news/wonk/wp/2016/03/28/the-feds-have-resumed-a-controversial-program-that-lets-cops-take-stuff-and-keep-it> [<https://perma.cc/69LF-8U74>].

²²⁵ In other domains, the DOJ has sought to discourage policing for profit. See Apuzzo, *supra* note 214.

²²⁶ Velikonja, *supra* note 124, at 904.

²²⁷ See Press Release, U.S. Dep’t of Justice, *supra* note 13.

²²⁸ See Breuer Testimony, *supra* note 14, at 4.

²²⁹ See *supra* note 15.

leading state attorney[s] general to expand our investigations into the abusive lending and packaging of risky mortgages that led to the housing crisis.”²³⁰ The President claimed the new unit would “hold accountable those who broke the law, speed assistance to homeowners, and help turn the page on an era of recklessness that hurt so many Americans.”²³¹ Three more years hence, the federal government has won many civil recoveries, but not a single *criminal* case has proceeded against a top official of any of the banks responsible for the financial crisis.²³²

What was ostensibly a criminal crackdown on banks and high-level executives became a *civil* one. The difference is enormous. To a well-heeled financial institution with generous directors and officers liability insurance, a civil crackdown is a “cost of doing business,” whereas a criminal crackdown means jail time for employees and a possible collapse of the company. But without acknowledging the drift, the administration has publicly cited the *civil* recoveries as evidence of the crackdown’s success.²³³ (It also exaggerated the scope and success of its pursuit of smaller-fry criminal cases.²³⁴) This is another illustration of slack—of an agent claiming success for a “mission accomplished” when

²³⁰ President Barack Obama, Remarks by the President in State of the Union Address (Jan. 24, 2012), <https://www.whitehouse.gov/the-press-office/2012/01/24/remarks-president-state-union-address> [<https://perma.cc/E795-KXN8>].

²³¹ *Id.*

²³² Haugh, *supra* note 15, at 157–58 (“[T]he number of criminal convictions of truly high-level executives related to the financial crisis stands at zero.”); Rakoff, *supra* note 15, at 4.

²³³ See Press Release, U.S. Dep’t of Justice, *supra* note 16.

²³⁴ The DOJ initially said that the year-long crackdown on mortgage fraud netted “285 federal criminal indictments and informations against 530 defendants for allegedly victimizing more than 73,000 American homeowners—and inflicting losses in excess of \$1 billion.” Press Release, U.S. Dep’t of Justice, Remarks as Prepared for Delivery by Attorney General Eric Holder at the Distressed Homeowner Initiative Press Conference (Oct. 9, 2012), <https://www.justice.gov/opa/speech/remarks-prepared-delivery-attorney-general-eric-holder-distressed-homeowner-initiative> [<https://perma.cc/LM23-4BVU>]. But reporters discovered this tally included cases filed in 2006, before the crisis began, as well as other cases that did not belong in the set. See Jonathan Weil, Eric Holder Owes the American People an Apology, *Bloomberg View* (Aug. 11, 2013, 9:14 PM), <https://www.bloomberg.com/view/articles/2013-08-11/eric-holder-owes-the-american-people-an-apology> (describing errors in announced DOJ statistics related to mortgage fraud and investment fraud crackdowns). Subsequently, the DOJ issued revised statistics showing a considerably more modest picture: 107 criminal cases, 17,185 homeowner victims, and total losses of only \$95 million. See Press Release, U.S. Dep’t of Justice, Financial Fraud Enforcement Task Force Members Reveal Results of Distressed Homeowner Initiative (Oct. 9, 2012), <https://www.justice.gov/opa/pr/financial-fraud-enforcement-task-force-members-reveal-results-distressed-homeowner-initiative> [<https://perma.cc/J3A3-XR78>].

in fact the mission that has been accomplished is not the one on which he was sent.²³⁵

III. GOVERNING THE CRACKDOWN

Legislatures do not enact laws for their health; they enact them in order to see them enforced (even if not generally to every last jot and tittle²³⁶). In principle, then, it may be hard to see how there could be anything improper about cracking down. From the perspective of democratic theory, the energetic enforcement of duly enacted laws seems obviously desirable; the risk, one might assume, comes from the opposite direction. And, indeed, constitutional law's preoccupation *du jour* (over nonenforcement and waiver) merely extends the decades-old anxiety over the paucity of mechanisms for ensuring vigorous executive branch enforcement.²³⁷

The difficulty creeps in when one moves from the lofty plane of theory to the messier realm of reality. There, one can easily see that a power that could be exercised in an entirely salutary or benign manner in principle is, in actuality, often not exercised in that way.

What can be done to improve this regime? This is, in essence, a challenge of good governance: the challenge of developing normative principles and legal or institutional structures to guide the choices of a powerful agent entrusted with making complicated and high-stakes decisions with no easy answers. This governance challenge is a pervasive and unified one, across the federal, state, and local domains, and across the domains of civil, criminal, administrative, and constitutional law. When existing law touches upon this challenge, it does so in a disjointed and piecemeal way. If a local police department decides to crack down on Latino criminals, or a state attorney general decides to crack down on campaign contributions to Democratic candidates, there will be sure consequences if the taint in those decisions can be discovered and prov-

²³⁵ To be clear, the "slack" problem here is not that the agent failed to win criminal convictions—a task that may well have been impossible. See Daniel C. Richman, *Corporate Headhunting*, 8 *Harv. L. & Pol'y Rev.* 265, 265–72 (2014); Toobin, *supra* note 159, at 39. The slack problem is in claiming success rather than candidly admitting the shortfall between what the government promised it would achieve and what it ultimately did. See Richman, *supra*, at 272 (noting the undesirability of giving the DOJ "credit for chest-thumping and vague talk about its zealotry and political commitment"); see also Weil, *supra* note 234.

²³⁶ See *supra* text accompanying notes 61–67.

²³⁷ See sources cited *supra* notes 32–35.

en. If a company is caught bribing a prosecutor to crack down on its competitors, criminal liability will follow. Take a step away from these isolated areas, however, and many problematic schemes of programmatic enforcement go without repercussion—even when *their* repercussions are sizeable.

Can the law do anything more to discourage crackdowns that are irrational, ill-motivated, or both? The best solution to such a challenge is likely to be one that takes the form of flexible and context-sensitive guidelines, rather than the creation of rigid *ex ante* rules. Guidelines rather than rules are most likely to preserve executive leeway to select and structure desirable crackdowns while also deterring the pursuit of undesirable crackdowns.

The remainder of this Part turns to this governance challenge. Its approach contains both internal and external pieces: an internal element directed at guiding the decisional framework of executive branch actors, and an external element directed at creating some degree of pressure to abide by that internal decisional framework. Section III.A develops the normative principles that should guide enforcers in the crackdown choice and explains how the Take Care Clause, and its cognate clauses in the state constitutions, serves as the textual foothold for grounding that framework in constitutional law across the federal and state domains. Section III.B then sketches the role that the judiciary can play in enforcing that framework.

A. The “Faithful” Crackdown

1. *The Crackdown as Interpretation*—A primary theme of this Article has been the idea that the crackdown, by enforcing the letter of the law to an overly literal degree, can “upend[] rather than perfect[] the existing sociolegal order.”²³⁸ Depending on the crackdown’s structure and implementation, the programmatic, literal enforcement of a law against trespassing, or a law that sets a speed limit, or a law that forbids the bringing of vehicles into parks, can upset custom, counter legislative expectations, and even infringe on constitutional values.

This suggests the first basic principle that should guide a crackdown’s design. Enforcers must remember that the act of programmatic enforcement, no less than the act of adjudication or the act of regulation, is fundamentally an act of *interpretation*. When a town cracks down on vehi-

²³⁸ Bulman-Pozen & Pozen, *supra* note 60, at 831.

cles in the park,²³⁹ it is not only a *judge* who must decide what should count as a “vehicle”; well before the first summons, the *mayor* who set the crackdown’s parameters had to decide whether to direct the police to prevent people from bringing in tricycles or prams. In crafting that directive, the mayor must act as a faithful interpreter in translating that statutory command into an enforcement plan.

This is a point that may seem so obvious, even banal, that its import might not be immediately apparent. But, in fact, this idea has been notably absent in the arena of enforcement policy setting. In the oceans of debate over the methodologies that should govern statutory interpretation by courts,²⁴⁰ little attention has been paid to the anomalous island of simple literalism that persists in the context of setting enforcement policy. There is no polite way to put it: if a plausibly available statutory hook exists for an enforcement program, our law treats that enforcement program as valid.²⁴¹ But the same considerations that shape interpretation elsewhere in the law bear on—and must be *brought* to bear on—the interpretive act of the crackdown. Whether she be judge or mayor, a faithful interpretive agent properly consults not only text, but also context, “the legislative plan,”²⁴² the public interest, constitutional rules, and commitments to rule-of-law values such as fair notice and procedural justice.²⁴³ Like the judge, the mayor must abjure a literalist approach to the interpretive work of enforcement²⁴⁴—the perspective under which

²³⁹ See Frederick Schauer, *A Critical Guide to Vehicles in the Park*, 83 N.Y.U. L. Rev. 1109, 1109–12 (2008) (explaining the jurisprudential significance of this “most famous hypothetical in the common law world”).

²⁴⁰ To draw a thimble from this ocean, see generally, e.g., Robert A. Katzmann, *Judging Statutes* (2014); Antonin Scalia, *A Matter of Interpretation* (1997); Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 Yale L.J. 1750 (2010); Manning, *supra* note 17.

²⁴¹ See *supra* Part I.

²⁴² *King v. Burwell*, 135 S. Ct. 2480, 2496 (2015) (“A fair reading of legislation demands a fair understanding of the legislative plan.”).

²⁴³ Without attempting any taxonomy or hierarchy amongst them, I set out these considerations as those that are relevant to the Legal Process school and its many modern-day descendants. On new textualism, purposivism, and new purposivism, see Manning, *supra* note 17, at 113–19. On Legal Process itself, see Henry M. Hart, Jr. & Albert M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* 162–71, 179–203 (1958); Lon L. Fuller, *The Case of the Speluncean Explorers*, 62 Harv. L. Rev. 616 (1949); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 Harv. L. Rev. 1 (1959). On Legal Process’s jurisprudential underpinnings, see Charles L. Barzun, *The Forgotten Foundations of Hart and Sacks*, 99 Va. L. Rev. 1, 1–45 (2013).

²⁴⁴ Dawn E. Johnsen, *Faithfully Executing the Laws: Internal Legal Constraints on Executive Power*, 54 UCLA L. Rev. 1559, 1580 (2007) (noting that the language of the Take Care

her only obligation is to ensure a crackdown is nominally compatible with the letter of the law—in favor of a more expansive and pragmatic inquiry aimed at getting to this “best” interpretation.²⁴⁵

2. *The Crackdown and the Honest Agent*—Another primary theme of this Article is that the crackdown choice, because of the unusually light checks upon it, can frequently be skewed towards advancing the various private interests of enforcers rather than towards advancing legislative ends, the public welfare, or other desiderata. To redress this problem, it is incumbent upon the enforcer to strive to act as an *honest agent* in setting the parameters of the crackdown—one who disinterestedly serves the public’s interests rather than her own.²⁴⁶ So, for example, a crack-

Clause “cannot be reconciled with executive action based on preferred, merely plausible legal interpretations that support desired policies, rather than an attempt to achieve the best, most accurate interpretations—especially when the enforcement of a federal statute is at stake”).

²⁴⁵ It might seem awkward to use the label “interpretation” for an inquiry this broad-ranging; such an inquiry, one might say, could more aptly be described as a process of virtuous or morally informed decision making aimed at discovering an all-things-considered best outcome. I use the terminology of interpretation largely in order to follow the conventional locution of Legal Process, see sources cited supra note 243, and of Ronald Dworkin, who advanced a more general teleological conception of interpretation under which interpretation of statutory texts by legal actors is generally aimed towards making governance of the system as a whole “fairer, wiser, and more just.” Ronald Dworkin, *Justice for Hedgehogs* 133 (2011).

²⁴⁶ The inquiry into what qualifies as a disinterested reading of a statute may call to mind the inquiry into whether a match exists between a plaintiff’s claim and a statute’s “zone of interests”—an inquiry that strives to rule out the instrumental use of statutes for unintended private profiting. See *Lujan v. Nat’l Wildlife Fed’n*, 497 U.S. 871, 883 (1990) (“Thus, for example, the failure of an agency to comply with a statutory provision requiring ‘on the record’ hearings would assuredly have an adverse effect upon the company that has the contract to record and transcribe the agency’s proceedings; but since the provision was obviously enacted to protect the interests of the parties to the proceedings and not those of the reporters, that company would not be ‘adversely affected within the meaning’ of the statute.”). The principle that government agents must abjure venality is reflected in, inter alia, antibribery statutes and in the federal honest-services statute, 18 U.S.C. § 1346 (2012), which *Skilling v. United States*, 561 U.S. 358, 368 (2010), construed to prohibit bribes and kickbacks. But these statutes are oriented to discrete transactions—for example, the exchange of the performance of an “official act” in return for “anything of value.” 18 U.S.C. § 201 (2012); *McDonnell v. United States*, 136 S. Ct. 2355, 2371–72 (2016) (construing “official act” to mean “a decision or action on a ‘question, matter, cause, suit, proceeding or controversy,’” requiring both that it “involve a formal exercise of governmental power that is similar in nature to a lawsuit before a court, a determination before an agency, or a hearing before a committee,” and that it “be something specific and focused”); *United States v. Sun Diamond Growers of Cal.*, 526 U.S. 398, 405–06 (1999) (rejecting an asserted interpretation under which the federal antibribery statute reached “any effort to buy favor or generalized goodwill from an official”). The multifarious motivations that might drive broad programmatic en-

down on every car driving at 26 mph or faster may appear to be as defensible an interpretation of a 25 mph speed limit sign as the enforcement policy it supplanted—the policy of occasionally ticketing cars driving faster than 35 mph. (Indeed, if one were an alien to our planet, or even just from Germany, the crackdown would probably seem a decidedly better interpretation of the posted speed limit.) But this crackdown would nonetheless be unfaithful if it were implemented in order to, say, enhance the mayor’s chances of future employment at the company that makes the speed radar guns that the town must now buy in bulk to implement the crackdown, and not to enhance public safety.²⁴⁷

This stylized example suggests the line between what one can call “good” or “secular” reasons, on the one hand, and “bad” or “venal” reasons on the other. Drawing that line with exactitude raises challenging questions of characterization (for example, what counts as a venal motive?) and of sufficiency (for example, how much venality is too much? Any at all, or only venality that is the “preponderant” motive behind a given crackdown?). Complicating the inquiry still further, the line that distinguishes secular from venal motives may not correspond to the line that distinguishes desirable from undesirable crackdowns. An enforcer might embark on a good crackdown for bad reasons (for example, if the enforcer’s personal interests happened to align, accidentally, with the public interest), or a bad crackdown for good reasons (for example, if a well-meaning enforcer honestly misconstrues his statutory authority and thereby enforces the law incorrectly). How should we rate the worth of such “accidentally good” or “accidentally bad” crackdowns?²⁴⁸

forcement policy choices are not easily policed or deterred by these transactionally oriented criminal laws—nor, probably, could they be. See *McDonnell*, 136 S. Ct. at 2373 (noting that the Court’s “more constrained interpretation” of the bribery statute avoids vagueness problems); *Skilling*, 561 U.S. at 408 (“Reading the statute to proscribe a wider range of offensive conduct [than bribery and kickbacks] . . . would raise the due process concerns underlying the vagueness doctrine.”).

²⁴⁷ For one possible example of venal interests at play in a recent crackdown, see Lemos, *supra* note 2, at 26 (“In early 2013 attorneys general from more than 30 states opened an investigation into possible false advertising and deceptive marketing by the company that produces 5-Hour Energy, a caffeinated drink. According to the company, it then began to receive requests for campaign contributions to the AGs involved in the investigation. Executives likened the solicitations to demands for ‘ransom.’ To be sure, that account is self-serving and ought to be taken with a healthy dose of salt. But whether solicited or not, records show that 5-Hour Energy contributed more than \$280,000 to various AG’s political funds in 2013 and 2014.” (footnotes omitted)).

²⁴⁸ Many thanks to Professor Richard Fallon for stressing the importance of these issues.

One response to these flummoxing questions might be to reject honesty entirely as a criterion for evaluating crackdowns. In other words, one might choose to treat a crackdown as good *regardless* of whether that crackdown arose from mixed or even predominantly venal motives on the enforcer's part (so long as the crackdown was proper as an interpretive matter, as elucidated above). But discarding honesty would also jettison other desiderata.

First, there is the value of transparency and the related value of fairness. A crackdown is costly to the targets of the crackdown; a crackdown results in arrests, lawsuits, penalties, imprisonment, and so forth. The reasons that justify those costs should be reasons that society would regard as acceptable. But to the extent the motive behind a crackdown is venal rather than secular, it is unlikely to be openly avouched. Instead, the publicly palatable secular motive is the only one that is going to be publicly cited,²⁴⁹ which will distort the public's understanding of the justifications for the crackdown and thereby distort its ability to evaluate and check the crackdown.

Second, removing honesty as a criterion for evaluating crackdowns would exacerbate the (already considerable) risk of motivated reasoning in this area²⁵⁰—that is, the risk that an enforcer will decide that a crackdown is a good idea because it is in the venal interests of the enforcer *for* that crackdown to be a good idea. In contrast, embracing a normative framework that reminds enforcers that venal motives are *not* actually good reasons for a crackdown will, at least at the margins, encourage better policymaking by forcing decision makers to adhere to the discipline of justifying their crackdowns on secular grounds and rejecting the crackdowns that cannot be so justified. One might think here of the judge who finds that an opinion just “won’t write.”²⁵¹ As Professor

²⁴⁹ See Lisa Heinzerling, *Classical Administrative Law in the Era of Presidential Administration*, 92 *Tex. L. Rev.* 171, 178–79 (2014); Nina A. Mendelson, *Disclosing “Political” Oversight of Agency Decision Making*, 108 *Mich. L. Rev.* 1127, 1159–60 (2010).

²⁵⁰ See Dan M. Kahan, *The Supreme Court, 2010 Term—Foreword: Neutral Principles, Motivated Cognition, and Some Problems for Constitutional Law*, 125 *Harv. L. Rev.* 1, 7 (2011) (defining “motivated reasoning” as “the tendency of people to unconsciously process information . . . to promote goals or interests extrinsic to the decisionmaking task at hand. When subject to it, individuals can be unwittingly disabled from making dispassionate, open-minded, and fair judgments.”).

²⁵¹ Frederick Schauer, *Giving Reasons*, 47 *Stan. L. Rev.* 633, 652 (1995) (“Think of a judge who reaches a conclusion but then, after struggling with the opinion, says, ‘It won’t write.’ Just what does that mean, and what assumptions does it reflect?” (citing Kathleen

Frederick Schauer notes, that phrase connotes that the judge is having difficulty crafting a publicly acceptable rationale that has some minimum quantum of generality.²⁵² Enforcers, like judges, should abjure crackdowns where their justifications for the crackdown “just won’t write” in a publicly acceptable way. Motivated reasoning may be a fact of life, but it is still “a *problem* for democracy to fix”²⁵³—and one of the tools for attacking that problem is to embrace a normative rule that instructs policymakers to act for secular reasons rather than venal ones.

The foregoing discussion can be synthesized into the following working rule. The enforcer should design and implement the crackdown in such a way that it reflects the enforcer’s honest and disinterested belief that enforcement at that level is the best way to enforce the law—where “best” is measured not only by the literal text of the statute, but also by the law’s purpose and context, by the public interest, by constitutional values, and by the rule of law.²⁵⁴ In a nutshell, the enforcer must ensure that her crackdown is faithful both as a matter of *interpretation* and as a matter of *motivation*.²⁵⁵ This normative framework furthers democratic

Waits, Values, Intuitions, and Opinion Writing: The Judicial Process and State Court Jurisdiction, 1983 U. Ill. L. Rev. 917, 931–32 (describing this phenomenon)).

²⁵² See *id.* at 653–54 (explaining how “an artificial constraint of giving reasons, and therefore of generality,” might counteract decisionmaker bias and partiality). In administrative law, a doctrinal correlate of the principle that a policymaker’s decision “must write” can be found in *Motor Vehicle Manufacturer’s Ass’n v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 57 (1983) (“An agency’s view of what is in the public interest may change, either with or without a change in circumstances. But an agency changing its course must supply a reasoned analysis” (alteration in original) (quoting *Greater Bos. Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970))).

²⁵³ Kahan, *supra* note 250, at 40–41 (“We believe that legislators and regulators can and should base their policy positions *on* their assessments of empirical evidence rather than use empirical evidence to ‘dress up’ as ‘facts’ positions they hold on other grounds. We do know that there is a risk, particularly on certain culturally charged issues, that people (usually not us; *them*) will fit their perceptions of policy consequences to their values. But that is a *problem* for democracy to fix—not the *reason* we use democracy to make policy.”).

²⁵⁴ The same requirement of faithfulness applies equally to formulation of a categorical and prospective nonenforcement policy, but with a slight analytical caveat. With respect to nonenforcement, the issue of faithfulness might be better treated as a subsequent question; the threshold question would be whether a categorical nonenforcement policy qualifies as “Tak[ing] Care” to execute the law in the first instance. If it does not, then the issue of faithfulness ought to be moot. The Supreme Court recently declined to shed light on this constitutional question, but it may do so in the future. See *supra* text accompanying notes 90–94.

²⁵⁵ Cf. Evan J. Criddle, *Fiduciary Foundations of Administrative Law*, 54 UCLA L. Rev. 117, 152 (2006) (noting agencies’ obligation to act with “care, loyalty, and transparency,” so as to promote both “fidelity to [their] statutorily defined missions and the best interests of their beneficiaries”).

values because it facilitates public reason-giving and induces the enforcer to act as an honest public servant of the people who elected her rather than in her own self-interest;²⁵⁶ it serves rule-of-law values, including transparency and predictability,²⁵⁷ and it is ultimately more fair to regulated parties, because it will produce an enforcement regime that aligns with reasonable expectations and avoids unjust results.²⁵⁸

Incidentally, if not coincidentally, this normative framework also cleanly rules out-of-bounds the crackdowns afflicted by the myriad principal-agency pathologies illustrated above.²⁵⁹ This normative framework would rule out the mayor fashioning the crackdown to enhance the chances of lucrative postgovernment job opportunities for herself or her staff,²⁶⁰ or to prevent the public discovering information about the mayor's administration that might embarrass or discredit it.²⁶¹ It would rule out crackdowns pursued purely to replenish depleted town coffers,²⁶² or to get the press off the mayor's back.²⁶³ It would rule out crackdowns that barter heavy impositions on constitutional values for slight or nonexistent gains,²⁶⁴ and crackdowns that generate superficially impressive statistics or convey the impression of diligence and activity but that yield unimpressive real benefits for the public.²⁶⁵ It would even rule out kabuki crackdowns, because the main payoff of such a crackdown—an unearned political dividend from a duped and grateful public—inures solely to the mayor, and not to the people she serves.²⁶⁶

²⁵⁶ *Id.* at 136 (noting that entrusting authority to an agent carries with it the implicit expectation that “agencies, like private-law fiduciaries, will align their performance with the expressed and implicit interests of their beneficiaries, exercising their discretion to promote the beneficiaries’ welfare”).

²⁵⁷ William N. Eskridge, Jr., *No Frills Textualism*, 119 *Harv. L. Rev.* 2041, 2043 (2006) (reviewing Adrian Vermeule, *Judging Under Uncertainty* (2006)).

²⁵⁸ *Id.* (noting that considering the “the reasonable expectations of those subject to the statute, as well as the factual and normative context for applying the statute,” will produce the result that “statutes will not be applied in ways that are unreasonable”).

²⁵⁹ See *supra* Part II.

²⁶⁰ Cf. *supra* text accompanying notes 160–65 (FCPA).

²⁶¹ Cf. *supra* text accompanying notes 137–39 (leak crackdown).

²⁶² Cf. *supra* text accompanying notes 201–12 (Florida speeding crackdowns).

²⁶³ Cf. *supra* text accompanying notes 166–76 (NYC nail-salon crackdown).

²⁶⁴ Cf. *supra* text accompanying notes 140–154 (broken-window crackdown), 180–90 (HUD crackdown on innocent tenants), 192–200 (NYC trespassing crackdown).

²⁶⁵ Cf. *supra* text accompanying note 226 (SEC enforcement); *supra* note 179 (Memphis street sweep).

²⁶⁶ Cf. *supra* text accompanying notes 227–35 (financial crisis “kabuki” crackdowns).

This framework thus has normative heft. What it currently lacks is clout. As reviewed above,²⁶⁷ black letter law currently does not meaningfully deter, much less rule out, such crackdowns, troublesome as they are. The thick tangle of doctrines that shields prosecutorial discretion and enforcement prioritization from external review has stunted the articulation of firm checks on the formulation of heightened enforcement policies.²⁶⁸ Nonetheless, a clean textual tether for this normative framework sits encapsulated in a single word writ on the face of the Federal Constitution and echoed in the state constitutions: a commitment to “faithful” enforcement.²⁶⁹ The executive branch is not merely required to “take care” that the laws be executed, but also to do so *faithfully*.

Few legal sources have addressed this dormant seed, this mandate to ensure that enforcement is “faithful.”²⁷⁰ In one early opinion, the Office

²⁶⁷ See supra Section I.A.

²⁶⁸ See supra Part I.

²⁶⁹ U.S. Const. art. II, § 3, cl. 5 (“[H]e shall take Care that the Laws be faithfully executed”); Williams, supra note 19, at 639 (“[E]very state constitution, like the U.S. Constitution, provides in substance that the chief executive shall ‘take care’ or see to it that the laws are faithfully executed.”); id. at 639 n.287 (collecting clauses). To be precise, forty-eight states require faithfulness in haec verba. E.g., Ala. Const. art. V. Massachusetts’s Constitution states its governor “shall, and may, from time to time, hold and keep a council, for the ordering and directing the affairs of the commonwealth, agreeably to the constitution and the laws of the land.” Mass. Const. pt. II, ch. II, § 1, art. IV. Kansas is the sole outlier; it amended its Constitution in 1972 to remove the word “faithfully.” Compare *State ex rel. Stubbs v. Dawson*, 119 P. 360, 363 (Kan. 1911) (“The Constitution declares: ‘The supreme executive power of the state shall be vested in a Governor, who shall see that the laws are faithfully executed.’”), with Kan. Const. art. I, sec. 3 (“The supreme executive power of this state shall be vested in a governor, who shall be responsible for the enforcement of the laws of this state.”). It is not clear what was intended by this change. See Francis H. Heller, *The Kansas State Constitution*, 62–63 (2011) (“There has been no occasion so far to determine what legal significance this change has (or should have), nor does the record reveal why the change was made.”).

²⁷⁰ As noted earlier, scholarship on the Take Care Clause appears not to have attended to this precise question. See supra note 20. Many facets of the Clause, including its passive voice (“ . . . that the laws be faithfully executed”), its mandatory phrasing (“he shall Take Care . . .”), and its connotation of flexibility (“Take Care”), have formed fodder for scholarly discussion. See, e.g., Metzger, supra note 20, at 1875–78; Saikrishna Bangalore Prakash, *Hail to the Chief Administrator: The Framers and the President’s Administrative Powers*, 102 *Yale L.J.* 991, 1000–03 (1993); see also Gary Lawson & Guy I. Seidman, *By Any Other Name: Rational Basis Inquiry and the Federal Government’s Fiduciary Duty of Care* 7–14 (Aug. 12, 2016) (unpublished manuscript), <http://ssrn.com/abstract=2822330> [<https://perma.cc/3ABS-QQXX>] (noting that the Oath Clause reflects “[f]iduciary duties, of both loyalty (‘faithfully’) and care (‘to the best of my Ability’)”). Professors Lawson and Seidman argue that tenets of English administrative law that required “reasonableness in the exercise of delegated power” should be treated as the “background principle of interpreta-

of Legal Counsel notes that faithful execution implies some latitude on the part of the executive branch²⁷¹: “The constitution assigns to Congress the power of designating the duties of particular officers: the President is . . . not to perform the duty, but to see that the officer assigned by law performs his duty *faithfully*—that is, *honestly*: not with perfect correctness of judgment, but *honestly*.”²⁷²

Later commentators have reached broadly similar conclusions. As Professor Saikrishna Prakash noted, “[i]f the officer performed his duties honestly, adequately, and within the boundaries of his statutory discretion, the presidential inquiry would end, for the President would have taken care that the laws were faithfully executed.”²⁷³ More recently, Professor Zachary Price explained that “the term ‘faithfully,’ particularly in eighteenth-century usage, seems principally to suggest that the President must ensure execution of existing laws in good faith, a meaning consistent with the Clause’s core purpose of ensuring congressional supremacy.”²⁷⁴ He further argues that the term “evokes a notion of ‘faithful agency,’ in which the agent’s proper discharge of his or her duties may depend on an implicit understanding of the principal’s expectations as much as on any explicit directives.”²⁷⁵ Pointing to parallel wording in the President’s oath of office, he contends that “proper performance of the executive function may require adherence to notions of justice, equity, and the public interest, even at the expense of complete enforcement of each and every statutory mandate.”²⁷⁶ Professor Josh Blackman’s recent originalist analysis of the Clause appears to dovetail with these conclusions. He surmises that “[t]he history of the Take Care Clause reveals a focused execution based on faith and honesty,”²⁷⁷ and that it

tion” against which we understand the Constitution’s vesting of “executive Power” in the President. *Id.* at 10–13 (“[A]gency law, developed in English private law and then applied by England’s royal courts to public agents as well, suggests serious legal limits on the manner in which the Constitution expects executive agents to carry out their tasks.”); Gary Lawson & Guy I. Seidman, *Necessity, Propriety, and Reasonableness*, in *The Origins of the Necessary and Proper Clause* 120, 125–33 (Gary Lawson et al. eds., 2010); Robert G. Natelson, *The Legal Origins of the Necessary and Proper Clause*, in *The Origins of the Necessary and Proper Clause*, *supra*, at 52, 52–53.

²⁷¹ *The President and Accounting Officers*, 1 Op. Att’y Gen. 624, 625–26 (1823).

²⁷² *Id.*

²⁷³ Prakash, *supra* note 270, at 1000–01.

²⁷⁴ Price, *supra* note 4, at 698.

²⁷⁵ *Id.*

²⁷⁶ *Id.*

²⁷⁷ See Blackman, *supra* note 20, at 229.

permits a margin of error: “[a]cting in good faith . . . does not require one-hundred-percent compliance with all legal duties.”²⁷⁸

No Supreme Court case has directly addressed the obligation of faithfulness under Article II.²⁷⁹ In an indirect manner, however, the Supreme Court has spoken to the meaning of the “faithfully” requirement through the removal cases. In *Free Enterprise Foundation v. PCAOB*, the Court held that “[t]he President cannot ‘take Care that the Laws be faithfully executed’ if he cannot oversee the faithfulness of the officers who execute them.”²⁸⁰ The *dual* for-cause removal provisions in that case were unconstitutional because the President could not directly “remove an officer who enjoys more than one level of good-cause protection, even if the President determines that the officer is neglecting his duties or discharging them improperly.”²⁸¹ In contrast, a *single* good-cause requirement does preserve enough leeway in the President to ensure that he can take care that the law is being faithfully executed. In *Humphrey’s Executor v. United States*, the Court sustained the constitutionality of a removal provision that provided that officers of the Federal Trade Commission (“FTC”) could be removed *only* for “inefficiency, neglect of duty, or malfeasance in office.”²⁸² The fact that this single good-cause provision is consistent with Article II means that the President possesses sufficient leeway to ensure that the law is going to be “faithfully” executed as long as he can remove inefficient, neglectful, or malfeasant officers.

These cases have implications for the meaning of “faithfully.” Imagine that an FTC officer were enforcing the law in a politically awkward way (as perceived by the President), but not in an inefficient, neglectful, or malfeasant way. The statute would not authorize the officer’s removal

²⁷⁸ *Id.* at 231.

²⁷⁹ David E. Pozen, *Constitutional Bad Faith*, 129 *Harv. L. Rev.* 885, 908 (2016) (noting that the Court “has declined to enforce or even recognize a duty of good faith under the Take Care Clause” and that the “principles of good faith and bad faith have failed to take hold in that corner of constitutional law where the plain text of the Constitution virtually cries out for their application”).

²⁸⁰ 561 U.S. 477, 484 (2010).

²⁸¹ *Id.* Because that removal decision was “instead committed to another officer, who may or may not agree with the President’s determination, and whom the President cannot remove simply because that officer disagrees with him,” the scheme “contravene[d] the President’s constitutional obligation to ensure the faithful execution of the laws.” *Id.* (citation omitted).

²⁸² 295 U.S. 602, 620 (1935) (quoting 15 U.S.C. § 41).

on that ground.²⁸³ Under *Humphrey's Executor*, that poses no Article II obstacle because the statute nonetheless adequately protects the capacity of the President to ensure that the laws are faithfully executed. If the President can guard against inefficient, neglectful, or malfeasant execution through removal, the President can ensure that the law will be faithfully executed. This point is echoed in *Free Enterprise Fund*, which rested on the principle that for a President to ensure faithful execution, he or she must be able to terminate an officer who is “neglecting his duties or discharging them improperly.”²⁸⁴ Unfaithful execution, then, means execution characterized by neglect or impropriety.

As this mosaic of sources shows, the law has thus far given little hard content to the obligation of faithfulness. But what little there is dovetails nicely with the normative framework proposed here. The Take Care Clause’s obligation of faithfulness offers a textual basis upon which to anchor the obligations of interpretive good faith and honesty. Put another way, we should treat the constitutional requirement of faithfulness as a proxy or portmanteau that subsumes the obligations of interpretive good faith and honesty and that imposes these obligations upon enforcers. To “faithfully” enforce the law means to enforce the law in a way that serves the best (not just the literal) reading of the statute, the public interest, and constitutional and rule-of-law values.

Just as the concept of the “marketplace of ideas” now shapes our understanding of the First Amendment,²⁸⁵ the concept of faithfulness should anchor our assessment of the enforcement power, whether that power is wielded by prosecutors, by agencies, by the federal government, or by the states. Reasonable people will, of course, differ on what the duty of faithful execution entails or connotes in a given situation. The principle that enforcement of the laws must be faithful is just that—a principle. It is not a recipe or an algorithm. Adopting the standard of faithfulness cannot alone resolve the merits of a debate over a given enforcement policy; but what it can do, what it *ought* to do, is set the terms on which that debate should be conducted.²⁸⁶

²⁸³ *Free Enter. Found.*, 561 U.S. at 502 (“[T]he Government does not contend that simple disagreement with the Board’s policies or priorities could constitute ‘good cause’ for its removal. Nor do our precedents suggest as much.” (citation omitted)).

²⁸⁴ *Id.* at 484.

²⁸⁵ See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

²⁸⁶ Cf. Cox & Rodríguez, *supra* note 60, at 214 (noting that even when limits on executive power cannot readily be “defin[ed] and then mobiliz[ed] . . . as doctrinal rules,” or translated into crisp “rules of constraint” on executive power, such limits may nonetheless “provide a

B. Crackdowns and Courts

Can courts play any role in encouraging crackdowns to be “faithful,” as that term has been elucidated here? Before dealing with that question in substance, it is worth addressing a threshold or preliminary issue: why turn to *courts* to police crackdowns rather than rely on other mechanisms? Given the homomorphism between the crackdown and rulemaking stressed throughout this Article, it may seem most natural to check the crackdown with regulatory techniques inspired by administrative law, such as requirements of advance public notice and comment,²⁸⁷ or perhaps by creating a centralized office that would vet enforcement pushes undertaken by prosecutors or agencies.²⁸⁸ Alternatively, given the stress placed by this Article on the fact that crackdowns have the effect of casting the executive branch in the role of de facto lawmaker, it may seem more fruitful to focus on developing or augmenting mechanisms that would prompt the legislature to act to constrain those crackdowns that depart from or subvert legislative wishes—say, a system for more regular and honest reports by the executive of enforcement activities—on the view that one could then leave the whole subject of crackdowns in the lap of lawmakers, where it belongs, and wash one’s hands of the matter. Either or both of these avenues may appear to be more promising

vocabulary well suited to legal conversations about constitutional norms with which we (scholars, lawmakers, internal executive watchdogs) can assess the merits of executive branch practice”).

²⁸⁷ Recent scholarship, in the vein that Professor Andrew Crespo has dubbed “New Administrativist,” seeks to apply administrative law principles to the task of administering criminal law. See Andrew Manuel Crespo, *Systemic Facts: Toward Institutional Awareness in Criminal Courts*, 129 *Harv. L. Rev.* 2049, 2059 (2016) (“The contemporary scholars advocating this pivot toward agency-centric regulation of law enforcement authority are admirably rejuvenating and expanding upon an earlier academic effort, leveraging valuable insights from administrative law in the hopes of righting a criminal justice system accurately perceived as having gone ‘seriously awry.’” (footnote omitted)); *id.* at 2058 n.25, 2059–60 nn.37–38 (collecting examples of scholarship in this genre). For discussion of some of the pitfalls of encouraging enforcers to make greater use of publicly disclosed enforcement guidance, see Barkow, *supra* note 7, at 1156–59. For skepticism of the view that internal executive branch checks can adequately constrain and legitimize administrative action, see Thomas W. Merrill, *Presidential Administration and the Traditions of Administrative Law*, 115 *Colum. L. Rev.* 1953, 1977–83 (2015). Professor Merrill unfavorably compares internal executive branch reviewing institutions with courts because of, *inter alia*, these institutions’ lack of authority and their propensity to “bend to the political winds.” *Id.* at 1983.

²⁸⁸ See Andrias, *supra* note 7, at 1036 (arguing for the creation of a White House office that would direct enforcement policy choices across the federal administrative state); *id.* at 1077–106.

than a proposal to turn to courts, especially in view of the long-manifest reluctance of courts to intervene directly in the prospective setting of executive branch enforcement policy.

These are fair points; there may well be fruitful strategies that would rely on legislative action or internal executive-branch reform to improve the checks on crackdowns.²⁸⁹ The argument here is not that courts should be the *only* or the exclusive mechanism for checking crackdowns. The contention is simply that the courts can play a role—an institutionally legitimate and meaningful role—in encouraging crackdowns to be faithful. Moreover, and perhaps more importantly, courts can begin to play that role *today*, without awaiting radical reconfigurations of the black letter law or the institutional architecture of criminal and administrative law.²⁹⁰

In this context, the checking role that courts can play is not a conventional one. In the usual model of constitutional judicial review, litigants

²⁸⁹ One might also develop strategies that were not confined to the institutions of a single jurisdiction—state or federal—but that instead relied on cross-jurisdictional dialogue among federal and state agencies and courts. See, e.g., Matt Apuzzo, Justice Dept. Condemns Profit-Minded Court Policies Targeting the Poor, N.Y. Times (Mar. 14, 2016), <http://www.nytimes.com/2016/03/15/us/politics/justice-dept-condemns-profit-minded-court-policies-targeting-the-poor.html>; Matt Apuzzo, Justice Dept. Presses Civil Rights Agenda in Local Courts, N.Y. Times (Aug. 19, 2015), <http://www.nytimes.com/2015/08/20/us/justice-dept-presses-civil-rights-agenda-in-local-courts.html> [<https://perma.cc/JM8Q-K84K>].

²⁹⁰ New Administrativists generally acknowledge that they are proposing significant institutional or legal reforms that will require statutory changes. Professor Slobogin's argument is different in that he argues that certain kinds of crackdowns—panvasive search and seizure policies—are already essentially legislative rules under the APA, because they affect public behavior. See Slobogin, *supra* note 32 at 133 (“[P]anvasive search and seizure policies prospectively affect the ‘rights and obligations’ of the citizenry, both individually and as a group.” (footnote omitted)). However, while freely admitting the murkiness of this area, the mere fact that a policy affects public behavior is not enough to make something a legislative rule. A legislative rule binds the agency as well as creates legal obligations on regulated parties. Panvasive search and seizure policies in particular, and crackdowns more generally, do not bind the agency to any particular course of conduct. Cf. *Nat. Res. Def. Council v. EPA*, 643 F.3d 311, 321 (D.C. Cir. 2011) (“To begin with, because the Guidance binds EPA regional directors, it cannot, as EPA claims, be considered a mere statement of policy; it is a rule.”); *Gen. Elec. Co. v. EPA*, 290 F.3d 377, 385 (D.C. Cir. 2002) (“On its face the Guidance Document imposes binding obligations upon applicants to submit applications that conform to the Document and upon the Agency not to question an applicant's use of the [specified] total toxicity factor. This is sufficient to render it a legislative rule.”); *Cnty. Nutrition Inst. v. Young*, 818 F.2d 943, 948 (D.C. Cir. 1987) (“For here, we are convinced that FDA has bound itself. . . . [T]his type of cabining of an agency's prosecutorial discretion can in fact rise to the level of a substantive, legislative rule.”). As a result, it is far from clear that crackdowns should be treated as legislative rules in principle, and it is clear that they are not treated as such in practice.

adduce evidence of a constitutional violation and, if they prevail, the court remedies the violation with an order binding on the government.²⁹¹ It should immediately be apparent that this conventional rubric of constitutional adjudication cannot sensibly be applied to a crackdown. In the context of law enforcement and policy deliberation, the rules of discovery are sharply skewed in favor of the government,²⁹² meaning that litigants will have little chance of obtaining evidence that might go to show that a crackdown is unfaithful. Even assuming that evidence were obtainable, demonstrating the unfaithfulness of a crackdown would be difficult for an individual litigant. The principal-agent problem with many crackdowns is an emergent phenomenon, one that will not necessarily be evident in a one-off case.²⁹³ A given speeding ticket, or a given FCPA investigation, or a given deferred-prosecution agreement, may have nothing obviously wrong with it. The faithfulness problem becomes apparent only when the underlying pattern or program behind a sequence of cases (or nonsuits) emerges. But the atomistic frame of the conventional rubric does not readily accommodate an inquiry into that underlying logic, even when constitutional rights are at stake.²⁹⁴ Finally, assuming these obstacles could be surmounted, thorny remedial questions

²⁹¹ See P. Bator et al., *Hart and Wechsler's The Federal Courts and the Federal System* 336–38 (2d ed. 1973) (the “Dialogue”); Henry Monaghan, *Constitutional Adjudication: The Who and When*, 82 *Yale L.J.* 1363, 1365–68 (1973).

²⁹² See sources cited *supra* notes 42–46. A number of evidentiary privileges would potentially also form obstacles to discovery in litigation seeking to unearth the motivations behind a crackdown. See Edward J. Imwinkelried, *The Government's Increasing Reliance on—and Abuse of—the Deliberative Process Evidentiary Privilege: “[T]he Last Will Be First,”* 83 *Miss. L.J.* 509, 515 (2014); Gerald Wetlaufer, *Justifying Secrecy: An Objection to the General Deliberative Privilege*, 65 *Ind. L.J.* 845, 845–46 n.3 (1990) (presidential communications and ongoing investigations privilege); see also 2 Christopher B. Mueller & Laird C. Kirkpatrick, *Federal Evidence* §§ 5:53–5:63 (3d ed. Supp. 2012) (describing privileges for deliberative process and law enforcement).

²⁹³ Consider, too, that defendants do not always challenge enforcement actions; they often—even mostly—plea or settle. Barkow, *supra* note 7, at 1135–36 (noting that in criminal law, around 95% of defendants plea, meaning that “the criminal enforcement process exists almost entirely outside the courts, even when charges are brought”); Lemos, *supra* note 2, at 44 (“Courts play an important role in deciding the merits of litigated cases, of course, but the overwhelming majority of public enforcement actions settle, often before reaching any court.”). A crackdown that takes the form of a slew of charges and complaints, followed by a slew of pleas and settlements, will not much involve the courts.

²⁹⁴ See Meares, *supra* note 7, at 174–79 (explaining how Fourth Amendment reasonableness doctrine requires adaptation in view of the fact that “statistics[,] rather than stories about stops” are necessary to assessing the purpose and effects of “programmatically” law enforcement practices).

would still remain. How, for example, could a court order the executive to cease a “kabuki” crackdown, without effectively prejudging the merits of cases not before it? Conversely, could a court order the executive to halt an ongoing crackdown without running afoul of *Heckler v. Chaney* and possibly also Article II? All in all, the machinery of conventional constitutional adjudication—in the inputs it demands, in the processes it can perform, and in the outputs it contemplates—is devastatingly ill-suited to evaluating the faithfulness of crackdowns and to remedying their unfaithfulness.²⁹⁵

The conventional model does not, however, exhaust the possibilities for the judicial check on executive action. As scholars have increasingly recognized,²⁹⁶ courts can also act as checks in softer ways—by pleading and prodding,²⁹⁷ by increasing the costs of certain outcomes without entirely blocking them,²⁹⁸ and by “sub-constitutional” norm articulation.²⁹⁹ While stopping short of directly enforcing various constitutional norms, courts have used these softer checks to foster deliberativeness, transparency, and respect for constitutional and rule-of-law values throughout many aspects of public administration.³⁰⁰ Such techniques now form a

²⁹⁵ See Price, *supra* note 62, at 1576 (elaborating obstacles to judicial review of enforcement programs and individual enforcement choices). Professor Price argues that such review poses intractable “political questions.” *Id.*

²⁹⁶ Benjamin Ewing & Douglas A. Kysar, Prods and Pleas: Limited Government in an Era of Unlimited Harm, 121 *Yale L.J.* 350, 357–58 (2011); Metzger, *supra* note 20, at 1910–13; Douglas NeJaime, Winning Through Losing, 96 *Iowa L. Rev.* 941, 946 (2011); David A. Sklansky, Quasi-Affirmative Rights in Constitutional Criminal Procedure, 88 *Va. L. Rev.* 1229, 1232–33 (2002) (supplying an overview of “strategies” that courts adopt to “promote ongoing dialog between the judiciary on the one hand and the political branches on the other”); David M. Jaros & Adam S. Zimmerman, Judging Aggregate Settlement (Jan. 10, 2017) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2897217 [https://perma.cc/CZV6-7G5H].

²⁹⁷ Ewing & Kysar, *supra* note 296, at 361 (noting that “one branch may ‘prod’ another by taking action that makes further avoidance of the issue unpleasant or infeasible”); *id.* (noting that a branch “may ‘plead’ with the other branch simply by calling attention to a problem of social need and asking for its resolution”).

²⁹⁸ *Id.*; Sklansky, *supra* note 296, at 1293–94.

²⁹⁹ See Metzger, *supra* note 20, at 1911–12.

³⁰⁰ Gillian E. Metzger, Ordinary Administrative Law as Constitutional Common Law, 110 *Colum. L. Rev.* 479, 490–501 (2010) (describing the underacknowledged role played in constitutional enforcement by, *inter alia*, judicial glosses on the APA’s arbitrary-and-capricious standard and its rulemaking requirements, and explaining how deference doctrine incentivizes agency attentiveness to constitutional values, even where the Court declines to explicitly identify that doctrine as a tool of constitutional enforcement); Sklansky, *supra* note 296, at 1293 (“Each of these methods allows courts to protect fundamental values without entirely displacing democratic decisionmaking . . .”).

fixed pillar of the apparatus of judicial control over public law's administration.³⁰¹

The crackdown is a crucial tool of public law's administration today. The model of indirect checking deployed by courts in other arenas can usefully be translated and adapted to the task of governing the crackdown. Here, as there, courts can "incentivize[,] . . . rather than mandat[e],"³⁰² meaningful changes to executive-branch practice. Here, as there, the *payoff* of this indirect and discretionary checking will be to elicit increased executive deliberation and public reason giving, and to pressure the executive to pay closer heed to statutory authority and constitutional and rule-of-law values in crafting its crackdowns. For courts to play this soft checking role is both legitimate and possible.³⁰³ Indeed, as noted below, some courts are *already* using indirect checking to curb certain crackdowns—crackdowns that are "unfaithful" within precisely the meaning of that term developed by this Article.

1. The Justices' Riposte

To understand how this check might operate, let us consider two recent Supreme Court cases—*Yates v. United States*³⁰⁴ and *Bond v. United States*³⁰⁵—that stand for much more than their WestLaw headnotes would suggest. These cases do *not* involve crackdowns, but they are nonetheless illuminating for what they show about the possibilities of indirect and discretionary judicial checking.

³⁰¹ See Metzger, *supra* note 300 at 490–501; Metzger, *supra* note 20, at 1911–12; Sklansky, *supra* note 296, at 1293.

³⁰² Metzger, *supra* note 20, at 1911.

³⁰³ As Cox & Rodríguez point out, some "constitutional scholars . . . believe the very definition of a 'limiting principle' is that it must be amenable to enforcement by an Article III judge." See Cox & Rodríguez, *supra* note 60, at 210. For those scholars, the softer form of judicial checking described here will be inherently unsatisfying. But, as they go on to note, "tangling up debates about the existence of limiting principles with longstanding disagreements about the extent to which constitutional norms must be judicially enforceable stymies genuine inquiry into how best to conform the enforcement power to conceptions of constrained and accountable government." *Id.*; see also Lemos, *supra* note 2, at 58–59 ("[O]ur system has no mechanism for sanctioning a judge who bases her vote on apparent public preferences [such as the results of a public opinion poll]. Yet most observers would balk at the notion that public opinion is an appropriate basis for decisions in individual cases, even cases as policy-laden as the ACA challenge. Such norms matter—and can shape behavior—even if they cannot be translated into enforceable regulations." (footnote omitted)).

³⁰⁴ 135 S. Ct. 1074 (2015).

³⁰⁵ 134 S. Ct. 2077 (2014).

Yates concerned a man prosecuted for destroying fish under a provision of the Sarbanes-Oxley Act, enacted after the collapse of Enron to prohibit destruction of documents or other “tangible object[s].”³⁰⁶ *Bond* concerned a woman prosecuted for attempting to poison her former husband’s paramour under a provision of an international treaty barring the use of chemical weapons.³⁰⁷ These cases both implicated the question whether the relevant federal criminal statutes, *bien entendu*, prohibited the conduct in question. Read literally, the text of both laws apparently did.³⁰⁸ But it was also apparent that the applications of these laws to these particular defendants was, to put it mildly, a far cry from what Congress was envisioning when it enacted those laws.³⁰⁹

The government lost both cases, and it did so in a cloud of disdain from the Justices. To the Justices, the cases seemed to bespeak a larger problem with the DOJ’s charging practices in criminal cases. During the *Yates* oral argument, Justice Scalia asked, “who do you have out there that . . . exercises prosecutorial discretion? Is this the same guy that . . . brought the prosecution in *Bond* last term?”³¹⁰ The government’s answer—that its policy was to seek the most severe available charges whenever it brought a case—elicited a fascinating riposte:

Well, if that’s going to be the Justice Department’s position, then we’re going to have to be much more careful about how extensive statutes are. I mean, if you’re saying we’re always going to prosecute the most severe, I’m going to be very careful about how severe I make statutes.³¹¹

Chief Justice Roberts also chimed in: “It’s an extraordinary leverage that the broadest interpretation of this statute would give Federal prosecutors.”³¹²

Leave aside the jarring fact that at least one of these Justices was an avowed textualist, and consider the substance of these remarks. The Justices here openly proposed to adjust how they interpret clearly worded criminal statutes to foreclose the DOJ from pursuing a crazy charging

³⁰⁶ 135 S. Ct. at 1081.

³⁰⁷ 134 S. Ct. at 2085.

³⁰⁸ *Yates*, 135 S. Ct. at 1081–82; *Bond*, 134 S. Ct. at 2090–91.

³⁰⁹ *Yates*, 135 S. Ct. at 1081–82; *Bond*, 134 S. Ct. at 2090–91.

³¹⁰ See Transcript of Oral Argument at 27, *Yates*, 135 S. Ct. 1074 (2014) (No. 13-7451), 2014 WL 9866152.

³¹¹ *Id.* at 29.

³¹² *Id.* at 31.

policy (or a charging policy the Justices regarded as crazy). This seems to flout the principle that the executive, not the courts, decides what violations of law to prosecute. The Justices' stance makes sense, though, if the Constitution *also* authorizes the Court to curb the manner in which the prosecutor can enforce *clearly worded* criminal laws.³¹³ Put another way, the federal government's announced position—that the DOJ will mechanically charge the *most* severe available violation of *every* plausibly available statute—runs afoul of the principle that enforcement must be *faithful*. The Court is performing its duty, not usurping another branch's, when it enforces that boundary.

Ultimately, the Court delivered on the threat implied at oral argument. It substantially limited the meaning of the statute in *Yates*,³¹⁴ just as it had substantially limited the meaning of the federal statute at issue in *Bond* the preceding year.³¹⁵ There was, of course, no foothold in black letter law for the Court to directly order the executive branch to temper its charging policy.³¹⁶ The Court could not and did not write its opinions

³¹³ Obviously, neither *Yates* nor *Bond* posed the First Amendment or vagueness concerns that elsewhere authorize limiting interpretations of criminal laws. See, e.g., *McDonnell v. United States*, 136 S. Ct. 2355, 2372–73 (2016) (“But the Government’s legal interpretation is not confined to cases involving extravagant gifts or large sums of money, and we cannot construe a criminal statute on the assumption that the Government will ‘use it responsibly.’” (quoting *United States v. Stevens*, 559 U.S. 460, 480 (2010))); *United States v. Sun-Diamond Growers of Cal.*, 526 U.S. 398, 408, 412 (1999) (declining to assume that “the Government’s discretion” will protect against overzealous prosecutions and concluding that “a statute in this field that can linguistically be interpreted to be either a meat axe or a scalpel should reasonably be taken to be the latter”).

³¹⁴ *Yates*, 135 S. Ct. at 1081 (“‘Tangible object’ . . . we conclude, is better read to cover only objects one can use to record or preserve information, not all objects in the physical world.”).

³¹⁵ *Bond*, 134 S. Ct. at 2090 (interpreting 18 U.S.C. § 229 not to reach “purely local” crimes).

³¹⁶ An exchange in the *Yates* argument captures this point. See Transcript of Oral Argument, *supra* note 310, at 52–53. The Justices challenged the government with a hypothetical under which the government’s reading of the statute produced an absurdly hard result. The government responded that “[t]he problem with the hypothetical is that this statute might be harsh in certain particular outlier applications. But Petitioner is not arguing for some sort of *de minimis* rule, he’s not saying that this statute can’t be applied in trivial cases.” *Id.* at 52. At this point, Justice Kennedy interrupted: “But he has no—he has no doctrinal basis to make that argument other than to say that there is such a doctrine as prosecutorial discretion and, A, that it’s enforceable and, B, that it has some substance, and you’ve indicated that it has neither.” *Id.* The government responded that the petitioner had not raised the question of abuse of prosecutorial discretion, and suggested that it would not be “a basis” for complaint. *Id.* Justice Kennedy’s response—“Well, it seems to me that we should just not use the con-

in *Yates* or *Bond* as “faithfully” holdings (which is what I would submit they really were). Instead, the Court cast its opinions in the implausible terms of federalism (*Bond*) and plain-vanilla textual interpretation (*Yates*).

Yates and *Bond* offer a beautiful illustration of the soft judicial check in action. Rather than directly enforce the faithfully rule, the Court used the tools legitimately at its disposal—pointed questions at oral argument and pointed raillery in the opinions that ultimately issued—to indirectly reveal its dissatisfaction with the DOJ’s charging practices. Altogether, *Yates* and *Bond* amounted to an unofficial instruction by the Court to the Solicitor General to see to it that the DOJ refrain from making such embarrassingly poor charging decisions in the future. The message was transmitted; the Solicitor General subsequently gave an address at an annual gathering of U.S. Attorneys from around the country—with a PowerPoint presentation featuring quotes from the *Yates* and *Bond* oral arguments—to emphasize the importance of ensuring that line attorneys exercise greater prosecutorial discretion in charging.³¹⁷

2. Discretionary Checks on Discretionary Power

Yates and *Bond* exemplify how indirect judicial checking can be meaningful and consequential, even when as a formal matter the Court has left untouched the black letter law governing enforcement choices. State and federal courts can use analogous discretionary strategies to encourage more faithful crackdowns.

Enabling courts to play this role will require surmounting a threshold obstacle: an informational problem. Information about prospective and ongoing enforcement policy is scant, at least as compared to information about rulemaking.³¹⁸ As a result, a court encountering a case that is part

cept or refer to the concept at all anymore”—conceded the point that, under extant law, abuse of prosecutorial discretion is unenforceable. *Id.* at 52–53.

³¹⁷ In many cities around the country, the Solicitor General also undertook to speak in more informal contexts with DOJ attorneys to urge the importance of exercising circumspection in charging decisions. My thanks to SG Verrilli for recounting these anecdotes to me. His efforts on this front deserve greater public acknowledgment.

³¹⁸ Scholars have recognized the deficiency in the supply of information on enforcement policy, and particularly in writing on the federal administrative state, scholars have pressed for more transparency into enforcement policy choices. For example, Professor Kate Andrias argued that “presidential enforcement should be more transparent: [m]ajor decisions about enforcement policy generally should be disclosed,” Andrias, *supra* note 7, at 1038, and Professor Ashutosh Bhagwat pressed for a regime under which agencies would be mandated to

of a crackdown may not know it in real time. If courts are to check crackdowns, enforcers need to supply a higher-quality flow of information about crackdowns to federal and state court judges.

There are many possible forms that a real-time crackdown disclosure system could take—a public clearinghouse, for example, that would aggregate reports of crackdowns from state and federal agencies and prosecutors. Here is a more modest idea with lower startup costs: when a court notices that a criminal case or enforcement action is part of a string of similar such cases or actions, it should seek to elicit information from the prosecutor (or the agency) about the nature and justifications for that pattern of heightened enforcement. To evaluate the crackdown's contours, the court might solicit a statement or a filing from the prosecutor or agency that states whether the case is part of a crackdown and that summarizes the crackdown's goals and its progress by describing the similar cases (in anonymized form) that had been or were being developed by that office.

This exchange of information between courts and the executive branch would not categorically bar the executive branch from pursuing any given crackdown, faithful or not. But what it *would* do is place some resistance on the pursuit of crackdowns that are difficult to justify to a knowledgeable observer. The mere obligation of public reason-giving before a neutral tribunal may deter the pursuit of unnecessary or unjustifiable crackdowns³¹⁹—much in the same way that pointed judicial questioning at oral argument can affect executive conduct.³²⁰

A second and related mechanism would enlist the tool of sentencing discretion.³²¹ A court can exercise (or threaten to exercise) its sentencing discretion to reduce the penalty borne by a party who was being prosecuted by dint of an unfaithful crackdown. Again, this strategy would not categorically bar or enjoin the executive branch from pursuing a crackdown. Instead, the use of sentencing discretion advertises that the court

formulate and explain their enforcement priorities in advance, Ashutosh Bhagwat, *Three-Branch Monte*, 72 *Notre Dame L. Rev.* 157, 187–88 (1996); see also Barkow, *supra* note 7, at 1173–80 (outlining possible legislative and executive branch reforms that would encourage agencies to “better publicize their enforcement practices and the relevant metrics”); Lemos, *supra* note 2, at 50–51 (criticizing lack of information about enforcement policies and shifts in enforcement policies).

³¹⁹ See *supra* text accompanying note 252.

³²⁰ See *supra* text accompanying notes 314–17.

³²¹ *Kansas v. Marsh*, 548 U.S. 163, 175 (2006); Arthur W. Campbell, *Law of Sentencing* § 9:5 (2d ed. 1991).

will not be a hospitable forum for more cases of the same ilk in the future.³²² Judges have recently used this strategy in cases arising from the selective crackdown on leakers.³²³ This form of judicial resistance may help to convince the executive to pull back on a problematic crackdown.³²⁴

Third, judges can encourage the executive branch to act faithfully in its crackdown choices by working in conjunction with a perhaps unexpected partner—the media. The media, as reflected above, is a double-edged sword when it comes to the crackdown. Media attention can prompt crackdowns, by sparking and inflaming public demand for enforcement.³²⁵ But it can also prompt the tempering of unduly severe crackdowns by drawing attention to the excesses of particular patterns of law enforcement.³²⁶

Judges can learn to wield this blade to exert pressure against unfaithful crackdowns, or to urge the implementation of faithful crackdowns, without formally running afoul of the doctrine that prohibits them from enjoining particular enforcement programs. Through the op-ed, the essay, or even the humble book review, judges can publish (generalized) critiques of enforcement programs and thereby encourage the executive branch to craft enforcement policy more carefully and sensibly. Apart from its direct effects, such critiques can also inform the legislature and the public of problematic enforcement policy choices, and draw further

³²² One might think of sentencing reduction in expected-value terms. If a legislature enacts a law imposing a fine of \$100 for speeding, but does so on the expectation that only one in ten speeders will be caught, then the legislature is effectively imposing a \$10 deterrent on each speeder. If a crackdown then results in the town's police charging all speeders, then a sentencing reduction effectively adjusts the penalty to more closely match the legislature's initial expectation that it was imposing a \$10 deterrent. Thanks to Professor Zach Price for this insight.

³²³ See, e.g., Peter Maass, *Obama's War on Leaks Faces Backlash in Court*, Intercept (May 13, 2015), <https://theintercept.com/2015/05/13/governments-crackdown-leaks-faces-new-challenges>; Editorial, *Overkill on a CIA Leak Case*, N.Y. Times (May 13, 2015), <http://www.nytimes.com/2015/05/13/opinion/overkill-on-a-cia-leak-case.html> [<https://perma.cc/92A5-P6Y5>] (calling Judge Brinkema's sentence to Jeffrey Sterling, a former CIA officer convicted of leaking classified information to the *Times*, "a significant rebuke to the Obama administration's dogged-yet-selective crusade against leaks").

³²⁴ See Maass, *supra* note 323 ("Brinkema's decision could give the government cause to reconsider the scope of its crackdown.").

³²⁵ See, e.g., text accompanying notes 166–78 (media effects on nail salon crackdown).

³²⁶ See, e.g., text accompanying notes 215–22 (media effects on asset forfeiture crackdown).

media attention to these problems. Any or all of these effects may encourage the executive to rectify problematic programs of enforcement.

The reigning maestro of this type of interbranch dialogue is Judge Jed Rakoff of the Southern District of New York. Judge Rakoff has castigated federal enforcers from both directions—as being too lenient with Wall Street banks,³²⁷ and also as being too heavy-handed in their tactics with individual criminal defendants.³²⁸ Reversed by the Second Circuit for a ruling that weaponized his scorn for the SEC’s leniency,³²⁹ Judge Rakoff turned to the pages of the *New York Review of Books* to make his case against the fecklessness of the federal government’s response to the financial crisis.³³⁰ It is not far-fetched to imagine that the accumulated force of Judge Rakoff’s public denunciations played a role in prompting the DOJ’s subsequent announcement that it would in the future hold corporate employees to account, and not just their corporate employers, for criminal wrongdoing³³¹—a move that might signal the DOJ will now take a more muscular approach to malfeasance in the financial sector. The judge’s writings, in other words, may have persuaded policymakers to *themselves* acknowledge the need to revise their approach to cracking down on financial crimes in order to make a kabuki crackdown a real one.³³²

The suggestion that judges should consider it part and parcel of their responsibility *as judges* to “commentate” on enforcement policy is, ad-

³²⁷ See *SEC v. Citigroup Global Mkts. Inc.*, 826 F. Supp. 2d 328, 333 (S.D.N.Y. 2011).

³²⁸ Jed S. Rakoff, *Why Innocent People Plead Guilty*, N.Y. Rev. Books (Nov. 20, 2014), <http://www.nybooks.com/articles/2014/11/20/why-innocent-people-plead-guilty/> [<https://perma.cc/3QEJ-FU74>].

³²⁹ *SEC v. Citigroup Global Mkts. Inc.*, 673 F.3d 158 (2d Cir. 2012).

³³⁰ Rakoff, *supra* note 15.

³³¹ See Memorandum from Sally Quillian Yates, Deputy Att’y Gen., Individual Accountability for Corporate Wrongdoing (Sept. 9, 2015), <https://www.justice.gov/dag/file/769036/download> [<https://perma.cc/5PHU-7RB5>]; Matt Apuzzo & Ben Protess, *Justice Department Sets Sights on Wall Street Executives*, N.Y. Times (Sept. 9, 2015), <http://www.nytimes.com/2015/09/10/us/politics/new-justice-dept-rules-aimed-at-prosecuting-corporate-executives.html> [<https://perma.cc/MY4Y-85YN>]. For an enlightening discussion of the influence exerted by Judge Rakoff and other federal judges on the SEC’s settlement practices, see Professors Zimmerman and Jaros, *supra* note 296, at 53–54.

³³² The SEC seems to have been less receptive to Judge Rakoff’s interventions. As Professor Urska Velikonja has written, since 2013 the SEC has altogether avoided judicial review of its settlements with large financial institutions by shifting its filing of these settlements to administrative proceedings. See Urska Velikonja, *Securities Settlements in the Shadows*, 126 *Yale L.J. Forum* 124, 130 (2016) (“As a result of the shift, in FY 2014 and FY 2015, all settlements with large Wall Street banks—the sorts of settlements that Judge Rakoff rejected—were filed in administrative proceedings. Not a single one was filed in court.”).

mittedly, an unorthodox one. But the influence of the judicial check need not be exhaustively summed up in the words “it is so ordered.” The executive branch’s strategic use of the media to achieve its ends has long been a feature of our political landscape.³³³ The judiciary can take a page from that book, and likewise use the media as an aide and collaborator in its pursuit of *its* constitutional duty to promote the faithful execution of the laws.

The barriers to direct judicial checking of the crackdown are not likely to dissolve anytime soon. But that need not be the end of the story. Instead, we should retool familiar aspects of judicial practice with an eye to promoting the faithfulness of crackdowns—a constitutional value that the law would otherwise leave drastically underenforced. These are softer checks, to be sure—but, by the same token, they are more supple and adaptable. They are thus well-suited for disciplining the crackdown, a task that requires a sophisticated, nuanced, and context-sensitive appraisal of the motives and effects of the executive’s enforcement choices. As “[a]mbition must be made to counteract ambition,”³³⁴ so, too, must (judicial) discretion be made to counteract (executive) discretion.

CONCLUSION

When the Duke of Vienna delegated his power to enforce the laws to Angelo, he did so without qualification.³³⁵ He entrusted Angelo with the fullest scope of discretion possible—the “scope . . . so to enforce or qualify the laws / as to [his] soul seem[ed] good.”³³⁶ And Angelo promptly exercised that discretion to make some highly questionable enforcement choices—including an unexpected crackdown on vice crimes³³⁷—choices that met no check until Vincentio returned and resumed the reins of state.³³⁸

³³³ See Pozen, *supra* note 9, at 559–62.

³³⁴ The Federalist No. 51 (James Madison).

³³⁵ Shakespeare, *supra* note 1, at ll. 42–43 (“Hold therefore, Angelo / In our remove, be thou at full ourself.”). For an insightful analysis of the play’s “implicit theories of justice,” see Bernadette Meyler, “Our Cities Institutions” and the Institution of the Common Law, 22 *Yale J.L. & Human.* 441, 453 (2010).

³³⁶ Shakespeare, *supra* note 1, at ll. 64–66.

³³⁷ *Id.* at act I, sc. 2, ll. 154–60 (“[T]his new governor [i.e., Angelo] / Awakes me all the enrolled penalties / Which have, like unscour’d armour, hung by th’ wall / So long, that nineteen zodiacs have gone round, / And none of them been worn; and for a name / Now puts the drowsy and neglected act / Freshly on me: ‘tis surely for a name.”).

³³⁸ *Id.* at act V, sc. 1.

Looked at one way, our system is more constrained than Vienna's. Our enforcers are not empowered to dispense justice simply "as to [their] soul[s] seem[] good."³³⁹ Rather, they are subject to legislative and judicial checks. Looked at another way, however, our system seems almost as unconstrained as Angelo's Vienna. An occasional crackdown that happens to be especially salient might eventually wake the legislature from its quiescence and prompt it, like Vincentio, to restrain the crackdown. But this check is sporadic; the judicial check is still more anemic. Our system vouchsafes wide leeway to the executive branch in designing and implementing crackdowns. But this leeway comes at a substantial cost—namely, an agency cost that is manifest in many crackdowns undertaken at the federal and state levels.

This Article seeks to improve this system. Crackdowns need not and should not remain *terra sancta* for the executive branch, whether federal or state, criminal, civil, or administrative. Instead, decisions of such consequence must be guided by a normative framework that finds a textual anchor in the Take Care Clause and in its coordinate clauses in the states' constitutions. Through tools both familiar and unconventional, judges can play a role in encouraging executive branch actors to make improved crackdown choices. Moreover, courts can begin to perform that role directly, without instigating drastic revisions to entrenched black letter law or awaiting overhauls of the bureaucracies of criminal and administrative law.

This initial foray into crackdowns suggests many potential lines of inquiry and avenues for reform. One might develop standardized metrics of crackdowns, in order to better inform the public, legislatures, and courts of the empirical fact of crackdowns across federal, state, and local law. One might conduct comparative analyses of crackdowns, across agencies or across jurisdictions, to work out whether and why crackdowns are more or less effective. One might develop internal ethical guidelines for the executive branch to apply in vetting and designing crackdowns. By exploring unmapped terrain on the subject of the crackdown, this Article has introduced a new dimension to the legal debate on enforcement.

³³⁹ *Id.* at act I, sc. 1, ll. 66.