

THE COURT AND OVERCRIMINALIZATION

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INTRODUCTION

In both *Bond v. United States*¹ and *Yates v. United States*,² the Supreme Court reversed federal criminal convictions. Neither defendant's conduct was constitutionally protected; there were no procedural irregularities in either trial, no vagueness or overbreadth issues, and no police misconduct. Instead, each case involved prosecuting a small-time individual with a big-time statute: In *Bond*, the federal government used the Chemical Weapons Convention Implementation Act of 1998³ against a "jilted wife."⁴ In *Yates*, it unleashed the Sarbanes-Oxley Act of 2002⁵ on a mischievous fisherman.⁶ Both proceedings raised concerns about overcriminalization that implicitly drove the Court's analysis in a new direction.

Here, overcriminalization means overlapping statutes, excessive punishments, and harsh "enforcement of petty violations."⁷ Dissenting in *Yates*, Justice Kagan chastised the plurality for allowing concerns with overcriminalization to override accepted statutory interpretation techniques: she argued that judges should channel their frustration with an overly punitive legislature towards "lectures, . . . law review articles, and . . . dicta," instead of letting it corrupt their legal reasoning.⁸ She was right, in part: this Essay suggests that *Bond*'s majority, along with *Yates*'s plurality and concurrence, envisioned—or at least practiced—a more active judicial role in curbing overcriminalization. They did so by utilizing a new, currently inchoate, substantive canon of con-

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1. 134 S. Ct. 2077 (2014).
2. 135 S. Ct. 1074 (2015).
3. Pub. L. No. 105-277, 112 Stat. 2681 (codified as amended in scattered sections of the U.S. Code).
4. *See Bond*, 134 S. Ct. at 2083.
5. Pub. L. No. 107-204, 116 Stat. 745 (codified in scattered sections of the U.S. Code).
6. *See Yates*, 135 S. Ct. at 1078-79.
7. Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703, 716 (2005).
8. *Yates*, 135 S. Ct. at 1101 (Kagan, J., dissenting).

struction, which might be called the overcriminalization canon (more precisely, an anti-overcriminalization canon), and which might be justified on due process grounds.

The overcriminalization canon is triggered when the government prosecutes an individual for a single act (or course of conduct) under a criminal statute whose main purpose has nothing to do with the defendant's conduct, yet which contains broadly worded provisions with words that, read literally, encompass it. The canon applies when the government is demanding years of incarceration for a far-from-deadly criminal act: either it is piling on, adding a federal charge when traditionally a state one would suffice, or it is criminalizing what would normally be a civil infraction. The canon effects a broadening of the usual statutory analysis, allowing the defendant to overcome text that appears unambiguous on its face, and imposes some sort of heightened burden on the government, requiring it to prove that Congress really meant to criminalize the conduct at issue through the particular statute.⁹

More specifically, the apparent doctrine forming the overcriminalization canon has two components. The Court begins by identifying two disconnects: that between a statute's narrow-sounding title and extremely broad language in specific provisions, and that between the common, man-on-the-street meaning of a phrase and the government's proposed reading of it. The Court then uses these disconnects to find ambiguity in a key term, even if the term is defined by the statute (as in *Bond*)¹⁰ or the term is frequently used and interpreted as a legal term of art (as in *Yates*).¹¹

Whether an overcriminalization canon would serve as a legitimate counter-majoritarian check on a retributive Congress or an instance of judicial overreach is a difficult issue. However, this Essay concludes by suggesting that due process values might justify it: this argument would require reconsidering the fairness of criminal law's ignorance-of-the-law-is-no-excuse maxim in light of the mind-boggling volume of federal administrative regulations and legislation.¹²

I. STATUTORY ANALYSIS GONE AWRY

A. *Bond v. United States*

Carol Bond's husband impregnated her best friend, Myrlinda Haynes.¹³ Bond sought nonlethal revenge. She obtained "an arsenic-based compound" and potassium dichromate, then spread them on Haynes's "car door, mailbox,

9. The precise extent of this burden is unclear. See *infra* note 73 and accompanying text.

10. See *infra* note 29 and accompanying text.

11. See *infra* notes 56-57 and accompanying text.

12. See *infra* Part II.

13. *Bond v. United States*, 134 S. Ct. 2077, 2085 (2014).

and door knob.”¹⁴ She thus inflicted Haynes with a minor chemical burn.¹⁵ Despite Haynes’s repeated calls about suspicious substances, the local police did nothing.¹⁶ Finally, when Haynes found powder in her mailbox, the local police suggested she contact federal agents; these agents “caught Bond opening Haynes’s mailbox, stealing an envelope, and stuffing potassium dichromate inside the muffler of Haynes’s car.”¹⁷

Bond was convicted of knowingly using “any chemical weapon,” and was sentenced to six years in prison.¹⁸ In general, the Chemical Weapons Convention Implementation Act defines a “chemical weapon” as a “toxic chemical and its precursors”¹⁹ and “[t]oxic chemical,” in turn, . . . as “any chemical which through its chemical action on life processes can cause death, temporary incapacitation or permanent harm to humans or animals.”²⁰

The statute explicitly encompasses both the chemicals at issue—toxic chemicals—and the defendant’s use of them—intending to harm another.²¹ Yet for Chief Justice Roberts (here, writing for the Court), the “exceptional convergence” of three factors required reversal of the conviction.²² These factors were (1) the statute’s definition of “chemical weapon,” which went beyond the normal meaning of the phrase;²³ (2) “the context from which the statute arose,” specifically the disconnect between the defendant’s harassment that happened to use chemicals and the concerns about terrorists employing chemicals in a targeted fashion that motivated the statute’s enactment;²⁴ and (3) federalism concerns, because adopting the government’s reading might have “fundamentally upset the Constitution’s balance between national and local power”²⁵ given the “purely local crimes” at issue.²⁶ The first two—detailed below—were the important factors because they justified invoking the third: the Court used the first two to find ambiguity in the statute’s text, and once the Court had the wiggle room that ambiguity often provides, it could invoke federalism’s clear statement requirement—“insist[ing] on a clear indication that Congress meant to reach purely local crimes, before interpreting the statute’s expansive lan-

14. *Id.*

15. *Id.*

16. *Id.*

17. *See id.*

18. *Id.* at 2085-86.

19. *Id.* (quoting 18 U.S.C. § 229F(1)(A) (2013)).

20. *Id.* (quoting 18 U.S.C. § 229F(8) (2013)).

21. *Id.* at 2094 (Scalia, J., concurring in the judgment); *see also* 18 U.S.C. § 229F(7) (2013) (excluding “[a]ny peaceful purpose” from criminal liability).

22. *Bond*, 134 S. Ct. at 2093.

23. *Id.*

24. *See id.*

25. *Id.*

26. *See id.* at 2092.

guage in a way that intrudes on the police power of the States” to find the statute inapplicable to Bond’s purely local conduct.²⁷

The Court’s doctrinal analysis can raise eyebrows. First, it claims the government’s reading of “chemical weapon” does not comport with what “an educated user of English” would consider a “chemical weapon.”²⁸ But *the statute specifically defines the term*, rendering Roberts’s comparison of a common definition to the statute’s curious—Justice Scalia quipped that, on this point, Roberts’s analysis of ordinary meaning was “undoubtedly” correct, “but undoubtedly beside the point.”²⁹ For Justice Scalia, the statutory definition ended the statutory analysis.

Roberts answered that the statute’s “extremely broad[]” and “general”—although not vague—definition was insufficiently clear to trump the “natural meaning” of the phrase, especially as the former covered purely local conduct.³⁰ Additionally, the Court noted that “[t]he substances that Bond used bear little resemblance to the deadly toxins that are ‘of particular danger to the objectives of the Convention.’”³¹ Curiously, the Court’s source for the “objectives of the Convention” was not another provision of the statute, or even legislative history; it was a book published nine years after the statute was enacted.³² Justice Scalia pointed out that lay understanding and a nonlegislative source do not generally trump a statutory definition.³³

The Court next explored “the context” of the statute’s enactment, and ended up discussing several of the most important issues involved in overcriminalization—although that term was unmentioned. It repeatedly emphasized the stark contrast between the defendant’s intensely personal feud and the large-scale “horrors of chemical warfare.”³⁴ The Court also trumpeted the title of the statute, which made Bond’s conduct seem almost trivial by comparison.³⁵ In doing so, the Court showed that Bond’s prosecution exemplifies an important facet of overcriminalization: the use of laws enacted to target the most culpable (or simply, the worst) of a given class of behavior, against those whose actions, while harmful, do not approach those of the most-culpable camp.³⁶

27. *Id.* at 2090.

28. *See id.*

29. *Id.* at 2096 (Scalia, J., concurring in the judgment).

30. *Id.* at 2090 (majority opinion).

31. *Id.* (quoting Ian R. Kenyon, *Why We Need a Chemical Weapons Convention and an OPCW?*, in *THE CREATION OF THE ORGANISATION FOR THE PROHIBITION OF CHEMICAL WEAPONS: A CASE STUDY IN THE BIRTH OF AN INTERGOVERNMENTAL ORGANISATION 1*, 17 (Ian R. Kenyon & Daniel Feakes eds., 2007)).

32. *Compare supra* note 3, *with supra* note 31.

33. *See Bond*, 134 S. Ct. at 2096 (Scalia, J., concurring in the judgment) (making the point colorfully).

34. *Id.* at 2083 (majority opinion); *see also id.* at 2087 (contrasting “war crimes and acts of terrorism” with “Bond’s common law assault”).

35. *See, e.g., id.* at 2091, 2093.

36. This issue is vividly illustrated in the illegal drug context, in which the government uses “the weight of narcotics as a proxy for the culpability of an individual defendant.” Mark

Next was overinclusiveness: if the Chemical Weapons Convention Implementation Act covers Bond's conduct, it would also reach conduct even further removed from chemical warfare, like parents poisoning goldfish.³⁷ Even the easily-abused power of prosecutorial discretion,³⁸ which courts are normally powerless to check,³⁹ came under scrutiny.⁴⁰ Under the guise of federalism concerns, the Court opined on redundant punishment, too: "The laws of the Commonwealth of Pennsylvania (and every other State) are sufficient to prosecute Bond."⁴¹ In other words, the conduct need not be federally criminalized because it would subject offenders to additional incarceration.⁴²

Less than a year later the Court again reversed a conviction based on crystal clear, but extremely broad, statutory language.

B. *Yates v. United States*

John Yates was the captain of a commercial fishing vessel.⁴³ In the Gulf of Mexico, he caught undersized red grouper in violation of a federal wildlife ordinance.⁴⁴ While still at sea, his ship was boarded by a federal agent as part of a routine inspection, and that agent discovered the undersized fish.⁴⁵ He ordered Yates to leave the fish—suddenly evidence of a federal regulatory violation—untouched until Yates docked the vessel in Florida.⁴⁶ A crew member, at

Osler, Opinion, *We Need Al Capone Drug Laws*, N.Y. TIMES (May 4, 2014), <http://nyti.ms/1iSQy76>. The use of weight means that "[i]f a kingpin imports 15 kilograms of cocaine into the country and pays a trucker \$400 to carry it, they both face the same potential sentence." *Id.* It results in "unjust sentences for too many low-level offenders, create[ing] racial disparities and crowd[ing] our prisons." *Id.* That is not to say all proxies are equally flawed: the government could use a more appropriate one for drugs such as "the amount of profit that any individual took from the operation of a narcotics ring." *Id.* Many criminal laws currently on the books, however, use deeply flawed proxies for culpability, resulting in unduly harsh sentences for many.

37. *Bond*, 134 S. Ct. at 2091.

38. Commentators recognize that the misuse of prosecutorial discretion is a significant component of the overcriminalization problem. *See, e.g.*, Erik Eckholm, *Prosecutors Draw Fire for Sentences Called Harsh*, N.Y. TIMES (Dec. 5, 2013), <http://nyti.ms/1bKpGsr> ("Using their discretionary power to apply lengthy 'enhancements' on top of required terms, . . . federal prosecutors are strong-arming defendants into pleading guilty and overpunishing those who do not—undermining the fairness and credibility of the justice system.").

39. *See, e.g.*, Robert L. Misner, *Recasting Prosecutorial Discretion*, 86 J. CRIM. L. & CRIMINOLOGY 717, 717 (1996) (stating that most prosecutorial decisions "are effectively unreviewable either through judicial or administrative processes").

40. *See Bond*, 134 S. Ct. at 2085 (expressing "surpris[e]" regarding chemical weapons charge); *id.* at 2092 (describing this prosecution of a "purely local crime" as "unusual").

41. *Id.* at 2092.

42. Although here, the state laws (as enforced by local police) *were* insufficient: Bond only stopped terrorizing Haynes once federal agents detained her. *See supra* notes 16-17 and accompanying text.

43. *Yates v. United States*, 135 S. Ct. 1074, 1078 (2015) (plurality opinion).

44. *See id.* at 1079.

45. *Id.*

46. *Id.*

Yates's direction, threw the fish overboard.⁴⁷ Yates was convicted of two federal felonies.⁴⁸ Yates did not appeal his first conviction, which was under a statute that provided "[w]hoever . . . after any search for . . . property by any person authorized to make such search . . . , knowingly . . . dispose[d] of [it] . . . for the purpose of . . . impairing the Government's lawful authority to take such property into its custody or control or to continue . . . shall be [punished]."⁴⁹ He did appeal his second one, which was for "knowingly . . . destroy[ing] . . . any . . . tangible object with the intent to impede . . . the investigation . . . of any matter within the jurisdiction of any . . . agency of the United States."⁵⁰ This latter provision was part of the Sarbanes-Oxley Act of 2002, enacted to prevent—or at least, punish—future Enrons.⁵¹

The Eleventh Circuit affirmed, rejecting Yates's statutory argument in six sentences.⁵² Justice Ginsburg's plurality and Justice Alito's opinion, concurring in the judgment, reversed by employing interpretative tools similar to those employed in *Bond*. Justice Kagan, however, dissented, and was joined by Justices Scalia, Thomas, and Kennedy. Kagan penned a scathing takedown, naming an opposition to "overcriminalization and excessive punishment" as the real driver of the plurality's and concurrence's opinions.⁵³

In its analysis, the plurality first compared the statute's title—"Destruction, Alteration, or Falsification of Records in Federal Investigations and Bankruptcy"⁵⁴—with the sweeping plain meaning of "tangible object," finding a disconnect between the two, as the title refers to *records*, yet *tangible objects* include so much more than that.⁵⁵ Because of that disconnect, absent "a clearer indication" of an intent to enact "an all-encompassing ban on the spoliation of evidence," reading "tangible object" to include all tangible objects would have been contrary to legislative intent.⁵⁶ For the members of the plurality, a contrast between a clear-but-sweeping definition and the narrow-sounding title introduced ambiguity (despite Justice Kagan's assertion that a statute's title does not usually narrow the construction of a commonly-used definition).⁵⁷

47. *Id.* at 1078.

48. *Id.*

49. *Id.* (quoting 18 U.S.C. § 2232(a) (2013)).

50. *Id.* (quoting 18 U.S.C. § 1519 (2013)).

51. *See id.* at 1079 (noting that the Sarbanes-Oxley Act was "designed to protect investors and restore trust in financial markets following the collapse of Enron Corporation").

52. *See United States v. Yates*, 733 F.3d 1059, 1064 (11th Cir. 2013), *rev'd*, 135 S. Ct. 1074 (2015).

53. *Yates*, 135 S. Ct. at 1100 (Kagan, J., dissenting).

54. 18 U.S.C. § 1519 (2013).

55. *Yates*, 135 S. Ct. at 1083 (plurality opinion). While the plurality uses the term "caption" and not "title," *see id.*, such differences are irrelevant for present purposes.

56. *Id.*

57. *See id.* at 1091, 1094 (Kagan, J., dissenting) ("Dozens of federal laws and rules of procedure (and hundreds of state enactments) include the term 'tangible object' or its first cousin 'tangible thing'—some in association with documents, others not."). *Bond* similarly

The plurality next analyzed the “position” of the section at issue, finding that it militated against accepting the usual meaning of “tangible object.”⁵⁸ It also applied the anti-superfluity canon, arguing that it required the Court to avoid an interpretation that would result in “significant overlap” between criminal statutes.⁵⁹ As the dissent pointed out, significant overlap is not the same thing as superfluity,⁶⁰ and regardless several congressmen knew of the overlap,⁶¹ so interpreting the phrase to avoid such overlap was arguably contrary to legislative intent. What the plurality was really doing, according to the dissent, was using the significant overlap that would result from a broad reading of tangible object to show that such reading would render the statute at issue unnecessary. This doctrinal move performed a similar function to *Bond*’s assertion that state criminal law was sufficient to punish a defendant’s conduct. Both opinions used these judicial assertions to adopt narrowing constructions of their respective statutes.

After finding ambiguity,⁶² the plurality was able to rule for the defendant by invoking the rule of lenity, which dictates that “ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.”⁶³ This doctrinal move—finding ambiguity through unusual means, then invoking an interpretative rule that automatically resolves that ambiguity in a particular direction—operated similarly in *Bond*, where ambiguity justified the Court’s invocation of the clear statement requirement.

Justice Alito’s opinion, concurring (as a decisive fifth vote) in the judgment, emphasized the “combined” effect of reading the “statute’s list of nouns, its list of verbs, and its title.”⁶⁴ His textual reading was strained, full of propositions like the following: “‘known unknowns’ should be similar to known

used a contrast to show ambiguity between a clear-but-sweeping definition and the educated-user-of-English’s definition.

58. *Id.* at 1083 (plurality opinion). The dissent characterizes this as the “new number-in-the-Code theory.” *Id.* at 1095 (Kagan, J., dissenting).

59. *Id.* at 1085 (plurality opinion).

60. *Id.* at 1095 (Kagan, J., dissenting).

61. *Id.* at 1096 (collecting remarks).

62. The plurality also invoked two interpretative canons on its way to finding ambiguity, but the opinion does not apply them in a conventional way. *Noscitur a sociis*, “a word is known by the company it keeps,” is employed, as “any record [or] document” appears narrower than “tangible object.” *Id.* at 1085 (plurality opinion). However, a narrowing construction of the latter is unnecessary, as the terms can be interpreted consistently as different varieties of a federal investigation’s evidence. The plurality similarly invoked *ejusdem generis*, “[w]here general words follow specific words in a statutory enumeration, the general words are [usually] construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words,” *id.* at 1086 (quoting *Wash. State Dept. of Soc. & Health Servs. v. Guardianship Estate of Keffeler*, 537 U.S. 371, 384 (2003)), but, as Justice Alito pointed out, narrowing “tangible object” when the similarly broad “any record [or] document” precedes it was an “imperfect” use of the canon, to say the least. *Id.* at 1089 (Alito, J., concurring in the judgment).

63. *See id.* at 1088 (plurality opinion).

64. *Id.* at 1089 (Alito, J., concurring in the judgment).

knowns, . . . here, records and documents.”⁶⁵ It is not apparent *what* was unknown: the statute says “tangible objects.” Justice Alito asked whether the reader would “raise an eyebrow” if asked whether a crocodile was similar to a record or document,⁶⁶ suggesting the government’s position strayed far from common sense, and approached absurdity. Justice Alito’s use of an invented factual scenario to highlight the overbroad scope of the government’s proposed statutory reading finds company in *Bond*’s majority opinion: his crocodiles fulfill the same function as Justice Roberts’s parents-who-poison-goldfish.⁶⁷ Justice Alito was also “influenced by” the statute’s title, namely that it referred to “records,” instead of, presumably, a more expansive noun such as “tangible objects” or “evidence.”⁶⁸ Contrasting the statute’s title with the defendant’s conduct serves the same function as *Bond*’s repeated invocation of the treaty’s title, the statute’s name, and the grand internationalist ambitions motivating their enactment: the statute at issue was meant for bigger and better things than prosecuting small-timers. Thus a fish could not be a “tangible object” because, here, that term can include only “something similar to records or documents.”⁶⁹

Justice Kagan’s dissenting opinion, joined by Justices Scalia, Kennedy, and Thomas, is convincing that “conventional tools of statutory construction” applied in a conventional way lead to an affirmance.⁷⁰ Yet the result reached by the plurality and concurrence has a ring of justice to it. Targeting slightly nefarious fishermen is certainly not why the Sarbanes-Oxley Act was enacted; the same goes for the prosecution of an amateur harasser under the Chemical Weapons Convention Implementation Act. What, then? Part II explores whether there might be a way to reconcile the results reached by the *Bond* majority with those reached by the *Yates* plurality and concurrence through traditional statutory analysis, namely by coining a new substantive canon of construction, termed the overcriminalization canon. The Essay then proposes a constitutional basis for such a canon, which if accepted, would justify the holdings of *Bond* and *Yates*.

65. *Id.*

66. *Id.*

67. *See supra* note 37 and accompanying text.

68. *Yates*, 135 S. Ct. at 1090 (Alito, J., concurring in the judgment).

69. *Id.* at 1089.

70. *Id.* at 1091 (Kagan, J., dissenting). In particular, the dissent’s affirmative case for adopting the plain meaning of “tangible object” was convincing: Justice Kagan detailed how the phrase is used in sundry statutes (federal and state) and procedural rules relating to evidence. *See supra* note 57. Same for the dissent’s criticisms of each of the plurality’s and concurrence’s doctrinal moves on the way to their findings of ambiguity. *See supra* notes 57-61 and accompanying text.

II. THE OVERCRIMINALIZATION CANON

Substantive canons are “meant to reflect a judicially preferred policy position,” in contrast to content-neutral interpretive canons.⁷¹ There are several substantive canons that impose extra burdens on Congress in certain circumstances, such as when lawmakers attempt to abrogate states’ Eleventh Amendment immunity or preempt state laws.⁷² Substantive canons represent the Court putting a finger on the scale of justice.

Attempting to synthesize the Court’s analyses in *Bond* and *Yates* raises two questions: Is there a new substantive canon of construction relating to overcriminalization in the works? And if so, is the creation of that new canon justified?

The answer to the first question appears to be *yes*, whether or not the Court admits it. Based on *Bond* and *Yates*, the overcriminalization canon applies when a defendant is charged under multiple criminal statutes, yet each appears to serve the same function as applied to the defendant’s conduct; there seems to be no need to accuse the defendant of *multiple serious crimes*. It imposes a not-quite-clear-statement-rule burden on the government,⁷³ empowering defendants to make holistic statutory arguments despite clear text in a given provision.

More specifically, the overcriminalization canon (1) uses a statute’s title⁷⁴ as a proxy for the legislation’s bigger-picture aims and (2) allows a common-sense reading of the whole statute to trump—or at least find ambiguity in—the very broad meaning that results from parsing a provision’s individual words.⁷⁵ At least members of the Court—Roberts, Ginsburg, Breyer, and Sotomayor—(3) consider whether the particular prosecution is *necessary*, given the other laws under which the defendant could be—and in *Yates*, was—prosecuted.⁷⁶

The answer to the second question, whether creating this new canon is justified, is *maybe*. According to one scholar, a new canon must be sufficiently “grounded in the courts’ understanding of how to treat statutory text with refer-

71. James J. Brudney & Corey Ditslear, *Canons of Construction and the Elusive Quest for Neutral Reasoning*, 58 VAND. L. REV. 1, 13, 14 n.58 (2005).

72. *Id.* at 14 (collecting cannons).

73. *Bond* did impose a clear statement rule, but based on federalism principles, and there was none in *Yates*, although the plurality did state that if the government’s reading of “tangible object” was correct, “one would have expected a *clearer* indication of that intent.” *Yates*, 135 S. Ct. at 1083 (emphasis added).

74. See *supra* note 35 and accompanying text (*Bond* discussing title); *supra* note 56 and accompanying text (*Yates* plurality discussing title); *supra* note 68 and accompanying text (*Yates* concurrence discussing title).

75. See *supra* notes 28, 31 and accompanying text (*Bond* invoking educated-user-of-English definition; discussing statute’s general purpose); *supra* note 58 and accompanying text (*Yates* plurality situating statute among other provisions); *supra* note 66 and accompanying text (*Yates* concurrence asking whether reader would raise an eyebrow, considering the category of nouns used).

76. See *supra* note 41 and accompanying text (*Bond* majority discussing state laws); *supra* note 59 and accompanying text (*Yates* plurality discussing “significant overlap”).

ence to judicially perceived constitutional priorities, pre-enactment common law practices, or specific statutorily based policies.”⁷⁷

While there might be other constitutional bases,⁷⁸ the Due Process Clause, specifically its fair notice requirement,⁷⁹ embodies a constitutional value for an overcriminalization canon to protect. Due process values, in the traditional sense, likely were not offended by either of the cases discussed in this Essay: both Bond and Yates surely *did* know what they were doing was unlawful.⁸⁰ Instead, the *Yates* plurality’s repeated use of due-process-themed language⁸¹ suggests a broader due process justification for invoking the canon when the government uses a big time statute against a small time defendant, as detailed below.

This more holistic due process conception would have to begin by confronting a bedrock criminal law rule: that ignorance of the law is no excuse.⁸² This legal rule may be unfair in our “law-rich world,” which is far afield from a time “when laws were largely congruent with morality, were widely known to everyone in the community (or everyone likely to encounter the law), or reasonably should have been known by someone in a profession or business as a rule specifically applying to that profession or type of business.”⁸³ And “law-rich” might be an understatement: there are 27,000 pages of federal criminal laws in the U.S. Code.⁸⁴

Given the enormous amount, and enormous complexity, of federal criminal law, the rule of lenity likely provides inadequate due process protection to defendants; specifically, defendants receive inadequate notice that their conduct constitutes a *federal felony*. The abundance of criminal statutes might mean the government should have to show, not actual subjective notice to the individual

77. Brudney & Ditslear, *supra* note 71, at 13.

78. Eighth Amendment or double jeopardy bases for an overcriminalization canon are beyond this Essay’s scope.

79. The Due Process Clause requires that “a fair warning . . . should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed.” *McBoyle v. United States*, 283 U.S. 25, 27 (1931).

80. Bond was harassing and attempting to injure another person, and Yates intentionally disobeyed a federal officer’s command.

81. Richard Re, *Stuntz’s Presence in Yates*, PRAWFSBLAWG (Mar. 2, 2015, 5:25 PM), <http://prawfsblawg.blogs.com/prawfsblawg/2015/03/stuntzs-presence-in-yates.html> (“[T]he *Yates* plurality invokes notice values by denying that Congress would ‘bury’ a broad law that people have ‘scant reason to anticipate’ and that denies the public ‘fair warning.’”).

82. See, e.g., Ronald A. Cass, *Ignorance of the Law: A Maxim Reexamined*, 17 WM. & MARY L. REV. 671, 671 (1976) (“Through the decisions, dissents and discourses, however, one Latin maxim, *ignorantia legis neminem excusat*, has escaped almost unscathed.” (footnote omitted)).

83. Ronald A. Cass, *Overcriminalization: Administrative Regulation, Prosecutorial Discretion, and the Rule of Law*, ENGAGE: J. FEDERALIST SOC’Y PRAC. GROUPS, July 2014, at 14, 14, 19.

84. Charles G. Koch & Mark V. Holden, *The Overcriminalization of America*, POLITICO MAG. (Jan. 7, 2015), <http://www.politico.com/magazine/story/2015/01/overcriminalization-of-america-113991>.

defendant, but something more than our (pre-*Bond* and -*Yates*) current regime required. Courts could use the overcriminalization canon to impose this burden, in essence requiring the government to prove “a reason for the defendant to have known that the law applied to the sort of conduct that the defendant contemplated.”⁸⁵ The overcriminalization canon would thus ensure more meaningful notice to defendants by restricting prosecutors to the “Cliff’s Notes” version of statutes. (A similar result might be achieved by shifting to a more purposivist analysis of criminal statutes.)⁸⁶

Adopting an overcriminalization canon would certainly increase the judiciary’s power and might prove unpredictable given its fact-specific nature and lack of concrete guidelines (unfortunately creating its own notice problems). But given the severity of overcriminalization’s harms, a canon to curb its worst excesses might outweigh its imperfections. The Court should explicitly consider these issues the next time it reviews a conviction resulting from an overreaching prosecution under a broadly worded provision in a statute designed to address issues much more pressing than those raised by the individual defendant’s conduct.

85. Cass, *supra* note 83, at 19. Cass’s argument was addressed to the legislature, not to the courts.

86. For a comparison of modern purposivism and textualism, see generally, John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70 (2006).