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## APOPLECTIC ABOUT HYPERLEXIS

*William D. Araiza\**

Mila Sohoni's article, *The Idea of Too Much Law*,<sup>1</sup> provides a broad examination of "the hyperlexis critique"—in plain English, the claim that there is too much law, especially federal law. This brief response begins with some observations about Sohoni's taxonomy of hyperlexis claims. It then offers a different, more narrative-based approach to the hyperlexis critique. It concludes by suggesting that this alternate perspective may help provide substance to a critique that, as Sohoni correctly observes, is both difficult to pin down and thus engage, yet profoundly corrosive of the legitimacy of our regulatory system.

### I. SOHONI'S CRITIQUE

After an introduction suggesting that all three federal branches have acknowledged a concern about hyperlexis,<sup>2</sup> Sohoni moves on to discuss various "accounts"<sup>3</sup> of hyperlexis. Her "accounts," however, reveal an ambiguity in her argument. At times it is unclear whether Sohoni's accounts focus on hyperlexis itself, or on dynamics that in turn generate hyperlexis. For example, she notes arguments that federal laws are either too numerous or complex, claims that directly address hyperlexis.<sup>4</sup> She then considers claims that Congress habitually exceeds its enumerated powers or delegates too much authority to administrative agencies.<sup>5</sup> Unlike the numerosity and complexity claims, these latter arguments implicate hyperlexis only tangentially. She then considers another direct hyperlexis claim—the argument that regulations are too costly.<sup>6</sup> After considering these arguments' implications, Sohoni ends with a "counsel of despair"<sup>7</sup> that no principled critique can zero in on how one decides whether there is in fact too much law, coupled with the warning that the prevalence of the critique undermines faith in government.

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\* Professor of Law, Brooklyn Law School. Thanks to Mila Sohoni for the opportunity to respond to her thought-provoking article, and to Sara Bernstein and Kristie LaSalle for fine research assistance.

1. 80 FORDHAM L. REV. 1585 (2012).

2. *See id.* at 1586–91.

3. *Id.* at 1601–22.

4. *See id.* at 1602–10.

5. *See id.* at 1610–14.

6. *See id.* at 1614–22.

7. *Id.* at 1631.

As suggested above, Sohoni's taxonomy of arguments is somewhat confusing. The numerosity, complexity, and cost arguments reflect direct claims of hyperlexis—arguments that, respectively, federal law is too verbose, complex, and expensive. By contrast, the federalism and delegation arguments implicate hyperlexis only indirectly, through claims that, respectively, congressional over-stepping of the federal-state balance and over-delegation to regulatory agencies create conditions in which hyperlexis can occur. While not a critical flaw in Sohoni's argument, this conflation of direct and indirect causes makes it harder to focus methodically on the hyperlexis phenomenon.

This confusion may reflect a deeper issue with Sohoni's method. She considers the hyperlexis critique as an abstract matter—hence her focus on concepts such as numerosity and complexity. So understood, she is correct to find that critique lacking. But abstract “accounts” of hyperlexis do not reflect the phenomenon as it is actually experienced. Perhaps hyperlexis, like obscenity, can only be identified when one sees it.<sup>8</sup> If so, we may make more progress by reasoning from actual stories that implicate hyperlexis anxiety.

This response suggests that scholars examine the hyperlexis critique at a more granular level, focusing on popular perceptions rather than abstractions. After all, if the hyperlexis critique flows fundamentally from such perceptions,<sup>9</sup> then investigating those perceptions may better reveal the nature of the concerns. In turn, that information may enable a more satisfying response.

## II. ONE EXAMPLE OF HYPERLEXIS ANXIETY: MEET THE SACKETTS

As one hyperlexis narrative, consider the story told by Chantell and Michael Sackett, the plaintiffs in *Sackett v. EPA*.<sup>10</sup> Their story, involving the Environmental Protection Agency's (EPA) administration of the Clean Water Act, constitutes the nightmare scenario—or perhaps one such scenario<sup>11</sup>—of those who worry about hyperlexis. In 2007, the Sacketts began building a home on a residential homesite they owned in an Idaho subdivision. The site was surrounded by homes and roads and otherwise indistinguishable from sites on which others had built single-family homes—the zoned use of the property. Nevertheless, late that year, the EPA issued the Sacketts a compliance order under the Clean Water Act, alleging that their property contained wetlands, ordering them to stop construction and remediate the wetlands damage their construction caused, and requiring them to allow EPA access to the parcel and documents

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8. *Cf. Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (“I shall not today attempt further to define the kinds of material I understand to be [obscenity] . . . . But I know it when I see it . . .”).

9. *See* Sohoni, *supra* note 1, at 1586–87 (noting complaints about hyperlexis in the popular press and among political commentators).

10. 132 S. Ct. 1367 (2012).

11. *See infra* note 36 and accompanying text (discussing another scenario that may implicate hyperlexis fears).

relating to it. The order warned that they were liable for fines of up to \$75,000 for each day of non-compliance. When the Sacketts sought judicial review of the order, the Ninth Circuit held that the statute precluded pre-enforcement review. Thus, judicial review would have to await EPA's decision to bring an enforcement action against them—a decision EPA might never make.<sup>12</sup>

The question before the Supreme Court was not the merits of the order—i.e., whether the Sacketts' property contained wetlands—but rather the availability of pre-enforcement review. The Court's unanimous answer, that such review was available,<sup>13</sup> was couched in the dry, technical jargon of the Administrative Procedure Act—mostly.<sup>14</sup> But most relevant for our purposes is the tenor of the Sacketts' factual narrative. Their brief opens with the following sentence: “The Clean Water Act casts a nationwide regulatory net that snags individual citizens doing ordinary, everyday activities.”<sup>15</sup> The theme that the statute imposes unanticipated (indeed, unanticipatable) liabilities echoes through the rest of their fact statement. Thus, the brief states that “Michael and Chantall Sackett are individual citizens unwittingly ensnared in this regulatory net.”<sup>16</sup> Not only were they performing “ordinary, everyday activities,”<sup>17</sup> but their legal violation could not have been reasonably foreseen: the brief observed that “[w]etlands are . . . defined by complex criteria . . . which defy consistent application and are not apparent to the average citizen.”<sup>18</sup> Nor did anyone warn them that their conduct was close to a legal danger zone: “The Sacketts had obtained no information that gave them any reason to believe that their property contained ‘wetlands’ regulated under the Clean Water Act. They obtained all required local permits . . . .”<sup>19</sup>

The Sacketts' legal argument about pre-enforcement review was, strictly speaking, distinct from this narrative. But the unavailability of that review was no mere technical flaw. Rather, adding legal force to their over-regulation narrative, the unavailability of judicial review trapped the Sacketts in a regulatory house of mirrors, where penalties accumulated daily for failure to comply with an administrative order alleging a regulatory violation the judicial review of which could only be triggered by

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12. *See Sackett*, 132 S. Ct. at 1369–73.

13. *Id.* at 1374 (finding that the compliance order constituted “final agency action” for purposes of judicial review, and that the Clean Water Act did not preclude such review).

14. *But see id.* at 1375 (Alito, J., concurring) (“The position taken in this case by the Federal Government . . . would have put the property rights of ordinary Americans entirely at the mercy of [EPA] employees.”); *id.* (“And if the owners want their day in court to show that their lot does not include covered wetlands, well, as a practical matter, that is just too bad.”); *id.* (“In a nation that values due process, not to mention private property, such treatment is unthinkable.”).

15. Brief for Petitioner at 4, *Sackett*, 132 S. Ct. 1367 (No. 10-1062), 2011 WL 4500687, at \*7.

16. *Id.* at 6.

17. *Id.*

18. *Id.* at 4.

19. *Id.* at 6.

the agency itself when—and if—it decided to bring an enforcement action. Too much law, indeed.

### III. HYPERLEXIS RECONSIDERED

In her article, Sohoni concludes that hyperlexis claims lack principled foundations, and thus cannot furnish the basis for a serious critique of our regulatory regime. I believe she is correct: abstract critiques of hyperlexis suffer from either logical flaws or the impossibility of establishing a coherent measurement metric. One might cavil with her analysis here and there. For example, Sohoni is probably too cavalier when she assumes that a tougher non-delegation doctrine would simply cause Congress to find new vehicles for enacting the same regulation.<sup>20</sup> One reason Congress finds regulation attractive is exactly that the looseness of current non-delegation doctrine allows it to legislate at low cost. Congress's use of vague statutory language allows legislators both to achieve compromise and avoid taking heat for particular policies while taking credit for "doing something" about the given problem.<sup>21</sup> But these are minor objections. Overall, she is right to conclude that "critiques of hyperlexis are difficult to operationalize individually [and] their cross-cutting ramifications make them impossible to operationalize in concert."<sup>22</sup> She is also correct that accounts from democratic process breakdowns are "elusive."<sup>23</sup>

By contrast, the Sacketts' framing of their case provides insight—if only impressionistic—into the root complaints about hyperlexis. The Sacketts portrayed themselves as "individual citizens doing ordinary, everyday activities," when they were "unwittingly ensnared" in the Clean Water Act's "nationwide regulatory net."<sup>24</sup> As explained earlier, their legal argument addressed the lack of judicial review of the compliance order that ensnared them, not the scope or depth of the net per se. These two facets of this case, however, combined to create a situation that led Justice Alito to ask the EPA's lawyer at oral argument, "[I]f you related the facts of this case as they come to us to an ordinary homeowner, don't you think most ordinary homeowners would say this kind of thing can't happen in the United States?"<sup>25</sup>

What about the Sacketts' story made Justice Alito so incredulous? In the colloquy in which his question appeared, he painted a picture of the Sacketts' plight:

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20. See Sohoni, *supra* note 1, at 1613–14.

21. See, e.g., Daniel B. Rodriguez, *Statutory Interpretation and Political Advantage*, 12 INT'L REV. L. & ECON. 217, 218 (1992) (credit-taking); Sandra B. Zellmer, *The Devil, the Details, and the Dawn of the 21st Century Administrative State: Beyond the New Deal*, 32 ARIZ. ST. L.J. 941, 955 (2000) (compromise).

22. Sohoni, *supra* note 1, at 1622.

23. *Id.* at 1624.

24. Brief for Petitioner, *supra* note 15, at 4, 6.

25. Transcript of Oral Argument at 37, *Sackett v. EPA*, 132 S. Ct. 1367 (2012) (No. 10-1062).

You . . . buy property to build a house. You think maybe there's a little drainage problem in part of your lot. So, you start to build the house, and then you get an order from the EPA which says: You have filled in wetlands; so, you can't build your house. Remove the fill, put in all kinds of plants, and now you have to let us on your premises whenever we want to. You have to turn over to us all sorts of documents, and for every day that you don't do all this, you're accumulating a potential fine of \$75,000. And, by the way, there's no way you can go to court to challenge our determination that this is a wetlands until such time as we choose to sue you.<sup>26</sup>

Justice Alito might as well have been paraphrasing the Sacketts' self-narrative. Add in the lack of prompt judicial review of the agency's determination, and one can understand Justice Alito's exclamation in his concurring opinion: "unthinkable."<sup>27</sup>

This description illustrates one variation of hyperlexis, what we can call the "lightning bolt." In this scenario, law reaches so broadly, deeply, and unpredictably that it traps individuals doing things they would never expect to trigger legal liability. So understood, the hyperlexis critique comes into focus: the problem in this scenario is not too many laws, or overly expensive or even complex laws, but laws that prohibit innocuous conduct that normal, law-abiding citizens engage in every day.

This understanding of hyperlexis eases some of the analytical difficulties Sohoni identifies. For example, she rightly notes that determining the complexity of a legal rule is itself quite difficult, thus rendering unhelpful what she calls "the Argument from Complexity."<sup>28</sup> Is a terse but vague tort rule (such as, "don't be negligent") more complex than detailed regulations governing how one acts in the world? Sohoni rightly notes the elusiveness of a principled answer to that question, as well as to questions about numerosity and costs. But the lightning bolt critique of hyperlexis points at a different inquiry: whether in some fundamental way it is unanticipated that certain conduct will trigger legal liability.<sup>29</sup>

As befits a generalized public anxiety about law, this critique finds expression in both popular imagination and legal doctrine. As to the former, we know of the Stalin-era fear of the midnight knock on the door, the sign that you have done something to get on the secret police's list. Straddling public imagination and legal doctrine is the narrative of landowners finding themselves suddenly subject to all the restrictions of the Endangered Species Act (ESA) when a single animal, usually an insignificant or humorous-sounding one, is found scurrying across one's

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26. *Id.* at 37–38.

27. *See Sackett*, 132 S. Ct. 1367, 1375 (Alito, J., concurring); *supra* note 14.

28. Sohoni, *supra* note 1, at 1607.

29. Indeed, Sohoni cites Richard Epstein's argument that legal complexity comprises the degree to which a legal rule "has *pervasive application* across routine social activities." *Id.* (quoting RICHARD A. EPSTEIN, *SIMPLE RULES FOR A COMPLEX WORLD* 29 (1995)). As explained in the text, my argument goes beyond mere pervasive application, to consider the degree to which *enforcement* of such a rule can be perceived as arbitrary.

property.<sup>30</sup> At the other extreme of seriousness are the views of Supreme Court justices who voted to invalidate the death penalty because it was imposed so arbitrarily.<sup>31</sup> What unites these examples is the freakishness of the liability imposed: you did something—who knows what?—to get your name on the secret police list, a “hapless toad” happened to crawl across your property, or you happened to be the one murder defendant out of a hundred whose jury decided on death.

But the lightning bolt critique implicates more than simple freakishness. It also reflects anxiety about the breadth and depth of the law, which ensures that any citizen, doing any commonplace thing, might be struck at any time. Anyone—not just a political opponent or a convicted murderer—is subject to the lightning bolt.<sup>32</sup> Thus, this critique also implies a public intuition about what conduct is legitimate, as encompassed in the Sacketts’ self-description as “individual citizens doing ordinary, everyday activities.”<sup>33</sup>

Under this critique, it is irrelevant whether tort liability is imposed via a “simple” common law rule or a “complex” set of regulations. Everyone understands that if you act carelessly, you may be sued. But nobody thinks that building a house in a residential subdivision risks liability. Everyone does it. It is innocent conduct. How can it be wrong? And if it *is* wrong, then something is wrong with the law. If anyone can be snagged by a regulatory net when simply minding her own business, then that net must be too wide.

#### CONCLUSION: HYPERLEXIS FROM THE GROUND UP

The Sacketts’ narrative complements Sohoni’s more abstract investigation of hyperlexis. It translates anxiety about hyperlexis as anxiety about arbitrary thunderbolts of liability hurled down (in particular, from afar) to strike innocent people engaging in innocuous activities. True or not, the story of a couple doing what many Americans do every day (and what many would like to do) when they were suddenly accosted by faraway

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30. See, e.g., *Rancho Viejo LLC v. Norton*, 334 F.3d 1158, 1160 (D.C. Cir. 2003) (Roberts, J., dissenting from rehearing en banc) (describing “the taking [under the ESA] of a hapless toad, that for reasons of its own, lives its entire life in California”); Laura J. Hendrickson, *Coverage of the Endangered Species Act in Four Major Newspapers*, 45 NAT. RESOURCES J. 135, 162 (2005) (discussing this phenomenon).

31. See *Furman v. Georgia*, 408 U.S. 238, 293–95 (1972) (Brennan, J., concurring); *id.* at 309–10 (Stewart, J., concurring).

32. Cf. EPSTEIN, *supra* note 29, at 29 (“The criminal law of homicide . . . provides its own safe harbor: don’t kill anyone. In contrast, the rules regulating the use of property or the hiring and firing of workers, or even the selling of products or the buying and selling of companies, provide no similar haven. Rather these rules routinely intrude into the lives of ordinary productive people, and are not directed to the destructive activities of a very small portion of the population. For my purposes at least, a complex rule is one that . . . has *pervasive application* across routine social activities, and is not directed solely to the dangerous activities of people who live at the margins of society. Legal complexity is not merely a simple measure of the inherent or formal properties of legal rules. It is also a function of how deeply they cut into the fabric of ordinary life.”).

33. Brief for Petitioner, *supra* note 15, at 4.

bureaucrats and slapped with massive unreviewable daily fines seems “unthinkable.”<sup>34</sup> The violent disabusal of their intuition that they were doing nothing even remotely wrong surely engenders suspicion that maybe there is too much law. The resonance of their story<sup>35</sup> suggests that, at least in the popular mind, there may in fact be something to the hyperlexis critique.

The Sacketts’ story does not reflect the only plausible version of hyperlexis anxiety. For example, one might also tell stories of businesses suffering under comically paternalistic over-regulation, as when Ronald Reagan famously claimed that Occupational Health and Safety Administration (OSHA) had issued over 100 rules addressing how to climb a ladder.<sup>36</sup> That hyperlexis critique is different from the one implied by the Sacketts’ story. One can easily frame other narratives as well.

The ultimate point is that Sohoni’s failure to find rubrics that “identify, measure, and critique”<sup>37</sup> the hyperlexis phenomenon calls for a more inductive approach that understands the hyperlexis critique as taking shape from individual stories. By examining those stories, we may develop a more helpful taxonomy of hyperlexis complaints based on substantive categories (for example, the thunderbolt story) rather than abstract explanations such as numerosity and over-delegation. These more informative categories may help us better identify the scope of any actual hyperlexis problem. If the stories reveal a non-existent problem, or one not flowing from anything identifiable as hyperlexis, then scholars may be able to rebut the claim and thus blunt what Sohoni correctly identifies as the corrosive force the hyperlexis claim exerts on our governmental institutions.<sup>38</sup> And if those complaints do suggest real hyperlexis, they can be resolved on their own terms, and not through blunderbuss approaches such as the generally ill-conceived regulatory reform proposals currently pending in Congress.<sup>39</sup>

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34. *Sackett v. EPA*, 132 S. Ct. 1367, 1375 (2012) (Alito, J., concurring).

35. For one example of how the popular media viewed the Sacketts’ case, see ‘*Little Guy*’ Wins High Court Fight over Property Rights, CNN (Mar. 21, 2012), [http://articles.cnn.com/2012-03-21/us/us\\_sctus-property-rights\\_1\\_property-rights-high-court-clean-water-act?s=PM:US](http://articles.cnn.com/2012-03-21/us/us_sctus-property-rights_1_property-rights-high-court-clean-water-act?s=PM:US).

36. See, e.g., Robert Stiff, *A Battle Best Not Waged*, EVENING INDEP., May 1980, at 1A. According to this source, Reagan’s claim was false.

37. Sohoni, *supra* note 1, at 1601.

38. See *id.* at 1628–31.

39. See *id.* at 1592–94 (discussing these proposals); William D. Araiza, *Regulatory Changes, Part 3: Curbing Independent Agencies’ Independence(?)*, PRAWFSBLAWG (Nov. 30, 2011, 7:23 PM), <http://prawfsblawg.blogs.com/prawfsblawg/2011/11/regulatory-changes-part-3.html> (same).