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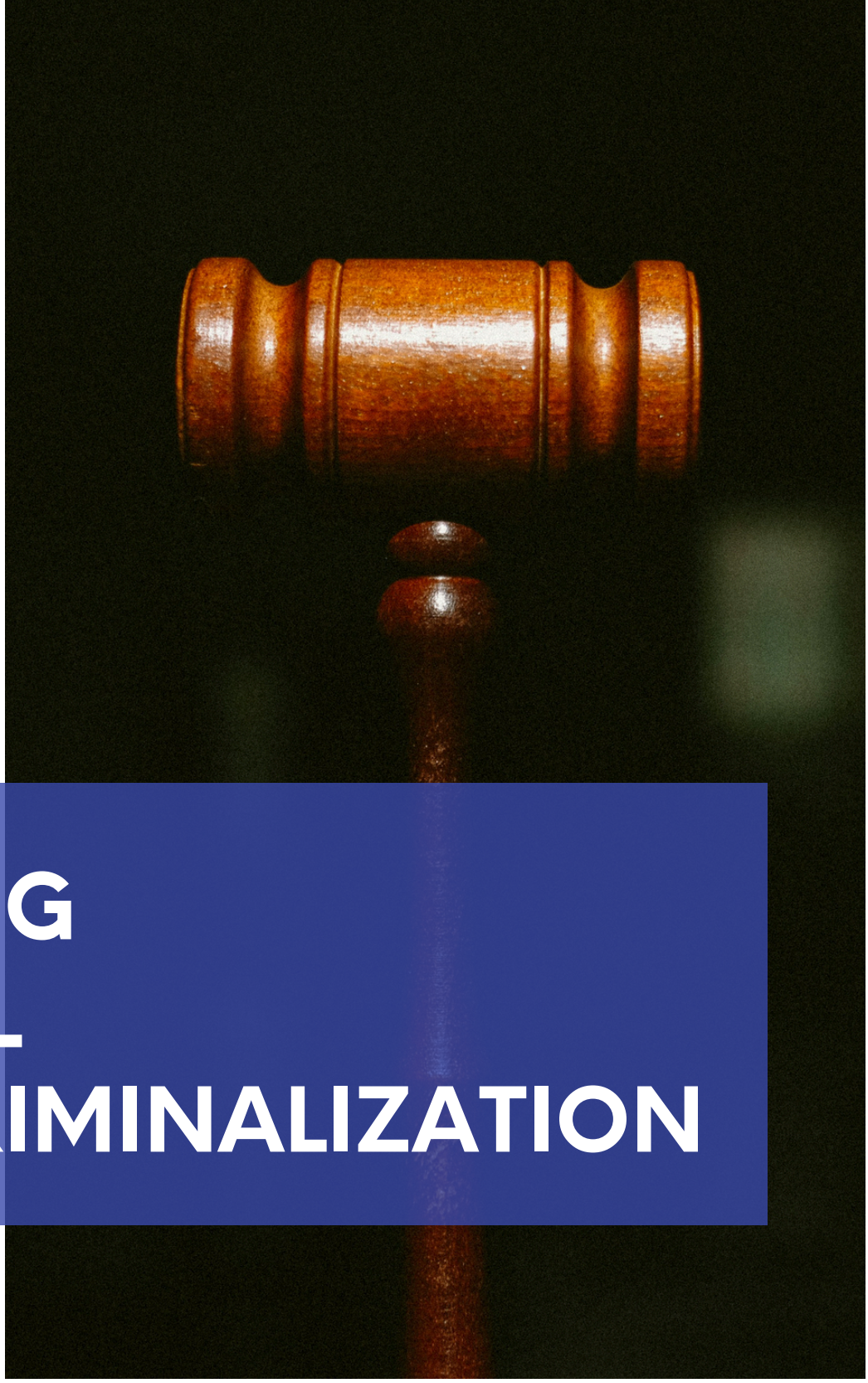

FIGHTING FEDERAL OVERCRIMINALIZATION

THE COUNCIL TO MODERNIZE GOVERNANCE

With the Prospect of a Post-Chevron World, Now Could be the Time to Modernize the Government's Approach to Criminal Regulations.

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I. Introduction

Administrative law appears on the precipice of seeing substantial changes in the near future. The Supreme Court, in the *Loper Bright Enterprises* case, [1] appears poised[2] to substantially change—or even overturn—the doctrine of "*Chevron* deference,"[3] Which effectively gives agencies tremendous leeway to interpret their own statutory responsibilities. Over the decades since *Chevron*, executive agencies have taken it upon themselves to interpret statutes broadly, seemingly hand themselves as much power and authority as possible. At the same time, the Code of Federal Regulations has exploded, producing many new criminal "laws" that were never passed by Congress and cover activities the average American might never suspect to be illegal.

Imagine you, like me, own a dog. It is a beautiful spring day in the D.C. area and you want to take Fido out to get some exercise. You go down to the National Mall, past the groups of tourists gawking at the monuments and newly-minted Hill staffers attempting to play softball. You find a nice, open spot of grass. You take a tennis ball and throw it. Fido dutifully trots off and returns with his new prize, ready for round two.

But, after a few minutes, you feel a tap on your shoulder. You turn around to see a stern face. "Your dog *must* be on a leash."

You apologize and begin to clip Fido back to his restraint.

"Can you call someone to take him home?"

Confused, you wonder, can't I just walk back?

These thoughts are quickly banished. "We're going downtown."

The bewildered look on your face remains as you are placed into a police car and driven to the station for processing. You quickly learn, you're facing time—hard time. Up to six months. You see, the National Mall is a National Park. And not having your dog on a leash in a National Park is a criminal offense, punishable by up to six months in federal prison.

This story is a dramatization but, as they say, it is inspired by real events. In 2008, Peter McMahon—husband of former White House Press Secretary and current Fox News

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[1] *Loper Bright Enterprises v. Raimondo*, Case No. 22-451 (S.Ct.); see also the companion case *Relentless, Inc. v. Department of Commerce*, Case No. 22-1219 (S.Ct.).

[2] For Council to Modernize Governance's take on the Supreme Court's oral arguments, see Curtis Schube, "Will the Supreme Court Impose A New 'Relentless' Doctrine to Replace Chevron?," modernizegovernance.org, February 15, 2024. https://modernizegovernance.org/will-the-supreme-court-impose-a-new-relentless-doctrine-to-replace-chevron/.

[3] Named after *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984). The *Chevron* doctrine stands for the idea that, when Congress has passed a statute that delegates power to an executive agency to enforce, the agency is given deference in interpreting the statute.

commentator Dana Perino, was out walking his dog without a leash.[4] He was initially given a ticket. When it was not promptly paid due to a series of snafus, he found himself placed under arrest, handcuffed, and placed in a cell until the court could hear his case.[5] He was then released after paying the associated fine.[6]

While Mr. McMahon's story is somewhat unusual—most Park Police officers thankfully have far more common sense than issuing an arrest warrant for walking a dog off a leash—it highlights a real and growing risk.[7]

As it turns out, the National Park Service is one of several agencies that have a broad grant of power from Congress to write whatever regulations it deems necessary and back all of those regulations with the power of criminal enforcement. The result is that there are now thousands of criminal statutes and hundreds of thousands of criminal regulations, many of which with few checks to make sure Americans even know they exist before risking a criminal record or even a trip to prison.

It does not have to be this way. While it is very difficult to fully root out problems stemming from overcriminalization and low or nonexistent *mens rea* requirements, there are a number of steps that Congress and the President can take today to at least make the situation a little better, including:

- Cataloging all of the criminal laws and regulations and their accompanying *mens rea* requirements;

- Setting a default *mens rea* standard of knowing and willful for all criminal regulatory violations;

- Requiring agencies to specify the *mens rea* standard for all elements of the regulatory offense; and

- Clarifying that regulations with both civil and criminal consequences do not receive judicial deference.

This problem of overcriminalization of the federal regulations is not new. But with the upcoming time of transition within administrative law jurisprudence on the horizon, the opportunity is ripe to reform this problem. This paper explores how.

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[4] Dana Perino, "How My Husband Ended Up in Jail After Walking Our Dog," The Daily Signal (Oct. 24, 2016), https://www.dailysignal.com/2016/10/24/how-my-husband-ended-up-in-jail-after-walking-our-dog/.

[5] Ibid.

[6] Ibid.

[7] Though, tellingly, even after everyone involved appeared to acknowledge the situation was ridiculous and "should not have happened," Mr. McMahon still had to pay the fine. No one apparently thought an unnecessary day trip through the criminal justice system was sufficient punishment to let the matter go at that. Ibid.

II. Americans are Beset by an "Excess of Law-Making"

In their wisdom, the framers of our Constitution warned "the faculty and excess of law-making seem to be the diseases to which our governments are most liable. . . . It will be of little avail to the people, that the laws are made by men of their own choice, if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood."[8]

Unfortunately, over time, their fears have been realized. Today, the United States Code—that is, the formal compendium of U.S. statutes—stretches over 48,000 sections spread through 53 separate "titles."[9] Worse, the Code of Federal Regulations, which supplements the U.S. Code with agency regulations, encompasses "236 volumes containing more than 175,000 pages."[10] Neither the U.S. Code nor the Code of Federal Regulations may fairly be described as "light" reading, even by the most idiosyncratic consumer. Yet, the American people—many of whom will never crack the cover of either—are responsible for abiding by every word therein.

To make matters worse, what is a "crime" is not always clear. The frightening reality is that no one—not the Department of Justice, charged with prosecuting Americans, nor Congress, charged with creating laws—actually knows how many criminal laws are out there lurking within the 48,000 sections of the U.S. Code, let alone the 175,000 pages of the Code of Federal Regulations.

To be sure, people have tried count:

- In the 1980s, the Department of Justice tried to determine how many separate federal crimes resided within the U.S. Code. It produced only an "educated estimate: about 3,000 criminal offenses."[11]

- In 1998, the American Bar Association picked up the ball. It "concluded that the number of crimes was by then likely much higher than 3,000, but didn't give a specific estimate," with its author noting "[w]e concluded that the hunt to say, 'here is an exact number of federal crimes,' is likely to prove futile and inaccurate."[12]

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[8] Alexander Hamilton or James Madison, Federalist Paper No. 62. https://avalon.law.yale.edu/18th_century/fed62.asp.

[9] GianCarlo Canaparo, Patrick McLaughlin, Jonathan Nelson, and Liya Palagashvili, "Count the Code: Quantifying Federalization of Criminal Statutes," The Heritage Foundation (Jul. 7, 2022), https://www.heritage.org/crime-and-justice/report/count-the-code-quantifying-federalization-criminal-statutes.

[10] Ibid.

[11] Gary Fields and John R. Emshwiller, *Many Failed Efforts to Count Nation's Federal Criminal Laws*, Wall St. J. (Jul. 23, 2011), https://www.wsj.com/articles/SB10001424052702304319804576389601079728920.

[12] Ibid.

- In the late 90s and early 2000s, a professor—Dr. John Baker—"undertook to replicate the ABA's methodology" to update their numbers.[13] "[H]e reached the 'fairly conservative' estimate that the U.S. Code contained more than 4,000 crimes."[14]

- In 2008, Dr. Baker once again updated his study, concluding "that the U.S. Code had at least 4,450 federal crimes."[15]

- Most recently, in 2019, a study by the Heritage Foundation and Mercatus Center at George Mason University estimated that the U.S. Code alone contained at least 5,199 crimes.[16]

Even these stunning numbers are emphatic undercounts because none of the studies cited above sought to count regulatory crimes. Hard estimates of the number of federal regulatory crimes are impossible to come by, with estimates over a decade ago ranging from 100,000 to 300,000 separate offenses. [17]

This vast expanse of federal crimes creates a number of problems.

a. The Tremendous Breadth of Federal Criminal Law Risks Divorcing Punishment from Blameworthiness

First and foremost, it raises questions about whether there is a proper fit between the practical punishment[18]and the moral stigma of a criminal conviction on one hand and the level of moral blameworthiness on the other.

It is a "great legal maxim that 'ignorance of the law is no excuse.'"[19] This maxim makes sense where there is either a small number of laws or where the law criminalizes inherently wrongful activity—so-called *mallum in se* offenses—such as theft, rape, and murder.[20] It becomes much more troublesome where, as today, there are more crimes than even the

[13] Canaparo et al.

[14] Ibid.

[15] Ibid.

[16] Ibid.

[17] Fields and Emshwiller.

[18] Including both formal sentences and associated collateral consequences, such as banking or professional restrictions.

[19] John G. Malcolm, "Morally Innocent, Legally Guilty: The Case for Mens Rea Reform," Federalist Society Review 18 (2017), 41. https://fedsoc.org/fedsoc-review/morally-innocent-legally-guilty-the-case-for-mens-rea-reform.

[20] Ibid.

Department of Justice can count—let alone the average citizen understand—many of which relate to subjects that are not intuitively wrong. [21]

Two central purposes of criminal law are to punish bad acts and to deter future wrongdoing. But these purposes can only be served when defendants know they are breaking the law. As Justice Robert Jackson noted, "[h]istorically, our substantive criminal law is based on the theory of punishing the vicious will. It postulates a free agent confronted with a choice between doing right and doing wrong and freely choosing to do wrong."[22] But people can only make a free choice between doing right and doing wrong when they know what is "right." The vast expanse of criminal strictures—particularly *malum prohibitum* offenses—makes this exceedingly difficult.

This creates a risk that criminal prosecution and conviction becomes more akin to the weather, something that exists and strikes more or less based on luck than blameworthiness. This risk is particularly acute when the vast web of criminal laws is combined with lower *mens rea* standards.

Mens rea refers to the state of mind necessary to be convicted of a crime. It can range from a willfulness standard, where a defendant generally must know what they are doing and that they are committing a crime, to a strict liability standard, where it doesn't matter if a defendant knew something was a crime or even intended to do it at all.[23] The rise in the number of criminal laws has also coincided with a rise in the number of strict liability offenses, as well as offenses with amorphous "knowing" standards that can require as little as consciously knowing one is undertaking an action.[24]

The confluence of an unknowable number of criminal prohibitions and lower *mens rea* standards breaks the traditional link between conviction and a "vicious will." Instead, it means citizens can and are subject to the sanctions and stigma associated with criminal conviction without morally blameworthy conduct.

b. The Burden of Excessive Criminal Liability Falls on the Little Guy

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[21] Ibid.

[22] *Morisette v. United States*, 342 U.S. 246, 250 n.4 (1952) (quoting Pound, Introduction to Sayre, Cases on Criminal Law (1927)).

[23] Even this spectrum is an oversimplification. In 1970, The National Commission on Reform of Federal Criminal Laws submitted a report that identified a "'staggering array' of mental-state terms," including "78 different *mens rea* terms" in Title 18 of the U.S. Code. Michael A. Foster, "Mens Rea: An Overview of State-of-Mind Requirements for Federal Criminal Offenses," Congressional Research Service (June 30, 2021), 10. https://crsreports.congress.gov/product/pdf/R/R46836 (quoting 1 Nat'l Comm' on Reform of Fed. Crim. L., Woking Papers 119-120 (1970)).

[24] *See generally* Ibid. ("This concept of a guilty mind as a necessary component of crime 'took deep and early root in American soil,' but by the middle of the twentieth century, the common-law development of a particular state-of-mind requirement on a crime-by-crime basis (and their inconsistent codification, in whole or in part, in state criminal codes) led to considerable disarray and confusion." (citations omitted)).

One common response to concerns about the consequences of an unwieldy number of criminal proscriptions combined with low *mens rea* requirements is that they are necessary to prevent bigger industry players and corporate leaders from evading responsibility for malfeasance through feigned ignorance.[25]

But it is more likely that the opposite is true. As former Attorney General Edwin Meese warned, "[l]aws with inadequate criminal intent requirements are particularly hazardous for individuals and small businesses, because ordinary citizens lack the time, money, and lawyers to stay on top of thousands—or hundreds of thousands—of constantly changing legal requirements. No person with a family to feed and a mortgage to pay has time to pore through the Code of Federal Regulations to ensure perfect compliance with 300,000 criminal regulations, just as no small business owner can afford to hire the army of lawyers necessary to understand the intricacies of the U.S. Code."[26]

Increased regulation—particularly regulation backed by serious consequences—serves to create barriers to entry in economic fields. They benefit larger corporate entities that can afford both costly compliance measures as well as lawyers to analyze the lay of the land and avoid traps for the unwary. And, unlike smaller companies or individuals, larger corporations have the resources to withstand enforcement actions taken by the government.

The founders were well aware of these concerns. Federalist 62 warned "[e]very new regulation concerning commerce or revenue, or in any way affecting the value of the different species of property, presents a new harvest to those who watch the change, and can trace its consequences; a harvest, reared not by themselves, but by the toils and cares of the great body of their fellow-citizens. This is a state of things in which it may be said with some truth that laws are made for the FEW and not the MANY."[27]

The Heritage Foundation's John G. Malcom expressed much the same sentiment in more modern prose, warning:

> [M]any executives at large corporations work in heavily regulated industries. They can hire lawyers on retainer to keep abreast of complex regulations as they change over time to adapt to evolving conditions. Their corporations are normally given explicit warnings by government officials, usually as a condition of licensure, about what the law requires and the potential criminal penalties for violating it. Therefore, they cannot reasonably or credibly claim that they were not aware that their actions might subject them to criminal liability, and would

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[25] *See* Malcolm 45-46. ("[I]ndividuals and agencies, acting out of an understandable desire to protect the public . . . believe, or at least fear, that insisting upon robust mens rea standards in our criminal laws will give a pass to those who engage in conduct that harms our environment or society—most likely, in their view, wealthy executives working for large, multinational corporations.").

[26] *The Adequacy of Criminal Intent Standards in Federal Prosecution*, United States Senate Committee on the Judiciary, (Jan. 20, 2016), (Testimony of Edwin Meese III). https://www.judiciary.senate.gov/imo/media/doc/01-20-16%20Meese%20Testimony.pdf.

[27] Federalist 62.

> therefore be unlikely to benefit from more protective mens rea standards. In contrast, individuals and small businesses are far less likely to be able to afford expert lawyers to advise them.[28]

Far from championing the interests of the common man by holding the rich and powerful accountable, a tangled web of criminal laws and regulations serves to ensnare the unwary and discourage the disadvantaged by erecting legal and practical barriers to entering regulated markers. Excess criminal regulation hurts the little guy.

c. Prosecutorial Discretion is an Insufficient Protection

In response, some have looked to prosecutorial discretion to ameliorate the harsh consequences of an overabundance of laws combined with low *mens rea* standards.[29] But this is not an effective solution.

First, prosecutorial discretion does little to help individuals order their conduct to avoid breaking the law. By its very nature, it can only apply *after* a person has already violated the law.

Second, it leaves too much discretion in the hands of prosecutors to target disfavored individuals. Then-Attorney General (and future Supreme Court Justice) Robert Jackson warned:

> Therein is the most dangerous power of the prosecutor: that he will pick people that he thinks he should get, rather than cases that need to be prosecuted. With the law books filled with a great assortment of crimes, a prosecutor stands a fair chance of finding at least a technical violation of some act on the part of almost anyone. In such a case, it is not a question of discovering the commission of a crime and then looking for the man who has committed it, it is a question of picking the man and then searching the law books, or putting investigators to work, to pin some offense on him. It is in this realm—in which the prosecutor picks some person whom he dislikes or desires to embarrass, or selects some

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[28] Malcom 46.

[29] *See, e.g.*, Andrew G. Ogden, "Dying for a Solution: Incidental Taking Under the Migratory Bird Treaty Act," 38 William and Mary Environmental Law and Policy Review 38, No. 1 (Fall 2013), 29. (Observing that "Historically, the limiting mechanism on the prosecution of incidental taking under the [Migratory Bird Treaty Act, which has been interpreted as a strict liability offense] by non-federal persons has been the exercise of prosecutorial discretion by the [Fish and Wildlife Service]."); *U.S. v. FMC Corp.*, 572 F.2d 902,906 (2d Cir. 1978) (Observing that strict liability applications of the Migratory Bird Treaty Act that "would offend reason and common sense" "properly can be left to the sound discretion of prosecutors and the courts."). *See also* United States Department of Interior, "The Migratory Bird Treaty Act Does Not Prohibit Incidental Take," Principle Deputy Solicitor (Dec. 22, 2017). https://www.doi.gov/sites/default/files/uploads/m-37050.pdf. (Explaining the basis for not interpreting the MBTA to encompass accidental conduct); United States Department of Interior, "Permanent Withdrawal of Solicitor Opinion M-7050 'The Migratory Bird Treaty Act Does Not Prohibit Incidental Take,'" Principal Deputy Solicitor (March 8, 2021). https://www.doi.gov/sites/default/files/permanent-withdrawl-of-sol-m-37050-mbta-3.8.2021.pdf .

> group of unpopular persons and then looks for an offense, that the greatest danger of abuse of prosecuting power lies.[30]

Though perhaps apocryphal, the famed head of the Soviet Secret Police Lavrentiy Beria is famously reported to have put it much more succinctly: "Show me the man and I'll show you the crime."[31] Beria's boast and Jackson's fear straightforward: rather than starting with a crime and moving forward to find a perpetrator, authorities would start with a disfavored individual and work backwards to find criminal offenses attributable to them. The combination of a myriad of obscure laws combined with low or nonexistent *mens rea* requirements creates an environment where prosecutors can adopt the this approach, selectively targeting disfavored individuals because they are disfavored, rather than because the crime they are accused of merits prosecution. This threatens "the proud boast of our democracy that we have 'a government of laws and not of men.'"[32]

This is not to say that all, most, or even many prosecutors will act out of malice or misuse prosecutorial discretion. The vast majority are good people who want to do the right thing. But those good intentions are not enough to erase the dangers lurking in an overly broad criminal code. As Justice Stevens warned, even though "[p]rosecutors necessarily enjoy much discretion and generally use it wisely . . . the liberty of our citizens cannot rest at the whim of an individual who could have a grudge or, perhaps, just exercise bad judgment."[33]

While it may be the exception, rather than the rule, there are plenty of examples of officials exercising bad judgment. Tellingly, in the example in the introduction, even after everyone involved appeared to acknowledge the situation was ridiculous and "should not have happened," Mr. McMahon still had to pay the fine.[34]

Moreover, even where cooler heads ultimately prevail, it cannot undo the damage done through an overzealous application of an overbroad law. For example, back in 2011, an 11-year-old girl in Fredericksburg, VA, found a baby bird being menaced by a cat. With the bird's mother nowhere in sight, she swooped in to rescue the worried woodpecker, placed it securely in

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[30] *Morrison v. Olson*, 487 U.S. 654, 728 (1988) (Scalia, J., dissenting) (quoting R. Jackson, The Federal Prosecutor, Address Delivered at the Second Annual Conference of United States Attorneys, April 1, 1940).

[31] *See generally* Michael Henry, "Show me the man and I'll show you the crime," The Oxford Eagle (May 9, 2018), https://www.oxfordeagle.com/2018/05/09/show-me-the-man-and-ill-show-you-the-crime/. ("Lavrentiy Beria, the most ruthless and longest-serving secret police chief in Joseph Stalin's reign of terror in Russia and Eastern Europe, bragged that he could prove criminal conduct on anyone, even the innocent. 'Show me the man and I'll show you the crime' was Beria's infamous boast.")

[32] *Morrison*, 487 U.S. at 697 (Scalia, J., dissenting).

[33] *U.S. v. Wells*, 519 U.S. 482, 512 n.15 (1997) (Stevens, J., dissenting); *see also Baggett v. Bullitt,* 377 U.S. 360, 373–374 (1964) ("It will not do to say that a prosecutor's sense of fairness and the Constitution would prevent a successful ... prosecution for some of the activities seemingly embraced within the sweeping statutory definitions"); *Keyishian v. Board of Regents of Univ. of State of N.Y.,* 385 U.S. 589, 599 (1967) ("It is no answer to say that the statute would not be applied in such a case").

[34] Perino.

a cage, and, along with her mother, went to a local hardware store. While there, she was confronted by an agent of the U.S. Fish and Wildlife Service who began an investigation that culminated two weeks later with a Federal agent, accompanied by a State Trooper, presenting the girl and her mother with a criminal citation threatening hundreds of dollars in fines and up to a year in jail. Luckily, all reason had not flown the coop. Eventually—and once the Service's actions became public—the Service concluded that the citation was issued in error and retracted it.[35]

Even though cooler heads ultimately prevailed in the example above, it is hard to imagine that this was a positive experience for that little girl.

Even when cooler heads prevail, excessively zealous regulatory enforcement may still impose high costs. Defending a crime can cost more than the fines. People on the receiving end of regulatory inquiries often have to hire legal counsel and accrue legal fees even if they are ultimately vindicated. This is not a cost that can be recouped.

III. Criminal Regulations are Particularly Problematic

Amidst this morass of federal crimes, criminal regulations are particularly pernicious.

First, as described above, the number of criminal regulations is orders of magnitude higher than criminal statutes. While no one is entirely sure, the best estimate is somewhere between 100,000 and 300,000 crimes created by regulation compared to just under 5,200 crimes created by statute—an over 1900% increase in the number of crimes when regulations are factored in.

Second, criminal regulations are subject to less democratic accountability. James Madison warned "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."[36] In doing so, he cited to concerns expressed by Montesquieu that "[w]hen the legislative and executive powers are united in the same person or body . . . there can be no liberty, because apprehensions may arise lest THE SAME monarch or senate should ENACT tyrannical laws to EXECUTE them in a tyrannical manner."[37]

Concerns about the aggregation of legislative and executive power in the hands of a single executive arose out of the framers' experience with the British monarchy. As Philip Hamberger explained, under common law, "kings could make law only in Parliament," where "monarchs participated as part of the legislative body" and "the entire nation was said to present

[35] "Agency Cancels $535 Fine for Woodpecker Savior's Mom," NBC News (Aug. 2, 2011), https://www.nbcnews.com/id/wbna43986826.

[36] James Madison, Federalist 47 (Feb. 1, 1788), https://avalon.law.yale.edu/18th_century/fed47.asp.

[37] Ibid.

and thus capable of consenting to new laws."[38] Over time, however, this began to change. In 1539, Parliament passed the Act of Proclamations, giving the King's proclamations the force and effect of an act of Parliament.[39] This action sparked pushback in short order, and "was repudiated by Parliament less than a decade later,"[40] leading David Hume to "observe that, when Parliament 'gave to the king's proclamation the same force as to a statute enacted by parliament,' it "made by one act a total subversion of the English constitution."[41]

These concerns were factored when drafting the U.S. Constitution. Article I vests the legislative power of the United States in Congress. According to Justice Gorsuch, "[w]hen it came to the legislative power, the framers understood it to mean the power to adopt generally applicable rules of conduct governing future actions by private persons—the power to 'prescrib[e] the rules by which the duties and rights of every citizen are to be regulated,'[] or the power to 'prescribe general rules for the government of society.'"[42] This "requires the exercise of legislative power."[43]

This allocation makes sense. After all, Congress is, by its very nature, more accountable to the American people. Members of the House of Representatives are elected every two years, while members of the Senate are elected every six years. By contrast, while Presidential administrations may change every four years, the vast majority of the federal bureaucracy remains indefinitely.

In response, many have observed that it is hard or impractical to expect Congress to deal with the myriad of detail involved in regulating the modern world. For example, Justice Kagan wrote "'in our increasingly complex society, replete with ever changing and more technical problems,' this Court has understood that 'Congress simply cannot do its job absent an ability to delegate power under broad directives.'" [44]

But the difficulty of passing criminal laws through Congress is a feature, not a bug, of our constitutional system. Federalist 62 explicitly touted the benefits of a Senate that made it more difficult for Congress to adopt new legislation, observing "[a]nother advantage accruing from this ingredient in the constitution of the Senate is, the additional impediment it must provide

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[38] Philip Hamburger, *Is Administrative Law Unlawful?* (University of Chicago Press Dec. 8, 2015), 33.

[39] *See Department of Transportation v. Association of American Railroads*, 575 U.S. 43, 71 (2015) (Thomas, J. concurring in judgment); *see also* Philip Hamburger 35-7.

[40] *Department of Transportation*, 575 U.S. at 71 (citing Hamberger 38).

[41] *Department of Transportation*, 575 U.S. at 71 (quoting 3 D. Hume, The History of England from the Invasion of Julius Ceasar to the Revolution in 1688, p. 266 (1983)).

[42] *Grundy v. United States*, 139 S.Ct. 2116, 2133 (2019) (Gorsuch, J., dissenting) (quoting Alexander Hamilton, Federalist 78 (May 28, 1788), https://avalon.law.yale.edu/18th_century/fed78.asp; *Fletcher v. Peck*, 10 U.S. 87, 136 (1810))).

[43] Ibid.

[44] *See, e.g.*, Ibid.

against improper acts of legislation" and noting that "as the faculty and excess of law-making seem to be the diseases to which our governments are most liable, it is not impossible that this part of the Constitution may be more convenient in practice than it appears in contemplation."[45]

This difficulty served not "only to limit the government's capacity to restrict the people's freedoms," but also "to promote deliberation," "ensur[e] that any new law would have to secure the approval of a supermajority of the people's representatives," "promote fair notice and the rule of law, ensuring the people would be subject to a relatively stable and predictable set of rules," and "ensure that the lines of accountability would be clear" because "[t]he sovereign people would know, without ambiguity, whom to hold accountable for the laws they would have to follow."[46]

A. From "Filling in the Details" to Writing Administrative Codes

So how did we get to the situation we are in today, where the overwhelming majority of crimes derive in critical respects from executive rather than Congressional action? Ultimately, it lies in interpreting and exploiting the play in the joints between the branches of government over time.

Early on, Chief Justice Marshall noted that "[t]he difference between the departments undoubtedly is, that the legislature makes, the executive executes, and the judiciary construes the law; but the maker of the law may commit something to the discretion of the other departments, and the precise boundary of this power is a subject of delicate and difficult inquiry, into which a Court will not enter unnecessarily."[47] To avoid entering these delicate and difficult inquiries unnecessarily, the Court early on determined that "as long as Congress makes the policy decisions when regulating private conduct, it may authorize another branch to 'fill up the details.'"[48]

What it means to "fill in the details" has shifted over time. One big change came with *United States v. Grimaud*, which upheld a broad delegation of authority to the President to create and enforce "rules and regulations" covering forest reservations.[49] In doing so, the Court concluded "the authority to make administrative rules is not a delegation of legislative power, nor are such rules raised from an administrative to a legislative character because the violation thereof is punished as a public offense."[50] Put differently, the Court effectively blessed the ability of administrative agencies to adopt their own code of regulations carrying criminal consequences.

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[45] Federalist 62.

[46] *Grundy v. United States*, 139 S.Ct. 2116, 2134 (2019) (Gorsuch, J., dissenting).

[47] *Wayman v. Southard*, 10 Wheat 1, 22 (1825).

[48] *Grundy v. United States*, 139 S.Ct. 2116, 2136 (2019) (Gorsuch, J., dissenting) (citing *Wayman*).

[49] *United States v. Grimaud*, 220 U.S. 506 (1911).

[50] *United States v. Grimaud*, 220 U.S. 506, 521 (1911).

The result is the broad delegation of authority to administrative agencies to write regulations that have criminal consequences.

To take one example, the Secretary of the Interior has authority to "prescribe such regulations as the Secretary considers necessary or proper for the use and management of [National Park System] units."[51] A person who violates any such regulation "shall be imprisoned not more than 6 months, fined under this title, or both, and be adjudged to pay all cost of the proceedings"[52]—in other words, criminally liable. It may well make sense for some aspects of National Park management to have criminal consequences. After all, we all want safe parks. But there are both general park regulations, which apply to all National Park Service units, as well as over 90 park-specific "special regulations,"[53] many of which contain exceptions or amendments to the general park rules for specific circumstances. The result is that a citizen seeking to stay on the right side of the law may want to consult an attorney before taking a walk in the park!

Unfortunately, the broad delegation to the National Park Service is not unique. For example:

- The Secretary of Agriculture has authority to "make such rules and regulations and establish such service as will insure the objects of such reservations, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction."[54] Any violation of such regulations "shall be punished by a fine of not more than $500 or imprisonment for not more than six months, or both."[55]

- The Secretary of the Interior has authority to "issue regulations necessary to implement the provisions of this Act with respect to the management, use, and protection of the public lands, including the property located thereon."[56] By regulation, this authority has been further delegated to Bureau of Land Management State Directors to "establish such supplementary rules as he/she deems necessary."[57]Any "knowing and willful" violation of these regulations "shall be fined no more than $1,000 or imprisoned no more than twelve months, or both."[58]

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[51] 54 U.S.C. § 100751(a).

[52] 18 U.S.C. § 1865(a).

[53] *See* 36 C.F.R. Part 7.

[54] 16 U.S.C. § 551.

[55] 16 U.S.C. § 551.

[56] 43 U.S.C. § 1733(a).

[57] 43 C.F.R. § 8365.1-6.

[58] 43 U.S.C. § 1733(a).

- The Secretary of the Interior has authority on Bureau of Reclamation Land to "issue regulations necessary to maintain law and order and protect persons and property within Reclamation projects and on Reclamation lands."[59] Any person who "knowingly and willfully" violates such regulations "shall be fined . . . imprisoned for not more than 6 months, or both."[60]

- The Secretary of the Interior is authorized to issue regulations relating to wildlife refuges and wildlife management, with "[a]ny person who knowingly violates or fails to comply with any of the provisions of this Act or any regulations issued thereunder" liable to "be fined . . . or imprisoned for not more than 1 year, or both," or, if such violation is not "knowing," "fined . . . or imprisoned not more than 180 days, or both."[61]

In principle, delegations from the legislature to the executive are supposed to be limited. In *J.W. Hampton, Jr. & Co. v. United States*, the Court "remarked that a statute 'lay[ing] down by legislative act an intelligible principle to which the [executive official] is directed to conform' satisfied the separation of powers."[62] According to Justice Gorsuch, that "phrase sat more or less silently entombed until the late 1940s," at which point it was resurrected to become the central pillar of regulatory nondelegation analysis.[63] Thus, even under the majority view of the Court today, legislative delegations to the executive are supposed to contain an "intelligible principle" to guide their exercise of authority.

As the organic statutes regarding the National Park Service, Forrest Service, Bureau of Reclamation, Bureau of Land Management, and Fish and Wildlife Service show, however, these "principles" can be very broad and very general. This has not gone without criticism. For example, a district court in Nevada in 2023 rejected criminal charges stemming from a violation of Bureau of Land Management regulations, holding that the delegation of authority to the Secretary of the Interior lacked an intelligible principle.[64] However, that opinion has not gained broader traction and its author has been criticized by the Ninth Circuit for his skepticism of federal authority.[65]

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[59] 43 U.S.C. § 373b(a).

[60] 43 U.S.C. § 373b(b).

[61] 16 U.S.C. § 668dd(f).

[62] *Grundy v. United States*, 139 S.Ct. 2116, 2138-2139 (2019) (Gorsuch, J., dissenting) (quoting *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928).

[63] *Grundy v. United States*, 139 S.Ct. 2116, 2139 (2019) (Gorsuch, J., dissenting); *see also Litcher v. United States*, 334 U.S. 742, 785 (1948); *Grundy*, 139 S. Ct. at 2123 ("[W]e have held, time and again, that a statutory delegation is constitutional as long as Congress 'lay[s] down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform.'" (quoting *Mistretta v United States*, 488 U.S. 361, 372 (1989)).

[64] *United States v. Pheasant*, Case No. 3:21-cr-00024, 2023 WL 3095959 (D.Nev. Apr. 26, 2023).

[65] *See United States v. Estate of Hage*, 810 F.3d 712, 722 (9th Cir. 2016) (finding "a reasonable observer could conclude that the judge's feelings against [the federal agencies] [including the Bureau of Land Management] are both well-established and inappropriately strong.").

More broadly, a majority of the current Supreme Court has expressed concern about the delegation of authority to draft criminal regulations. Writing for the dissent in *Gundy*, Justice Gorsuch—joined by Chief Justice Roberts and Justice Thomas, stated "[t]o allow the nation's chief law enforcement officer to write the criminal laws he is charged with enforcing—to 'unite' the 'legislative and executive powers . . . in the same person'—would be to mark the end of any meaningful enforcement of our separation of powers and invite the tyranny of the majority that follows when lawmaking and law enforcement authorities are united in the same hands."[66] Justice Kavanaugh—who did not participate in *Gundy* subsequently wrote positively of Justice Gorsuch's dissent, stating "Justice Gorsuch's scholarly analysis of the Constitution's nondelegation doctrine in his *Gundy* dissent may warrant further consideration in future cases."[67] And Justice Alito—who provided the fifth vote for the judgment in *Gundy*—wrote "[i]f a majority of this Court were willing to reconsider the approach we have taken for the past 84 years, I would support that effort. But because a majority is not willing to do that, it would be freakish to single out the provision at issue here for special treatment."[68]

But, while the Court has signaled a more stringent policing of implicit delegations,[69] it has not returned the basic question in *Gundy* and *Grimaud*: The ability of agencies to write their own criminal regulations.

B. The Problem of Criminal Regulations is Exacerbated by Broad *Chevron* Deference

Broad application of *Chevron* deference heightens the problems associated with criminal regulations. Under the *Chevron* doctrine, courts defer to agency interpretations of law where the statute is ambiguous and the agency's interpretation is reasonable.[70] Importantly, under *Chevron* step 2, "[a]n agency need not adopt, as [the Court] must, the best reading of a statute, but merely one that is permissible."[71]

In principle, the Supreme Court "has 'never held that the Government's reading of a criminal statute is entitled to any deference,'"[72] and has emphasized that "courts bear an

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[66] *Grundy v. United States*, 139 S.Ct. 2116, 2144-2145 (2019) (Gorsuch, J., dissenting) (quoting Federalist 47).

[67] *Paul v. United States*, 140 S.Ct. 342 (2019) (Statement of Kavanaugh, J., respecting the denial of certiorari).

[68] *Grundy*, 139 S.Ct. at 2131 (Alito, J., concurring in judgment).

[69] *See West Virginia v. Environmental Protection Agency*, 597 U.S. 697 (2022).

[70] *See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

[71] *Dada v. Mukasey*, 554 U.S. 1, 29 n.1 (2008) (Scalia, J., dissenting).

[72] *Guedes v. Bureau of Alcohol, Tobacco, Firearms and Explosives*, 140 S.Ct. 789, 790 (2020) (Statement of Gorsuch, J., concerning denial of writ of certiorari) (quoting *United States v. Apel*, 571 U.S. 359, 369, (2014)).

'obligation' to determine independently what the law allows and forbids."[73] In practice, multiple courts *have* applied *Chevron* to agency rules with criminal consequences.[74]

Much has been written about the problems associated with *Chevron* and the consequences of its highly deferential application. Indeed, the question of whether to overrule *Chevron* "or at least clarify that statutory silence concerning controversial powers expressly but narrowly granted elsewhere in the statute does not constitute an ambiguity requiring deference to the agency" is currently pending before the United States Supreme Court.[75] Analyzing the propriety of *Chevron* generally is beyond the scope of this exercise. For our purposes, it is merely necessary to observe that *Chevron* as it is currently applied magnifies the problems associated with criminal regulations.

IV. Solutions

Unfortunately, there is no magic bullet to fix these problems. With thousands of laws and hundreds of thousands of regulations, it is inevitable that many serve invaluable and unobjectionable purposes. After all, few people believe things like terrorism or trafficking in child pornography should not be criminalized and punished. Yet, when focusing on these specific offenses, it is easy to miss the forest for the trees. And the forest is a vast expanse of federal criminal prohibitions that no one—not even the Department of Justice—fully knows about, let alone understands.

The fact that it is hard does not mean we must accept the status quo. There are a number of modest fixes that can be adopted to help ensure that criminal enforcement does not become like weather, something that befalls the unlucky or unpopular, rather than something that targets specific, deliberate wrongful conduct.

a. Catalog the Number of Criminal Statutes and Regulations

It is scandalous that no one—including the Department of Justice—actually knows how many potentially criminal statutes there are, let alone potentially criminal regulations. The bare minimum that can be done is to create a catalog of statues and regulations that carry potentially criminal consequences.

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[73] Ibid. (quoting *Abramski v. United States*, 573 U.S. 169, 191, (2014)).

[74] *See*, *e.g. Guedes v. Bureau of Alcohol, Tobacco, Firearms and Explosives*, 920 F.3d 1 (D.C. Cir. 2019) (applying *Chevron* to the ATF's bump-stock rule); *Aposhian v. Barr*, 958 F.3d 969 (10th Cir. 2020) (same); *Gun Owners of America, Inc. v. Garland*, 19 F.4th 890 (6th Cir. 2021) (en banc) (same); *but see Cargill v. Garland*, 57 F.4th 447 (5th Cir. 2023) (holding *Chevron* does not apply to regulations with criminal consequences).

[75] *See Loper Bright Enterprises*, Case No. 22-451.

This is not a new idea.[76] For the past decade, a requirement to create a catalog of criminal statutory and regulatory offenses has been part of the proposed Smarter Sentencing Act.[77] This proposal was also supported by the Department of Justice in 2016, which expressed support for legislation that "would require an inventory of federal criminal laws and the identification of laws that lack an explicit *mens rea* requirement."[78]

There is no need to reinvent the wheel. Congress should start with the basics of the proposal already before it in section 5 of the Smarter Sentencing Act of 2023, sponsored by Senator Durbin (among others). This includes:

- Requiring the Attorney General to produce a list of all statutory criminal offenses, including:
    - The elements for each offense;
    - The potential criminal penalty for each offense;
    - The number of prosecutions for the offense brought by the Department of Justice in each of the past 15 years; and
    - The *mens rea* requirement for each offense;

- Requiring the heads of federal agencies to produce a similar list of regulatory offenses that includes:

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[76] *See, e.g.* Paul J. Larkin, Jr., "Regulation, Prohibition, and Overcriminalization: The Proper and Improper Uses of the Criminal Law," Hofstra Law Review 42, no. 745 (2014): 756-757. https://scholarlycommons.law.hofstra.edu/hlr/vol42/iss3/2

[77] *See* U.S. Congress, Senate, *Smarter Sentencing Act of 2014*, S.1410, 113th Congress, 2d Session, introduced in Senate on July 31, 2013. https://www.congress.gov/bill/113th-congress/senate-bill/1410/text?s=6&r=10&q=%7B%22search%22%3A%22%5C%22smarter+sentencing+act%5C%22%22%7D; U.S. Congress, Senate, *Smarter Sentencing Act of 2015*, S.502, 114th Congress, 1st Session, introduced in Senate on Feb. 12, 2015. https://www.congress.gov/bill/114th-congress/senate-bill/502/text?s=6&r=8&q=%7B%22search%22%3A%22%5C%22smarter+sentencing+act%5C%22%22%7D; U.S. Congress, Senate, *Smarter Sentencing Act of 2017*, S.1933, 115th Congress, 1st Session, introduced in Senate on October 5, 2027. https://www.congress.gov/bill/115th-congress/senate-bill/1933/text?s=6&r=6&q=%7B%22search%22%3A%22%5C%22smarter+sentencing+act%5C%22%22%7D; *Smarter Sentencing Act of 2019*, S.2850, 116th Congress, 1st Session, introduced in the Senate on November 13, 2019, https://www.congress.gov/bill/116th-congress/senate-bill/2850/text?s=6&r=3&q=%7B%22search%22%3A%22%5C%22smarter+sentencing+act%5C%22%22%7D; *Smarter Sentencing Act of 2021*, S.1013, 117th Congress, 1st Session, introduced to the Senate on March 25, 2021, https://www.congress.gov/bill/117th-congress/senate-bill/1013/text?s=6&r=2&q=%7B%22search%22%3A%22%5C%22smarter+sentencing+act%5C%22%22%7D; *Smarter Sentencing Act of 2023*, S.1152, 118th Congress, 1st Session, introduced to the Senate on march 30, 2023, https://www.congress.gov/bill/118th-congress/senate-bill/1152/text?s=6&r=1&q=%7B%22search%22%3A%22%5C%22smarter+sentencing+act%5C%22%22%7D.; *see also generally* United States Congress, House, Count the Crimes to Cut Act of 2021, H.R. 5597, 117th Congress, 1st Session, introduced to the House on October 15, 2021. https://www.congress.gov/bill/117th-congress/house-bill/5597/text?s=1&r=4&q=%7B%22search%22%3A%22%5C%22mens+rea%5C%22%22%7D.

[78] *The Adequacy of Criminal Intent Standards in Federal Prosecutions*, United States Senate Committee on the Judiciary, January 20, 2016, Statement of Assistant Attorney General Leslie R. Caldwell. https://www.justice.gov/media/822031/dl.

- The criminal penalty for a violation of the regulatory offense;
- The number of violations referred to the Department of Justice in each of the past 15 years; and
- The mens rea requirement for the offense.

This alone would be an excellent start. However, there are a few improvements that would make the proposal in the Smarter Sentencing Act even stronger.

First, the agency reports should include a list of elements for each regulatory offense. As written now, the Smarter Sentencing Act only requires a list of elements for statutory offenses, leaving open the appropriate elements of regulatory crimes.

Second, reports for both the Attorney General and agency heads should include a *mens rea* for each statutory or regulatory element. As the Department of Justice has previously noted, many statutes have *mens rea* requirements for some elements, but not others.[79] Requiring the Attorney General or agency heads to match up *mens rea* requirements with criminal elements would provide additional clarity on what is actually required.

Third, the Smarter Sentencing Act only requires agency heads to catalog regulations "enforceable" by the agency. This leaves too much play in the joints for agencies that lack independent enforcement authority to claim they do not actually "enforce" regulations, even if they are viewed as the interpreting authority. It would be better to place the onus on the agency that promulgates or manages the regulations.

Fourth, the Smarter Sentencing Act gives the Department of Justice and agencies an extra year to make the results of these reports available to the public after they are provided to Congress. There is no reason for this delay. Agency reports should be made available to "we the people" at the same time as they are available to our representatives.

Finally, the list of agencies required to report should be expanded. The Smarter Sentencing Act contains a list of agencies required to report their criminal regulations. But the list is not all inclusive. For example, one notable omission is the Department of Defense. This excludes the U.S. Army Corps of Engineers, which also has authority to make criminal referrals for certain environmental violations.[80] Another omission is the Department of State, which has significant arms control regulations with potentially criminal consequences.[81]

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[79] *See* Ibid.

[80] *See generally* 33 C.F.R. § 326.5(a) ("For cases the district engineer determines to be appropriate, he will recommend criminal or civil actions to obtain penalties for violations, compliance with the orders and directives he has issued pursuant to §§ 326.3 and 326.4, or other relief as appropriate. Appropriate cases for criminal or civil action include, but are not limited to, violations which, in the district engineer's opinion, are willful, repeated, flagrant, or of substantial impact.").

[81] *See generally* 22 C.F.R. § 127.3 (Penalties for violations).

As scholars have noted, cataloging criminal statutes and regulations does not necessarily require Congressional action. "[T]he President can issue an executive order requiring all executive branch agencies that have criminally enforced regulations to identify those regulations and describe the *mens rea* requirements."[82] But while such executive action is possible (and desirable), it is likely to receive pushback from recalcitrant agencies and runs a risk of getting subsumed by other administration priorities. Thus, it would be better for such a mandate to come from Congress.

b. Set a Default *Mens Rea* Requirement, Particularly for Criminal Regulations

It is a "basic principle that 'wrongdoing must be conscious to be criminal.'"[83] "Although there are exceptions, the 'general rule' is that a guilty mind is 'a necessary element in the indictment and proof of every crime.'"[84] Accordingly, the Supreme Court has advised that it "generally 'interpret[s] criminal statutes to include broadly applicable scienter requirements, even where the statute by its terms does not contain them.'"[85]

In spite of this "basic principle," the last 70 years have seen the tremendous rise of strict liability offenses, regulatory offenses, and offenses with "knowing" standards that are little better than strict liability standards.

The most direct way to fix this problem is to adopt a default *mens rea* standard.[86] Various proposals to adopt a default *mens rea* standard have been introduced on the Hill and have become one of the more controversial elements of criminal justice reform discussions. Senator Lee has proposed one of the more stringent default *mens rea* requirements, generally setting a default of "willfulness" for all elements of an offense that otherwise lack a specific *mens rea* requirement.[87] Others, such as Representative Sensenbrenner and Representative Rooney, previously proposed legislation with a default *mens rea* of "knowing."[88]

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[82] Canaparo et. al.

[83] *Elonis v. United States*, 575 U.S. 723, 734 (2015) (quoting *Morissette v. United States*, 342 U.S. 246, 250 (1952)).

[84] Ibid. (quoting *United States v. Balint*, 258 U.S. 250, 251 (1922)).

[85] Ibid. (quoting *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 70 (1994)).

[86] Larkin 757-758 (recommending that Congress adopt a willfulness standard or a mistake of law defense).

[87] *See, e.g.* U.S. Congress, Senate, *Mens Rea Reform Act of 2021*, S.739, 117th Congress, 1st Session, introduced to the Senate on March 11, 2021. https://www.congress.gov/bill/117th-congress/senate-bill/739/text?s=1&r=3&q=%7B%22search%22%3A%22%5C%22mens+rea%5C%22%22%7D; *Mens Rea Reform Act of 2017*, S.1902, 115th Congress, 1st Session, introduced to the Senate on October 2, 2017. https://www.congress.gov/bill/115th-congress/senate-bill/1902/text?s=2&r=3&q=%7B%22search%22%3A%22%5C%22mens+rea+reform%5C%22%22%7D.

[88] *See generally* U.S. Congress, House, *Stopping Over-Criminalization Act of 2015*, H.R. 3401, 114th Congress, 1st Session, introduced to the House on July 29, 2015. https://www.congress.gov/bill/114th-congress/house-bill/3401/text?s=2&r=1&q=%7B%22search%22%3A%22%5C%22default+mens+rea%5C%22%22%7D; U.S. Congress, House, *Criminal Code Improvement Act of 2015,* H.R. 4002, 114th Congress, 2d Session, introcued to the

Various proposals have also taken different approaches to statutory and regulatory offenses. For example, several proposals call for a heightened showing in cases, such as regulatory offenses, where a defendant might reasonably be unaware that the conduct could be criminally punished.[89]

These proposals have engendered significant controversy. The Department of Justice has pushed back, claiming that default standards would "unleash sweeping changes across the *entire* United States Code," "create massive uncertainty in the law, undermine the enforcement of a multitude of criminal laws, and allow defendants charged with serious crimes . . .to embroil federal courts in extensive litigation and potentially escape liability for egregious and very harmful conduct."[90]

In many ways, the Department of Justice's hyperbolic rhetoric misses the point. It is *supposed* to be hard to criminally prosecute American citizens. That's a feature, not a bug, of our system. And, crimes with no *mens rea* are far more uncertain than a world with a default *mens rea*. Thus, some of the Department's rhetoric about how basic *mens rea* standards would make their jobs harder miss the mark.

That said, the Department does raise a number of practical concerns with a blanket default *mens rea* requirement. For example, how do heightened *mens rea* standards apply to crimes with multiple elements? As one example, the Department of Justice cites to 18 U.S.C. section 2332, which criminalizes the killing of U.S. citizens outside the United States, to ask: Must a perpetrator know that the person they are killing is a U.S. citizen, or merely that they are murdering *someone*?[91]

In practice, these concerns allow exceptions to dictate the rule. For example, concerns about the impact of a default *mens rea* on a specific statute could be addressed by Congress in response to specific concerns about specific statutes, rather than serving to tank the entire project.[92] This is particularly true if a default *mens rea* were to take effect after the completion of the statutory and regulatory catalog of crimes described above, which would serve to flag potential issues.

House on December 23, 2016. https://www.congress.gov/bill/114th-congress/house-bill/4002/text?s=2&r=2&q=%7B%22search%22%3A%22%5C%22default+mens+rea%5C%22%22%7D.

[89] *See generally* Stopping Over-Criminalization Act of 2015; Criminal Code Improvement Act of 2015.

[90] *See* Statement of Assistant Attorney General Leslie R. Caldwell.

[91] *See* Ibid.

[92] *See* Malcolm. ("Congress can always obviate the need to resort to [a default *mens rea* provision] by including its own preferred *mens rea* element with respect to the statute in question. Moreover, on those (hopefully rare) occasions when Congress wishes to pass a criminal law with no *mens rea* requirement whatsoever, it should make its intentions clear by stating in the statute itself that Members have made a conscious decision to dispense with a *mens rea* requirement for the particular conduct in question.").

Given the controversy around default *mens rea* standards for statutory crimes, Congress can and should focus on an area where the concerns about traps for the unwary are heightened and the Department's concerns about unintended consequences are less salient: regulatory crimes.

Specifically, Congress should adopt a default *mens rea* standard of willfulness for all non-jurisdictional elements of regulatory offenses. As noted above, the are hundreds of thousands of regulatory offenses. A default standard of willfulness would ensure that no one is prosecuted criminally for violating a regulation that was not passed by their duly elected representatives in Congress and that they may have no reason to know about.

Moreover, unlike most default *mens rea* requirements, which only apply in the absence of a specified standard, a willfulness standard should supersede lower *mens rea* standards for regulatory violations. In other words, the bar should be raised, not just established, for offenses that do not directly derive from statute.

A standard of willfulness is consistent with how many agencies already approach criminal regulations. As noted above, both the Bureau of Reclamation and the Bureau of Land Management already require a "knowing and willful" violation to sustain a criminal violation of land use regulations. It is unlikely that a similar standard would lead to chaos for similar agencies, such as the U.S. Forest Service.

A standard of willfulness for *criminal* enforcement also does not mean other deleterious regulatory violations must go uncorrected. As the Heritage Foundation's Paul Larkin observed, "[r]egulatory programs, almost without exception, authorize administrative agencies to pursue enforcement through civil processes."[93] Many regulatory schemes that allow for *criminal* enforcement also have *civil* enforcement provisions. Applying a willfulness standard to *criminal* violations would not necessarily require imposing a similarly heightened standard for *civil* violations.

This distinction matters. As John Malcolm observed, "[t]here is a significant difference between regulations that carry civil or administrative penalties for violations and those that carry criminal penalties. People caught up in the latter may find themselves deprived of their liberty and stripped of their rights to vote, sit on a jury, and possess a firearm, among other penalties that simply do not apply when someone violates a regulation that carries only civil or administrative penalties."[94] While there may still be good reasons for adopting heightened *mens rea* standards for civil liability, particularly where such liability has large financial consequences, the negative effects of criminal prosecutions require a more immediate fix.

Finally, a default willfulness standard can be combined with a provision allowing agencies to adopt lower *mens rea* standards through notice and comment rulemaking. This ensures that agencies stop and think through whether lower *mens rea* standards are appropriate to

[93] Larkin 749.

[94] Malcolm.

specific regulations, and gives the public a chance to weigh in, rather than merely presumptively applying a lower *mens rea* standard based on general grants of authority. And it gives them an avenue to "fix" any regulations where a default *mens rea* requirement would throw a wrench in the works.

A default mens rea standard for criminal regulations is the preferred outcome. Nevertheless, if Congress is unable to pass such a standard overall, it should at minimum apply a knowing and willful standard to the violation of any regulatory provision that is not included in a catalog of regulatory offenses. If the agency itself does not know something is illegal, the American people should not be expected to either.

Adopting a default *mens rea* standard for criminal regulations is not a panacea. But it would go a long way to mitigating concerns about criminalizing innocent conduct.

c. Require Agencies to Specify the *Mens Rea* Standard for All Elements of the Regulatory Offense

There's an old saying: when you're in a hole, stop digging. Administrative agencies and the American people are already in a deep hole when it comes to criminal regulations. There are already hundreds of thousands of criminal regulations, spread throughout the government, many with poorly defined elements and *mens rea* requirements. The least the government can do is stop digging.

Specifically, all agencies should specify at the time they publish a proposed rule whether the regulation will have criminal consequences and, if so, what the elements of any criminal offense are, the *mens rea* requirement for each element, and the potential punishment for each offense. This would allow the public to meaningfully evaluate the potential consequences and engage with the agency during the notice and comment period. It would also ensure there is fair notice of future criminal offenses when a final regulation is adopted.

In addition, there should be a heightened standard for any regulation that seeks to impose strict liability. Under the review process established under Executive Order 12866, agencies are required to submit "significant regulatory action," which are those that have certain economic effects, create inconsistencies with actions of other agencies, alter certain budgetary impacts, or "[r]aise novel legal or policy issues," to the Office of Information and Regulatory Affairs in the White House Office of Management and Budget for heightened interagency review.[95] Any regulation that seeks to establish a strict liability violation should be deemed a "significant regulatory action" and subject to the OIRA review process.

There was an effort to undertake a similar effort during the Trump administration. Two days before the end of his term, President Trump signed Executive Order 13980, which sought to require agencies to specify whether new regulations included criminal consequences and, if so,

[95] *See* "Executive Order 12866 of September 30, 1993 Regulatory Planning and Review," *Federal Register* 58, No. 190 (Sept. 30, 1993). https://www.archives.gov/files/federal-register/executive-orders/pdf/12866.pdf.

the *mens rea* standards for such offenses.[96] Unfortunately, Executive Order 13980 was summarily revoked by President Biden—along with five other executive orders—by Executive Order 14029.[97] As John Malcolm and GianCarlo Canaparo of the Heritage Foundation noted, President Biden "campaign[s] as a criminal justice reformer."[98] Yet, "[b]y rescinding Trump's order, Biden pave[d] the way for more morally innocent, unsuspecting Americans to be caught up in the criminal justice system."[99]

This effort should be revived. Congressional action—which cannot be undone through an omnibus executive order revocation—would be a more enduring solution. However, in the absence of Congressional action, the executive branch should revisit this basic transparency measure.

d. Clarify that Regulations with Both Civil and Criminal Consequences Do Not Receive Judicial Deference

As described above, the Supreme Court has repeatedly emphasized that interpretations of criminal laws are not entitled to *Chevron* deference. Nevertheless, lower courts have repeatedly applied *Chevron* deference to agency regulations with criminal consequences. This problem is further complicated by the presence of regulations with both civil and criminal consequences, where deference in the civil context may be applied through the back door in the criminal context.[100]

The Supreme Court may well provide greater clarity in its forthcoming *Loper Bright* decision. However, even if the Court pairs back or eliminates *Chevron*, it is unlikely to fully resolve the issue of how to approach regulations interpreting criminal laws.

Congress can step in to fill this void. Specifically, Congress should specify that agency regulations implementing "ambiguous" criminal statutes are not entitled to deference. The proper interpretation is what it has been for criminal statutes: the best interpretation of the statute, not merely one that is minimally plausible. This will help ensure the laws Americans are

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[96] *See* "Executive Order 13980 of January 18, 2021 Protecting Americans from Overcriminalization through Regulatory Reform," Federal Register 86, No. 13 (Jan. 18, 2021): 6817. https://www.federalregister.gov/documents/2021/01/22/2021-01645/protecting-americans-from-overcriminalization-through-regulatory-reform.

[97] "Executive Order 14029 of May 14, 2021 Revocation of Certain Presidential Actions and Technical Amendment," Federal Register 86, No. 95 (May 14, 2021): 27025. https://www.federalregister.gov/documents/2021/05/19/2021-10691/revocation-of-certain-presidential-actions-and-technical-amendment.

[98] GianCarlo Canaparo & John Malcolm, "Biden Unwisely Rescinds One of Trump's Criminal Justice Reforms," The Heritage Foundation (May 18, 2021). https://www.heritage.org/crime-and-justice/commentary/biden-unwisely-rescinds-one-trumps-criminal-justice-reforms.

[99] Ibid.

[100] *See generally* Frank Garrison, "The Supreme Court May Have Gutted Chevron for Statutes in Sackett," Bloomberg (June 28, 2023), https://news.bloomberglaw.com/us-law-week/the-supreme-court-may-have-gutted-chevron-for-statutes-in-sackett.

subject to are the laws passed by Congress; not the gloss placed on them by unelected administrative agencies.

V. Conclusion

America is over-regulated. Even professionals at the Department of Justice do not know how many criminal statutes or regulations exist. The average American can hardly be expected to know better. Yet, in many ways, the average American *is* held to a higher standard. If they violate a statute or regulation with criminal consequences, they can be held criminally liable, even if they did not and had no reason to know what they were doing was wrong. This has a deleterious effect on our basic notions of fairness and justice, as well as our faith in the judicial system.

It does not have to be this way. The Supreme Court is likely going to provide an opportunity that can and should be seized. There are four solutions that will help move the ball forward:

- The government should catalog all of the statutes and regulations with criminal consequences, including listing the specific elements, *mens rea* requirements for each element, and criminal penalties;

- There should be a default *mens rea* standard, particularly for criminal regulations, which have a heightened risk of serving as traps for the unwary;

- Agencies seeking to adopt regulations with criminal consequences should be clear upfront about what will constitute a crime and what the consequences will be, giving the public an opportunity to weigh in on the propriety of the agency's proposal. Regulations with low or no *mens rea* requirement should be subject to a heightened regulatory review to protect the American people from further overcriminalization; and

- Agency regulations purporting to interpret or apply criminal statutes should not be granted deference in federal courts. Rather, potential violations should be judged based on the best reading of the underlying statute.

Even together, these solutions will not solve all of the problems associated with hundreds of thousands of criminal prohibitions. But they are good first steps to mitigate the harms associated with "excess law-making" that the framers warned about over 230 years ago.