REGULATION, PROHIBITION, AND OVERCRIMINALIZATION: THE PROPER AND IMPROPER USES OF THE CRIMINAL LAW

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I. INTRODUCTION

In May 2013, the Judiciary Committee of the U.S. House of Representatives created a bipartisan task force to examine the issue of "overcriminalization."[1] That neologism fundamentally refers to the overuse and misuse of the criminal law to punish conduct traditionally deemed morally blameless,[2] a phenomenon of increasing importance, as witnessed by the growing interest shown in it by the academy, elected officials, the media, and the public.[3]

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1. Press Release, House Judiciary Comm., House Judiciary Committee Creates Bipartisan Task Force on Over-Criminalization (May 5, 2013), *available at* http://www.judiciary.house.gov/news/2013/05082013.html. On February 5, 2014, the House Judiciary Committee reauthorized the Task Force for an additional six months. Press Release, U.S. House Judiciary Comm., House Judiciary Committee Reauthorizes Bipartisan Over-Criminalization Task Force (Feb. 5, 2014), *available at* http://judiciary.house.gov/index.cfm/press-releases?ID=2D73C6FD-DAEB-4DA0-B4B4-7A2F32BA784F. The House Judiciary Committee had previously demonstrated interest in this subject. *See, e.g.*, *Reining in Overcriminalization: Assessing the Problem, Proposing Solutions: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Sec. of the H. Comm. on the Judiciary*, 111th Cong. 1 (2010) (statement of Hon. Robert C. "Bobby" Scott, Chairman, S. Comm. on Crime, Terrorism, and Homeland Security); *Over-Criminalization of Conduct/Over-Federalization of Criminal Law: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Sec. of the H. Comm. on the Judiciary*, 111th Cong. 14 (2009) (statement of Hon. Robert C. "Bobby" Scott, Chairman, S. Comm. on Crime, Terrorism, and Homeland Security). Creation of the task force suggests that the committee may address the issue through legislation.

2. Paul J. Larkin, Jr., *Public Choice Theory and Overcriminalization*, 36 HARV. J.L. & PUB. POL'Y 715, 719 (2013) [hereinafter Larkin, *Public Choice Theory*]. For different flavors of that concept, see *id.* at 719 n.13.

3. The literature on the subject is already considerable and continues to grow. *See, e.g.*,

A prime example of this phenomenon is the use of the criminal law to enforce a regulatory regime. That practice can pose extraordinary compliance problems for the average person because criminal and regulatory laws exist for very different purposes. The function of the criminal law at bottom is to enforce the moral code that every person knows by heart—to enforce the minimum substantive content of the social compact by bringing the full moral authority of government to bear on violators.[4] By contrast, the function of the regulatory system is to efficiently manage components of the national economy using civil rules, rewards, and penalties to incentivize desirable behavior without casting aspersions on violations attributable to ignorance or explanations other than defiance.[5] Treating regulatory crimes as if they were no different than "street" crimes ignores the profound difference between the two classes of offenses and puts parties engaged in entirely legitimate activities without any intent to break the law at risk of criminal punishment. There is no good reason to construe criminal and constitutional law in a manner that ignores the practical difficulties created by using the criminal law to regulate a modern industrial state. Both doctrines are sufficiently flexible that courts can accommodate the government's interests and those of private parties without damaging the public interest in the process. The only question is whether the courts and legislatures have the willingness to reconsider ancient common law doctrines in light of entirely modern practical concerns.

II. THE MARRIAGE OF THE REGULATORY PROCESS AND THE CRIMINAL LAW

An elementary principle of criminal and constitutional law is that the government must clearly identify particular conduct as criminal so

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DOUGLAS HUSAK, OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW 3 (2009); TASK FORCE ON THE FEDERALIZATION OF CRIMINAL LAW, AM. BAR. ASS'N, THE FEDERALIZATION OF CRIMINAL LAW 1-2 (1998); Sara Sun Beale, *The Many Faces of Overcriminalization: From Morals and Mattress Tags to Overfederalization*, 54 AM. U. L. REV. 747, 748 (2005); Edwin Meese III, *Overcriminalization in Practice: Trends and Recent Controversies*, 8 SETON HALL CIRCUIT REV. 505, 506 (2012); Ellen S. Podgor, *Overcriminalization: The Politics of Crime*, 54 AM. U. L. REV. 541, 542 (2005); Daniel Richman, *Overcriminalization for Lack of Better Options: A Celebration of Bill Stuntz*, *in* THE POLITICAL HEART OF CRIMINAL PROCEDURE 64, 66 (Michael Klarman et al. eds., 2012);Dick Thornburgh, *The Dangers of Over-Criminalization and the Need for Real Reform: The Dilemma of Artificial Entities and Artificial Crimes*, 44 AM. CRIM. L. REV. 1279, 1279-80 (2007); George F. Will, *Blowing the Whistle on Leviathan*, WASH. POST, July 29, 2012, at A17. *See generally* GO DIRECTLY TO JAIL: THE CRIMINALIZATION OF ALMOST EVERYTHING (Gene Healy ed., 2004).

4. *See* Edwin Meese III & Paul J. Larkin, Jr., *Reconsidering the Mistake of Law Defense*, 102 J. CRIM. L. & CRIMINOLOGY 725, 734 (2012).

5. *See id.* at 752-53.

that the average person, without resort to legal advice, can comply with the law.[6] Historically, that requirement posed little difficulty. The government ordinarily could satisfy that obligation simply by enacting and making public a statute that was written in terms the average person could readily understand. Throughout Anglo-American legal history, contemporary mores condemned certain conduct as harmful, dangerous, or blameworthy, such as murder, rape, robbery, and burglary.[7] A legislature could readily draft a straightforward, easily comprehensible ordinance outlawing those actions by drawing on language widely understood in the community.[8] To be sure, courts would construe those statutes after-the-fact in particular cases, and in so doing would flesh out the terms they use and concepts they embody.[9] But the authority to define criminal conduct in the American system fundamentally has rested in the hands of legislatures,[10] who could draft the appropriate laws without unduly burdening the intellectual abilities of the average layperson.[11]

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6. *See, e.g.*, Rogers v. Tennessee, 532 U.S. 451, 459 (2001) (identifying "core due process concepts of notice, foreseeability, and, in particular, the right to fair warning as those concepts bear on the constitutionality of attaching criminal penalties to what previously had been innocent conduct").

7. *See* WAYNE R. LAFAVE, CRIMINAL LAW § 1.2(f), at 14-15 (5th ed. 2010); THEODORE F. T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 442-62 (5th ed. 1956); Livingston Hall & Selig J. Seligman, *Mistake of Law and* Mens Rea, 8 U. CHI. L. REV. 641, 644 (1941) ("[T]he early criminal law appears to have been well integrated with the mores of the time, out of which it arose as 'custom.'").

8. Due process requires not only that the criminal laws are on the books, but also that they are readily understandable by the average person. *See, e.g.*, Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939) ("No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids." (footnote omitted)); Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926) ("[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law."); Herbert L. Packer, Mens Rea *and the Supreme Court*, SUP. CT. REV., 1962, at 107, 123. *See generally* Meese & Larkin, *supra* note 4 (discussing how the Constitution requires such notice); Anthony G. Amsterdam, Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960) (discussing the historical development of the void-for-vagueness doctrine). For recent applications of that doctrine, see, for example, FCC v. Fox Television Stations, Inc., 132 S. Ct. 2307, 2317-20 (2012); Chicago v. Morales, 527 U.S. 41, 56-60 (1999); Kolender v. Lawson, 461 U.S. 352, 357-61 (1983).

9. From 1660 to 1860, the English courts claimed the power to outlaw conduct that they deemed *contra bonos mores*. *See* Jerome Hall, *Nulla Poena Sine Lege*, 47 YALE L.J. 165, 179 (1937). In the federal system, however, only Congress can create a federal crime. *See* United States v. Hudson, 11 U.S. (7 Cranch) 32, 34 (1812). The Due Process Clause keeps state courts from enlarging criminal liability in an unforeseeable manner. *See, e.g.*, Metrish v. Lancaster, 133 S. Ct. 1781, 1786-87 (2013); Bouie v. City of Columbia, 378 U.S. 347, 354-55 (1964).

10. *See* LAFAVE, *supra* note 7, § 2.1(a), at 78-79. Today, the criminal law is almost entirely statutory. *Id.*

11. *Cf.* JOHN SALMOND, JURISPRUDENCE 426-27 (8th ed. 1930) ("The common law is in great

That is no longer true across the board. For more than a century now, legislatures have used regulatory programs to protect the public against the sequelae of industrialization.[12] Common fields of regulation involve: food, drugs, public health, housing, transportation, and the environment.[13] Statutes creating those regulatory schemes define the circumstances in which regulated conduct may and may not be undertaken, establish permitting and monitoring protocols to ensure that the amount and type of regulated activity does not exceed tolerable limits, and empower the government to use administrative orders and civil fines as enforcement mechanisms. Those programs typically have the following characteristics: the relevant statutes create and delegate implementing and enforcement authority to administrative agencies that are entrusted to use their superior, technical expertise in order to achieve the goals of the program; and the statutes vest broad authority and discretion in the expert agencies in order to permit them the flexibility deemed necessary for them to respond to advances in scientific and medical knowledge and changes in manufacturing or other productive mechanisms. Regulations promulgated by agencies often form highly reticulated networks demanding a sophisticated understanding of technical subjects beyond the ken of the average person.[14]

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part nothing more than common honesty and common sense. Therefore although a man may be ignorant that he is breaking the law, he knows very well in most cases that he is breaking the rule of right.").

12. Graham Hughes, *Criminal Omissions*, 67 YALE L.J. 590, 595 (1958); *see also* Gerald E. Lynch, *The Role of Criminal Law in Policing Corporate Misconduct*, 60 LAW & CONTEMP. PROBS. 23, 37 (1997) ("Legislatures, concerned about the perceived weakness of administrative regimes, have put criminal sanctions behind administrative regulations governing everything from interstate trucking to the distribution of food stamps to the regulation of the environment."); Francis B. Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55, 67 (1933) (recognizing the implantation of regulatory programs in both the United States and England). Graham Hughes has noted:

> [I]t was in the latter half of the nineteenth century that the great chain of regulatory statutes was initiated in England, which inaugurated a new era in the administration of the criminal law. Among them are the Food and Drugs Acts, the Licensing Acts, the Merchandise Marks Acts, the Weights and Measures Acts, the Public Health Acts and the Road Traffic Acts.

Hughes, *supra*, at 595 (footnotes omitted).

13. *See* Marc T. Law & Sukkoo Kim, *The Rise of the American Regulatory State: A View from the Progressive Era*, *in* HANDBOOK OF THE POLITICS OF REGULATION 113, 113 (David Levi-Faur ed., 2011).

14. For an excellent discussion of the birth and functioning of environmental regulatory programs and their interaction with the criminal law, see generally RICHARD J. LAZARUS, THE MAKING OF ENVIRONMENTAL LAW (2004); Richard J. Lazarus, *Meeting the Demands of Integration in the Evolution of Environmental Law: Reforming Environmental Criminal Law*, 83 GEO. L.J. 2407 (1995).

Regulatory programs, almost without exception, authorize administrative agencies to pursue enforcement through civil processes.[15] The distinction between the civil and criminal laws is an ancient one,[16] with state-administered punishment traditionally reserved only for a violation of the latter.[17] Many contemporary regulatory programs, however, define unlawful conduct not just as a civil wrong, but also as a crime, and empower the government to penalize regulatory infractions through the same criminal process historically used to investigate, prosecute, and imprison parties for murder, rape, robbery, theft, and a host of other offenses known today as "street" crimes or "blue-collar" crimes.[18]

Resorting to the criminal law to enforce regulatory programs poses numerous, difficult compliance problems not present in the case of traditional "blue-collar" offenses, or even standard "white-collar" crimes. Those problems stem from several defining features of regulatory laws that increase the difficulty placed on an average person to understand precisely where the line is drawn between lawful and illegal conduct. It is important to identify those problems to determine whether they can be remedied, and, if so, to decide how that should be done.

III. TROUBLE IN THE MARRIAGE

A. The Number of Regulatory Crimes Today Is Unknown, but Likely Is Quite High

The number of federal statutes and regulations relevant to criminal conduct is unknown, but likely is immense. The difficulty in identifying all of the rules that must be known in order fully to comply with the law is but one aspect of the broader problem stemming from the massive number of federal civil and criminal laws on the books today. A serious problem is that there is no one readily and freely accessible criminal code that is comprehensive, "reader friendly," and understandable to the

15. *See* Max Minzner, *Why Agencies Punish*, 53 WM. & MARY L. REV. 853, 858-59 (2012).

16. Jerome Hall, *Interrelations of Criminal Law and Torts*, 43 COLUM. L. REV. 753, 757-58 (1943).

17. *See, e.g.*, Smith v. Doe, 538 U.S. 84, 92-94 (2003); Kennedy v. Mendoza-Martinez, 372 U.S. 144, 167-69 (1963). The Supreme Court has discussed how to distinguish criminal from civil statutes on various occasions, an important distinction is that the government may punish someone criminally only if he is convicted at a fair trial. Chapman v. United States, 500 U.S. 453, 465 (1991).

18. Meese & Larkin, *supra* note 4, at 735-36, 744-45 (describing criminal enforcement of the federal environmental laws).

average person without needing to resort to legal advice. Part of the problem is due to the number of federal statutes that define crimes. That number is quite high—so large, in fact, that no one seems to know exactly how many relevant laws exist.[19] The U.S. Justice Department and American Bar Association tried to tabulate them all years ago, but both gave up the effort without completing the job.[20] Some commentators have estimated that there are more than 4000 statutes and more than 300,000 regulations that define conduct as criminal or otherwise bear on the proper interpretation of the laws that do.[21] If those authorities are even just half right, the number is more than anyone can know. If it is true that lawyers, law professors, and judges do not know all of the laws that impose criminal liability,[22] it is utterly unreasonable to expect that the average person has that knowledge.

B. Regulations Can Be Difficult for the Average Person to Find and Understand

Some criminal statutes are obscure because they are poorly worded. Others are obscure due to their inconspicuous location. Housing rules in a local or municipal code that cannot be accessed by the Internet makes those laws, practically speaking, unavailable to most of the public. Federal laws can be equally difficult for the average person to find, particularly if they are part of a complex regulatory scheme. Given the massive increase in the size of federal and state penal codes over the last 125 years, there is a vast number of ways that someone can violate criminal statutes today, and it is certain that the average person will be completely unaware of some of those ways that he or she can break the law. Few people are aficionados of the U.S. Code, let alone the Code of Federal Regulations or the Federal Register.

Accordingly, a threshold problem with defining crimes via regulations is that it can be quite difficult for the average person just to *find* all of the relevant statutes, regulations, policy statements, and interpretive decisions, let alone to *understand* them, given the often

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19. Gary Fields & John R. Emshwiller, *Many Failed Efforts to Count Nation's Federal Criminal Laws*, WALL ST. J., July 23, 2011, at A10.

20. *Id.*

21. *See, e.g.*, Paul Rosenzweig, *The History of Criminal Law*, *in* ONE NATION, UNDER ARREST 127, 129 (Paul Rosenzweig & Brian W. Walsh eds., 2010); John S. Baker, Jr., *Revisiting the Explosive Growth of Federal Crimes*, HERITAGE FOUND. (June 16, 2008), http://heritage.org/research/reports/2008/06/revisiting-the-explosive-growth-of-federal-crimes.

22. William J. Stuntz, *Self-Defeating Crimes*, 86 VA. L. REV. 1871, 1871 (2000) ("Ordinary people do not have the time or training to learn the contents of criminal codes; indeed, even criminal law professors rarely know much about what conduct is and isn't criminal in their jurisdictions.").

abstruse rules that agencies adopt for subjects that are recondite, technical, or scientific in nature. Yet, it is settled law that the government cannot criminally enforce a law that cannot be understood by a person "of ordinary intelligence."[23] The result should be the same if the government chose to follow the practice of Caligula and to publish criminal laws in a location making them, as a practical matter, unreadable.[24] After all, a secret criminal law offers no more notice of criminal conduct than a law that is publicly available, but incomprehensible.[25] An obscure statute thus can create the same notice problems that we already acknowledge to exist when a statute is unduly vague. In both cases, the average person would not know what has been classified as a crime.

C. Congress Often Adopts Broad, Aspirational Regulatory Laws, Which Makes Compliance Difficult for the Average Person

The primary function of most regulatory laws is three-fold: to identify an important social or economic subject in need of regular supervision; to create an expert administrative agency directed to monitor and govern that field and its participants; and to empower the agency to deal with identified, persistent, or new problems through legal rules, moral suasion, or enforcement actions.[26] Because Congress expects that administrative agencies will have an indefinite half-life, regulatory legislation often uses broadly-phrased and aspirational language as a means of giving agencies the necessary flexibility to deal with ongoing or newly arising problems, and to point them in a direction toward which they should aim, even if the finish line is over the horizon ("For example, eliminate all pollution by 2020."). Criminal enforcement of aspirational goals, however, poses exceptionally difficult notice problems for the average person, who necessarily must focus on the particular task at hand, rather than the pot of gold at the end of the rainbow. The environmental laws serve as an example of this problem:

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23. United States v. Harriss, 347 U.S. 612, 617 (1954); *see supra* note 6 and accompanying text.

24. *See* Screws v. United States, 325 U.S. 91, 96 (1945) ("To enforce such a [vague] statute would be like sanctioning the practice of Caligula who 'published the law, but it was written in a very small hand, and posted up in a corner, so that no one could make a copy of it.'").

25. A secret criminal law would violate one of the criminal law's "elementary" principles, the "rule of legality," which provides that no conduct can be punished as a crime without a law prohibiting that conduct and affixing a penalty to it. Hall & Seligman, *supra* note 7, at 650 n.39 ("[W]here the law was not available to the community, the principle of 'nulla poena sine lege' comes into play . . . .").

26. Sayre, *supra* note 12, at 68-69.

> [The environmental laws] primarily seek to reduce the potential, long-term risk of injury to human health and the environment generally, not just to a specified person or persons. The scientific evidence necessary to establish the likelihood and type of harm can be a matter of estimate, judgment, and dispute even among experts. To empower regulators to reduce such potential, evolving risks, the environmental laws use broad, aspirational, complex, and dynamic standards in order to enable regulators to capture all possible harms. Unlike the criminal laws, which require that forbidden conduct be defined with certainty, the environmental laws intentionally leave regulators ample room to maneuver in case new evidence amplifies the known potential adverse effect of hazardous substances (e.g., carcinogens) or brings to light new harms.[27]

It can be unreasonable to expect that the average person will readily know how broadly-phrased or highly-technical rules must be applied in particular cases without legal advice. Yet, that is the standard that criminal laws must satisfy. The Due Process Clause takes as a given the proposition that legal advice, while potentially valuable, is never a prerequisite to avoid criminal liability.[28] In cases involving challenges to penal statutes on the ground that they are void for vagueness, the Supreme Court has explained that the standard all criminal laws must pass is whether a person of "ordinary" or "common" intelligence can readily understand what has been made a crime.[29] That standard leaves no room for imposing any obligation to consult an attorney before making a decision. Tasking the public with that duty shifts the obligation to provide notice of criminal conduct from the government to each person—a burden that unfairly weighs on parties, such as small businesses, who do not have their own legal staffs, or individuals of average or limited means. In fact, the Supreme Court has expressed reluctance to allow parties to rely on the advice of counsel as a defense to a crime unless the government has the burden of proving that a defendant willfully and deliberately flouted the law.[30]

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27. Meese & Larkin, *supra* note 4, at 744; *see also, e.g.*, Richard J. Lazarus, *Assimilating Environmental Protection into Legal Rules and the Problem with Environmental Crime*, 27 LOY. L.A. L. REV. 867, 881-84 (1994) [hereinafter Lazarus, *Assimilating Environmental Protection*] (recognizing the health risks that may result from violating environmental laws).

28. *See* U.S. CONST. amend. V.

29. *See, e.g.*, United States v. Harriss, 347 U.S. 612, 617 (1954) (discussing persons of "ordinary intelligence"); Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926) (discussing persons of "common intelligence").

30. *Compare* Sinclair v. United States, 279 U.S. 263, 299 (1929) (rejecting the defense of reliance on the advice of private counsel), *with* Cheek v. United States, 498 U.S. 192, 202-03 (1991) (finding that a defendant's good faith belief that his conduct was lawful is a defense to the charge of willfully violating tax laws).

D. Regulatory Agencies Often Issue Complex, Abstruse Rules, Which Makes Comprehension Difficult for the Average Person

The opposite problem can arise as well. Regulatory schemes designed to protect the public against health hazards caused by the improper manufacture, transportation, use, or disposal of hazardous substances may need to be as detailed and complex as the science itself, justifying the need for regulation. The result often is that agency rules, such as the ones promulgated under the federal environmental laws, can be extraordinarily abstruse, demanding almost as much scientific or technical knowledge as legal skill to ensure their proper interpretation.[31] Just as the criminal law does not require a person to consult with an attorney in order to avoid liability, so too, it should not demand that an individual resort to a biologist, geologist, or hydrologist before undertaking facially reasonable activity in a legitimate business.

E. Regulatory Programs Can Make Compliance Difficult Because They Limit Conduct Without Prohibiting It Altogether

Laws prohibiting murder and robbery forbid the conduct defined by those crimes in all circumstances. The law neither fixes a cap on the number of murders that a miscreant may commit, nor is there an office to which someone can apply for a permit to commit robbery. By contrast, the *raison d'être* of a regulatory program is that certain conduct cannot or should not be forbidden in all circumstances, but must be managed, controlled, or supervised in order to limit the instances in which that conduct occurs or poses a hazard. Agency rules merely define when, where, how, and by whom such conduct may be done. Complying with a carefully nuanced rule, however, is more difficult than with a *diktat* forbidding any and all instances of identified conduct. Even the lawyers who practice in a regulated industry will not know all of the applicable statutes, rules, regulations, and agency interpretations—which makes hopeless the plight of the average person who lacks legal training or ready and inexpensive access to an attorney.[32]

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31. For a good discussion of one such example, see Vidrine v. United States, 846 F. Supp. 2d 550, 561-69 (W.D. La. 2011) (involving the issue of whether used oil was a recyclable product or hazardous waste).

32. *See* Meese & Larkin, *supra* note 4, at 742-43. Edwin Meese and I have stated:

> Some public welfare laws have an expansive reach and delegate broad authority to officials to craft a detailed regulatory scheme using changing, newly available scientific data. The promulgation of implementing regulations can lead to an avalanche of positive criminal laws in one form or another. That approach may serve well the needs of officials tasked with filling in the blanks of a regulatory program, but it ill serves the interests of regulated parties, who need clearly understandable rules defining criminal

F. There Is No "Rule of Thumb" Providing the Average Person with a Clear Tool for Compliance

By and large, laws defining street crimes and most white-collar offenses are relatively short, straightforward, and easily understandable by the average person. If you lie, cheat, steal, or physically harm someone, you have broken the law. Said differently, if you know the Decalogue, you know what not to do. By contrast, regulatory statutes are long, elaborate, intricate, and reticulated. They may apply to conduct demanding knowledge of highly technical and scientific fields; they use arcane, technological terms; and they do not have a ready go-by, like the Golden Rule, that a person can read in order to comply with the criminal law.[33] Contemporary mores do not offer a rule of thumb enabling a law-abiding citizen to comply with many regulatory laws on his own, and it is difficult to see how a citizen's ethics could offer that aid when you realize that some amount of pollution, for example, is inevitable.[34] Those difficulties can make criminal enforcement of a complex regulatory regime fundamentally unfair.

G. Regulatory Crimes Can Lack the Mens Rea Elements Found in Common Law Crimes that Limit Blameworthy Conduct

The common law deemed the presence of "evil intent" necessary to distinguish morally blameworthy conduct from conduct that, while damaging, dangerous, or tortious, was not a fit subject for criminal sanction.[35] At common law, a crime consisted of "a vicious will" and "an unlawful act consequent upon such vicious will."[36] That principle still has resonance today.[37] The criminal law traditionally has looked

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> liability in order to avoid winding up in the hoosegow. Worse still is the prospect that the government has interpreted its regulations in nonpublic guidance documents that, in effect, create "secret law."

Id. (footnotes omitted).

33. *See, e.g.*, *Vidrine*, 846 F. Supp. 2d at 561-69.

34. STEPHEN BREYER, BREAKING THE VICIOUS CIRCLE 10-29 (1993); Lazarus, *Assimilating Environmental Protection*, *supra* note 27, at 882; Meese & Larkin, *supra* note 4, at 745-46. Meese and I have discussed this point by noting:

> [S]ome amount of pollution and waste is inevitable in a modern industrial society. There is no realistic possibility of eliminating all risk of harm from some activities. Even breathing releases carbon dioxide into the environment. The question, therefore, is not how we can eliminate pollution entirely, but how we should manage known and unknown risks from the known, inevitable consequences of running a modern economy.

Meese & Larkin, *supra* note 4, at 745-46 (citations omitted).

35. Morissette v. United States, 342 U.S. 246, 250-56 (1952).

36. 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 21 (1979).

37. *See, e.g.*, Staples v. United States, 511 U.S. 600, 616-17 (1994); *Morissette*, 342 U.S. at 251.

askance on negligence as a basis for liability,[38] and has treated strict liability crimes with outright scorn.[39]

Regulatory programs, however, often do not treat scienter with the same respect.[40] The reason for that slight is that regulatory laws see their goal as protection of the public against particular insults or hazards, such

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38. *See, e.g.*, LAFAVE, *supra* note 7, § 1.3(b), at 17; *id.* § 5.4(a)(2), at 279; Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 421-22 (1958) [hereinafter Hart, *Aims*]; Edwin R. Keedy, *Ignorance and Mistake in the Criminal Law*, 22 HARV. L. REV. 75, 84-85 (1908); Otto Kirchheimer, *Criminal Omissions*, 55 HARV L. REV. 615, 637-39 (1942); Sayre, *supra* note 12, at 72.

39. *See, e.g.*, MODEL PENAL CODE § 2.05, cmt. 1 (Tentative Draft No. 4, 1955); LON L. FULLER, THE MORALITY OF LAW 77 (rev. ed. 1969) ("Strict criminal liability has never achieved respectability in our law."); JEROME HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 342-51 (2d ed. 1960); Hart, *Aims*, *supra* note 38, at 422-25; H.L.A. Hart, *Negligence,* Mens Rea*, and Criminal Responsibility*, *in* PUNISHMENT AND RESPONSIBILITY 136, 152 (1968) (stating that "strict liability is odious"); Hughes, *supra* note 12, at 602-03; Douglas Husak, *Strict Liability, Justice, and Proportionality*, *in* APPRAISING STRICT LIABILITY 81, 91-92 (A.P. Simester ed., 2005); Rollin M. Perkins, *Criminal Liability Without Fault: A Disquieting Trend*, 68 IOWA L. REV. 1067, 1067-68, 1081 (1983); Paul Roberts, *Strict Liability and the Presumption of Innocence: An Exposé of Functionalist Assumptions*, *in* APPRAISING STRICT LIABILITY, *supra*, at 151, 182, 191; Sayre, *supra* note 12, at 56; A.P. Simester, *Is Strict Liability Always Wrong?*, *in* APPRAISING STRICT LIABILITY, *supra*, at 21, 21 (stating that strict liability is irrational because it "leads to conviction of persons who are, morally speaking, innocent"); Richard G. Singer, *The Resurgence of* Mens Rea*: The Rise and Fall of Strict Criminal Liability*, 30 B.C. L. REV. 337, 403-04 (1989); Herbert Wechsler, *The Challenge of a Model Penal Code*, 65 HARV. L. REV. 1097, 1109 (1952). *See generally* Paul J. Larkin, Jr., *Taking Mistakes Seriously*, 28 B.Y.U. J. PUB. L. (forthcoming 2014) (listing authorities). There are, however, contrary views, as well. *See, e.g.*, James B. Brady, *Strict Liability Offenses: A Justification*, 8 CRIM. L. BULL. 217, 222-24 (1972); Steven S. Nemerson, Note, *Criminal Liability Without Fault: A Philosophical Perspective*, 75 COLUM. L. REV. 1517, 1570-76 (1975); Richard A. Wasserstrom, *Strict Liability in the Criminal Law*, 12 STAN. L. REV. 731, 734 (1960). Herbert Wechsler wrote:

> The most that can be said for such provisions [prescribing liability without regard to any mental factor] is that where the penalty is light, where knowledge normally obtains and where a major burden of litigation is envisioned, there may be some practical basis for a stark limitation of the issues; and large injustice can seldom be done. If these considerations are persuasive, it seems clear, however, that they ought not to persuade where any major sanction is involved.

Wechsler, *supra*, at 1109.

40. *See* Meese & Larkin, *supra* note 4, at 744-45. Meese and I wrote:

> [T]he environmental laws often do not require proof of the same type of mental state and actions that ordinary crimes demand. Some criminal environmental laws require proof of the same 'evil meaning' mind demanded by common law crimes. But most can lead to a conviction if a person knew what he was doing, even if he did not know that what he was doing was illegal or wrongful, and sometimes even if he merely acted negligently. Moreover, the 'knowledge' necessary to establish a violation can be imputed to a person from the knowledge of others in his company. As far as the necessary criminal acts go, a person can be held liable not only for his own actions, but also for the conduct of others under his supervision because of his position in the company. In some instances, a person can be held criminally liable for *not* reporting a crime. Finally, '[i]gnorance or mistake-of-law are generally not valid defenses, except perhaps for a specific intent crime that requires a knowing violation.'

Id. (citations omitted).

as carcinogens, that cause insidious short- or long-term harm regardless of the intent or knowledge of the party responsible for their creation or misuse.[41] Public health programs, for example, seek to empower agencies, such as the Food and Drug Administration or the Environmental Protection Agency, to intervene in the manufacturing, distribution, or disposal processes in order to prevent adulterated drugs from entering the stream of commerce, or to keep hazardous waste from poisoning the water supply, regardless of whether the party involved was aware of, or oblivious to, the dangers that his conduct posed.[42] Injunctive remedies are reasonable devices for preventing public injury, and after-the-fact civil or administrative fines serve reasonable educational and deterrent purposes.[43] But the criminal law is society's most powerful weapon against conduct deemed unlawful and traditionally has been brought to bear on an individual only when he acted with a wicked intent, rather than merely negligently, let alone when no blame at all can be attributed to him. Regulatory laws do not see it that way. That creates serious notice and compliance problems for small businesses.

IV. MARRIAGE COUNSELING: AVAILABLE REMEDIES FOR THOSE PROBLEMS

There are several potential remedies for the notice problems discussed above. They may not entirely solve those difficulties, but they certainly advance the ball as close to the goal line as is reasonably possible.

A. Identify the Crimes

The first remedy is the easiest to implement: direct the federal government to identify every statute and regulation that itself defines a crime or bears on laws that do. Congress could pass a law directing the Executive Branch (in all likelihood the U.S. Justice Department) to perform the following tasks: (1) to identify all statutes and regulations bearing on the definition of criminal conduct; (2) to list all those statutes in one provision to be codified in Title 18 of the U.S. Code; (3) to catalogue those laws in a manner that can be readily understood by the average person; (4) to place the text of those laws on a government website that every person can access for free over the Internet; and (5) to keep that website up to date over time. To give that statute bite,

41. *Id.* at 744.

42. *See id.*

43. Hudson v. United States, 522 U.S. 93, 102 (1997) ("[A]ll civil penalties have some deterrent effect.").

Congress could also hold a sword over the government's head by enacting a separate provision stating that no act of Congress can serve as a basis for criminal liability unless it has been codified in Title 18 or is expressly listed in a new Title 18 section, which lists and catalogs all federal criminal statutes codified elsewhere in the U.S. Code. Those small steps would help identify all federal criminal laws, thereby providing the public both some notice of what is outlawed, as well as some information about the scope of this problem.[44]

B. Modify the Substantive Law: A "Willfulness" Mens Rea Standard and a Mistake of Law Defense

The above proposal would be a valuable first step for the government to undertake in order to satisfy its obligation to notify the public as to what conduct had been made a crime.[45] But making the corpus of the criminal law available to the average person may still not guarantee that every person receives adequate notice of the line between lawful and illegal conduct. One reason is that the esoteric nature of many regulatory laws and regulations may not be readily understandable by a person "of ordinary intelligence."[46] Contemporary statutes and regulations are often written in terms making it difficult for an experienced lawyer to understand their meaning, let alone someone untutored and inexperienced in the law. Accordingly, there are two other remedies, both of which are modifications of the substantive criminal law, that Congress or the federal courts should endorse.

In order to ensure that the criminal law does not condemn morally innocent parties, Congress could require the government to prove—as a condition for criminal, but not civil, liability—that a person "willfully" violated a regulation. The Supreme Court has construed the term "willfully" to require the government to prove that the accused intended to breach a known legal duty.[47] That approach would place the burden of proof on the government. Alternatively, Congress should authorize a defendant to raise a "mistake of law" defense to any such charge, which

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44. *See* Larkin, *Public Choice Theory*, *supra* note 2, at 759 n.193. The Senate Judiciary Committee recently approved a bill that would require the Executive Branch to provide that notice. On January 30, 2014, the Senate Judiciary Committee approved the Smarter Sentencing Act of 2013. S.1410, 113th Cong. (2013). Section 3 of that bill (among other things) would require the Executive Branch to identify every federal criminal law, their penalties, and the mental state that each one requires for conviction. *See id.*

45. *See supra* Part IV.A.

46. United States v. Harriss, 347 U.S. 612, 617 (1954).

47. Bryan v. United States, 524 U.S. 184, 191 (1998); Ratzlaf v. United States, 510 U.S. 135, 138 (1994); Cheek v. United States, 498 U.S. 192, 200 (1991); United States v. Pomponio, 429 U.S. 10, 12 (1976); United States v. Bishop, 412 U.S. 346, 360 (1973).

would place the burden of proof on the accused.[48] The criminal law generally does not recognize an exculpatory mistake of law doctrine today, but Congress and the federal courts have the authority to recognize a properly-defined defense, and one or the other should do so. Either step would improve the substantive criminal law by returning its focus to the type of evil intent or wicked nature that William Blackstone identified as the hallmark of criminal conduct,[49] and by ensuring that a party does not wind up in prison for making a reasonable mistake.[50]

V. CONCLUSION

The marriage of the regulatory law and the criminal law poses difficulties not present when either doctrine stands alone. There are instances in which the union is necessary to protect the public against the hazards of industrialization, and, in those cases, foregoing criminal prosecution would result in the inadequate enforcement of laws safeguarding the public health. But it is a mistake to believe that the use of the criminal law to enforce a regulatory program is the same as the use of the penal code to prevent the harms to each other and each other's property that have been the primary focus of the criminal law since the days of Blackstone. Just as using any tool for a purpose it was not designed to serve is likely to damage both the tool and the object of its intended use, using the criminal law for regulatory purposes will impose serious costs on both the criminal justice system and the public. At the end of the day, society may deem those costs justifiable in pursuit of a more important goal, but that decision cannot be made without considering precisely how the purposes and uses of the regulatory and criminal law differ, whether those disparate purposes can be reconciled without doing violence to either one, and if that reconciliation can be achieved in a better manner. That decision can only be made after taking into account the specific elements of a particular regulatory program and how the criminal law would be used as an enforcement tool. The recommendations noted above would go a long way toward accommodating the competing public and private interests.[51]

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48. *See, e.g.*, Smith v. United States, 133 S. Ct. 714, 718-20 (2013) (stating that the defendant can be required to prove that he withdrew from a conspiracy); Dixon v. United States, 548 U.S. 1, 17 (2006) (stating that the defendant can be required to prove duress); Martin v. Ohio, 480 U.S. 228, 233, 235 (1987) (stating that the defendant can be required to prove that he acted in self-defense); Patterson v. New York, 432 U.S. 197, 208-10 (1977) (stating that the defendant can be required to prove that he acted due to extreme emotional disturbance).

49. 4 BLACKSTONE, *supra* note 36, at 21.

50. *See* Larkin, *Public Choice Theory*, *supra* note 2, at 779-81.

51. *See supra* Part IV.