Written Statement
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"Criminalizing America: The Growth of Federal Offenses and Regulatory Overreach"

Subcommittee on Crime and Federal Government Surveillance
Committee on the Judiciary
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Chairman Biggs, ranking member McBath, members of the Subcommittee, my name is Jonathan Turley. I am a law professor at George Washington University, where I hold the J.B. and Maurice C. Shapiro Chair of Public Interest Law.[1] It is an honor to appear before you today to discuss the criminalization of America.

Exactly twenty-seven years ago, on May 7, 1998, I appeared in this very committee room before the House Judiciary Committee to discuss the rapid criminalization of federal laws, particularly in the form of administrative crimes.[2] I testified on the exponential growth of federal crimes in every aspect of American life. Regrettably, that over-criminalization has continued largely unabated with chilling implications for our society.

For the purposes of background, I come to this subject as someone who has been both an academic and a criminal defense attorney in this area for over three decades. Since my testimony over a quarter of a century ago, I have seen progress in many areas in which I have testified. However, the criminalization of administrative and civil violations continues to be a habit that Congress simply cannot shake.

There are an estimated 5,000 federal crimes and hundreds of thousands of regulatory crimes.[3] These federal crimes overlay state crimes, which have also expanded exponentially. This would have been unimaginable for our Founders, who viewed police powers as resting primarily with the states. There are only three specific crimes mentioned in the Constitution: treason, piracy, and counterfeiting. Federal criminal and regulatory authority remained very limited into the early twentieth century. The federal

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[1] I appear today on my own behalf, and my views do not reflect those of my law school or the media organizations that feature my legal analysis.

[2] United States House of Representatives, Committee on the Judiciary, Subcommittee on Commercial and Administrative Law on "Administrative Crimes and Quasi Crimes," May 7, 1998 (testimony of Professor Jonathan Turley).

[3] *See* John C. Coffee, Jr., *Does "Unlawful" Mean "Criminal"?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. REV. 193, 216 (1991).

criminalization of our society has occurred with the increasing federal incursion into state police powers and the effective delegation of creating new crimes to federal agencies by passing catch-all criminal provisions.

The line between criminal and civil conduct is one of the most important elements of our legal system and traditions. Sir William Blackstone described crimes as denoting offences against public law that "are of a deeper and more atrocious dye." Crimes were largely reserved for those acts that most threatened the public order and safety. The very allegation of criminal conduct brought a stigma of an act committed with criminal intent, reflecting a malicious or even evil character of the actor.[4] Today, Congress has allowed the criminalization of conduct in the United States to a chilling degree. As law professor John Baker stated, "There is no one in the United States over the age of 18 who cannot be indicted for some federal crime.[5]

With these layers of criminal provisions, the focus of criminal conduct has moved from its narrowly defined origins of intent, or mens rea, to any act deemed worthy by Congress or agencies to warrant criminal rather than civil redress. These include criminal negligence provisions that I have criticized for decades as erasing important lines between criminal and civil conduct. There are also criminal strict liability violations that do not require the showing of scienter or intent, but only the commission of the prescribed act.

The Framers recognized the harm that comes from the over-criminalization of conduct. James Madison wrote in Federalist Paper 62 that "It will be of little avail to the people that laws are made by men of their own choice if the laws be . . . so incoherent that they cannot be understood . . . [so] that no man who knows what the law is today, can guess what it will be like tomorrow."[6] That is precisely what we have allowed to occur. Today, citizens have no idea what is considered a criminal act and are often surprised by minor violations resulting in criminal charges. While we continue to mouth the adage that "ignorance of the law is no excuse," we have let our criminal laws become an unintelligible morass where no one can fully understand what is now criminal conduct. Congress often does not even define the scope of a crime and defers to agencies to do so, leaving key details to a subterranean administrative process that few citizens understand or follow. Since Congress has no clue about the full range of criminal provisions that it has allowed to be established, it is hardly surprising that citizens are even less cognizant of the scope of federal criminal provisions, let alone the combination of federal and state systems. Indeed, even the agencies have a hard time keeping track of this perpetual criminalization machine. In *Caring Hearts Personal Home Services, Inc. v. Burwell*, then 10th Circuit Judge (now Justice) Neil Gorsuch wrote about how even the Centers for Medicare & Medicaid Services became confused by this labyrinth of criminal provisions:

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[4] 2 HENRY DE BRACTON, ON THE LAWS AND CUSTOMS OF ENGLAND 384 (Samuel E. Thorne trans. & ed., Harvard Univ. Press 1968) (c. 1300)

[5] William N. Clark & Artem M. Joukov, The Criminalization of America, 76 Ala. Law. 224, 224 (2015) (quoted and cited by Gamble v. United States, 139 S. Ct. 1960, 2008 n.98 (2019) (Gorsuch, J., dissenting)).

[6] The Federalist No. 62, at 323-24 (James Madison) (George W. Carey & James McClellan eds., 2001).

> "Executive agencies today are permitted not only to enforce legislation but to revise and reshape it through the exercise of so-called 'delegated' legislative authority. The number of formal rules these agencies have issued thanks to their delegated legislative authority has grown so exuberantly it's hard to keep up. The Code of Federal Regulations now clocks in at over 175,000 pages. And no one seems sure how many more hundreds of thousands (or maybe millions) of pages of less formal or 'sub-regulatory' policy manuals, directives, and the like might be found floating around these days.
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> For some, all this delegated legislative activity by the executive branch raises interesting questions about the separation of powers. For others, it raises troubling questions about due process and fair notice - questions like whether and how people can be fairly expected to keep pace with and conform their conduct to all this churning and changing 'law.'
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> But what if the problem is even worse than that? What happens if we reach the point where even these legislating agencies don't know what their own "law" is? . . .
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> This case has taken us to a strange world where the government itself - the very 'expert' agency responsible for promulgating the 'law' no less - seems unable to keep pace with its own frenetic lawmaking. A world Madison worried about long ago, a world in which the laws are 'so voluminous they cannot be read' and constitutional norms of due process, fair notice, and even the separation of powers seem very much at stake."[7]

Justice Gorsuch is not alone in raising the alarm over this criminalization trend. The Supreme Court has repeatedly returned to the over-criminalization of our society, with both the massive increase in the number of crimes and the length of sentences. In *Morissette v. United States*, Supreme Court Justice Robert Jackson wrote: "The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law … to choose between good and evil . . . and took deep and early root on American soil."[8]

In 1998, a Task Force of the American Bar Association concluded that more than 40% of the federal criminal code had been enacted since 1970 alone.[9] Since that time, the criminal provisions have exploded in size. In *Sykes v. United States*, Justice Antonin Scalia observed, "It should be no surprise that as the volume increases, so do the number of imprecise laws. . . . Fuzzy, leave-the-details-to-be-sorted-out-by-the-courts legislation is attractive to the Congressman who wants credit for addressing a national problem" without dealing "with the nitty-gritty."[10]

The most direct cost of over-criminalization is moving an ever-expanding number of citizens into the criminal justice system. Today, one out of every 47 adults is reportedly under "some form of correctional supervision." It also produces other ills within the

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[7] Caring Hearts Pers. Home Servs., Inc. v. Burwell, 824 F.3d 968, 2016 WL 3064870, at *1 (10th Cir. 2016).

[8] Morissette v. United States 342 U.S. 246, 251-252. (1952)

[9] Am. Bar Ass'n Task Force on Federalization of Criminal Law, the Federalization of Crime (1998).

[10] Sykes v. United States, 131 S. Ct. 2267, 2288 (2011) (Scalia, J., dissenting).

criminal justice system. It allows prosecutors to coerce citizens into plea agreements to avoid the ruinous costs of a criminal defense. It allows the government to overcharge for petty or minor offenses and seek excessive punishment. While our criminal system recognizes the need for prosecutorial discretion, it is Congress that creates the framework for such discretion. By criminalizing a huge swath of human conduct, we have allowed prosecutors discretion to not simply decide how to handle traditional criminal allegations, but whether to convert unintentional or negligent conduct into crimes.[11]

The Court has pushed back on these trends in cases like *Bond v. United States*[12] and *Yates v. United States*[13] where the justices rejected excessive charges. In *Bond*, "an amateur attempt by a jilted wife to injure her husband's lover" was hit with a charge under the Chemical Weapons Convention Implementation Act of 1998. In *Yates*, a commercial fisherman caught an undersized red grouper in the Gulf of Mexico and, aware that you cannot catch undersized fish, ordered a crew member to toss the suspect catch into the sea. For that offense, he was charged under the Sarbanes-Oxley Act of 2002. There is, however, a limit to what courts can do when Congress tosses aside its responsibilities toward citizens. As Justice Oliver Wendell Holmes explained "if my fellow citizens want to go to Hell I will help them. It's my job."[14] In dissenting from the majority opinion written by Justice Ruth Bader Ginsburg in *Yates*, Justice Kagan chastised the majority for taking such corrective action, noting that such objections from justices should be confined to "lectures, . . . law review articles, and . . . dicta."

Congress created this problem, and Congress will have to correct it. However, it has allowed this problem to become so massive that few have an appetite to try to take a bite out of it. Past efforts have failed to create meaningful reductions. In May 2013, the House of Representatives Committee on the Judiciary created an Over-Criminalization Task Force to consider the problem of over-criminalization.[15] Despite some fine work and testimony, there was little demonstrable progress in reducing the almost incomprehensible level of criminal provisions created by Congress. The most chilling fact about over-criminalization is that we still do not have a precise number of crimes enforced at the federal level.

The criminalization of America is one of the most destructive failures of the legislative branch. It is a trend that is fueled by the worst motivations of politicians to amplify the seriousness of a given cause by making violations criminal acts. Absent a criminal dimension, federal laws were somehow viewed as lesser concerns for public policy. The result is that, rather than making criminal provisions the exception for legislation, it became the rule. This means that an ever-larger percentage of our

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[11] BRIAN W. WALSH & TIFFANY M. JOSLYN, WITHOUT INTENT: HOW CONGRESS IS ERODING THE CRIMINAL INTENT REQUIREMENT IN FEDERAL LAW 29 (2010).

[12] 572 U.S. 844 (2014).

[13] 574 U.S. 528 (2015)

[14] 1 HOLMES-LASKI LETTERS 249 (M. Howe ed. 1953).

[15] *See Defining the Problem and Scope of Over-Criminalization and Over-Federalization: Hearing Before the Over-Criminalization Task Force of 2013 of the H. Comm. on the Judiciary*, 113th Cong. 65-66 (2013)

population is being pulled into the criminal justice system and often left with lasting and life-changing criminal records.[16]

The solution is, and always has been, clear. We need to return to bright-line rules emphasizing mens rea, or criminal intent, as the basis for crimes. That would likely result in most federal crimes being redefined as civil violations. Once again, the Supreme Court has tried on the margins to coax laws back to core scienter standards, including pushing back on criminal strict liability cases. For example, in *Morissette v. United States*,[17] a scrap metal dealer found some discarded bomb casings on an Air Force bombing range and sold them at a junk market. He was prosecuted for "knowingly" converting government property. Morissette insisted, while he did take the casings, he did not know that they had any value. The Court ruled that "knowing" applies to all the elements of the offense and rejected the strict liability charge.

Likewise, in *Staples v. United States*, the Supreme Court looked at the strict liability provisions of the National Firearms Act and overturned the conviction.[18] By not registering his weapon, the defendant was convicted of violating a provision making it unlawful "for any person to possess a machinegun that [was] not properly registered with the Federal Government." The statute conspicuously omitted any mens rea requirement. Prosecutors should be required to prove that he "knew the weapon he possessed had the characteristics that brought it within the statutory definition of a machinegun." Justice Clarence Thomas agreed in the 7-2 majority opinion and laid out the factors that the Court would impose in such cases to limit criminal strict liability in cases of the "public welfare."[19] Those factors include that the statute involves relatively new crimes of inherently dangerous activities and exposes defendants to relatively low penalties or stigmas.

Recently, the Court continued its narrowing of criminal elements in *Thompson v. United States,* where a former Chicago alderman was convicted of making false statements under 18 U.S.C. § 1014 to the Federal Deposit Insurance Corporation. The Court unanimously overruled the Seventh Circuit and held that false statements under the provision do not include "misleading" statements. They must actually be false. While not directly on point, it shows how the Court tried to maintain bright-line interpretations regarding criminal conduct and has reinforced doctrines like lenity. The Supreme Court has repeatedly relied on the doctrine of lenity to guarantee that "no citizen should be held accountable [to] a statute whose commands are uncertain, or subjected to punishment that is not clearly proscribed."[20] Without Congress changing the course of our criminalization

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[16] Gorsuch, Neil., Nitze, Janie. Over Ruled: The Human Toll of Too Much Law. United States: HarperCollins, 2024.

[17] 320 U.S. 277 (1943).

[18] Staples v. United States, 511 U.S. 600 (1994).

[19] This term was coined almost 100 years ago by Professor Francis B. Sayre in considering the rise of strict-liability offenses. *See generally* Francis B. Sayre, *Public Welfare Offenses*, 33 Colum. L. Rev. 55 (1933).

[20] United States v. Santos, 533 U.S. 507, 514 (2008).

trend, however, those decisions are about as effective as moving around the deck chairs on the Titanic.

That brings us back to the main challenge. It is the same challenge that Congress has faced for decades. It must first determine how many criminal provisions currently exist. Congress should ask President Donald Trump to issue an executive order requiring every agency to assemble a list of all criminal offenses and their elements. Once the universe of criminal provisions is established, we need to explore new technology, including AI, to sort out these provisions for possible decriminalization. Experts can help design an algorithm to use for these purposes to identify provisions that lack criminal intent and conduct worthy of criminalization. The benefit of new technology could be the critical difference from past efforts. However, Congress must also be committed to achieving these goals. To that end, I recommend the establishment of parallel bodies in the legislative and executive branches. Congress should create a Special Committee for the Decriminalization of Federal Laws and Regulations. The Trump Administration should create a counterpart office or task force to expedite the work of the Committee. This work could serve as a model for the states to address their own runaway criminalization crisis.

I would also recommend a new House rule for future sessions of Congress that requires any new criminal provision to meet narrowly stated criteria and receive the approval of multiple committees, including the Judiciary Committee. The fact is that the criminalization of American life is due to a perverse political incentive. With so many matters now subject to the criminal code, legislators feel that their insular public policy issue will not be seen as serious unless it is also a matter for criminal prosecution. Criminal provisions are treated as putting an exclamation point on policies. It is self-authenticating that a given issue is so important to the legislator that it is a matter for prosecution and not simply civil enforcement. To paraphrase James Madison, Congress must first show that it can control the criminal code and then show it can control itself.

It is hard to imagine returning to this Committee to testify again on over-criminalization exactly 27 years after my prior testimony. However, it is even harder to imagine the exponential growth in these criminal offenses over those roughly three decades. Despite that history, I remain optimistic that we can still reverse this trend. That optimism is due to the development of new technologies and the continued bipartisan commitment to decriminalizing our laws.

Once again, thank you for the honor of appearing before you to discuss these important issues. I am happy to answer any questions from the Subcommittee.

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