STATEMENT

of

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Over-Criminalization of Conduct/Over-Federalization of Criminal Law

Mr. Chairman, distinguished members of the subcommittee:

My name is Tim Lynch. I am the director of the Cato Institute's Project on Criminal Justice. Before I get into some of the nitty-gritty details of legal doctrine, let me begin by thanking you for the invitation to testify this afternoon. Although I believe the problems of Over-Criminalization of Conduct and Over-Federalization of Criminal Law are among the most serious problems facing the Congress today,[1] my role this afternoon, as I understand it, is to highlight a related trend in the law—and that is the drift away from the idea of blameworthiness as a first principle of American criminal justice. That is, too often the government seeks to deny the proposition that it is unjust to inflict criminal punishment on people who are not blameworthy. My remarks will thus focus on that particular subject.

[1] For a detailed discussion of these issues, see Task Force on Federalization of Criminal Law, *The Federalization of Criminal Law* (Chicago: American Bar Association, 1998); John Baker, "Measuring the Explosive Growth of Federal Crime Legislation," (The Federalist Society for Law and Public Policy Studies (May 2004)); John Baker, "Nationalizing Criminal Law: Does Organized Crime Make It Necessary or Proper?" *Rutgers Law Journal* 16 (1985): 495; Brian Walsh, "Doing Violence to the Law: The Over-Federalization of Crime," *Federal Sentencing Reporter* 20 (June 2008): 295; Erik Luna, "The Overcriminalization Phenomenon," *American University Law Review* 54 (2005): 703.

I. Introduction and Background

My approach to the criminal law begins with three basic propositions. First, the power that is wielded by police and prosecutors is truly immense. A dramatic raid, arrest, or indictment can bring enormous damage to a person's life—even before he or she has an opportunity to mount a defense in court. Second, the term "criminal" carries a stigma. It implies that the culprit has done something that is blameworthy. Third—and relatedly—it is important to keep a close eye on the manner in which the government creates and defines "criminal offenses." For as Harvard Law Professor Henry Hart once noted, "What sense does it make to insist upon procedural safeguards in criminal prosecutions if anything whatever can be made a crime in the first place?"[2] In my view, all persons of goodwill ought to be disturbed by the fact that the government is now bypassing the procedural protections of the Bill of Rights and attaching the "criminal" label to people who are not truly blameworthy.

Let me begin by trying to clarify some terminology. In our law schools today, the terms "intent" and "*mens rea*" are commonly used in a very broad manner—as concepts that include a spectrum of mental states (ranging from purposeful conduct to strict or vicarious liability) to be defined in statutes by policymakers. But for purposes of my testimony today, I will be using those terms in a more narrow sense. As Justice Potter Stewart once observed, "Whether postulated as a problem of '*mens rea*,' of 'willfulness,' of 'criminal responsibility,' or of 'scienter,' the infliction of criminal punishment upon the unaware has long troubled the fair administration of justice."[3] Today I want to advance the claim that it is wrong to criminally punish those who were "unaware" of the facts or rules that made their conduct unlawful. The remainder of my testimony will pinpoint the areas of our law where this problem is especially acute.

II. The Problem Areas

A. Ignorance of the Law is No Excuse

The sheer volume of modern law makes it impossible for an ordinary American household to stay informed. And yet, prosecutors vigorously defend the old legal maxim that "ignorance of the law is no excuse."[4] That maxim may have been appropriate for a society that simply criminalized inherently evil conduct, such as murder, rape, and theft, but it is wholly inappropriate in a labyrinthine regulatory regime that criminalizes activities that are morally neutral. As Professor Henry M. Hart opined, "In no respect is contemporary law subject to greater reproach than for its obtuseness to this fact."[5]

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[2] Henry M. Hart, Jr., "The Aims of the Criminal Law," reprinted in *In the Name of Justice* (Washington, D.C.: Cato Institute, 2009), p. 6.
[3] *United States v. International Minerals & Chemical Corp.*, 402 U.S. 558 (1971) (Stewart, J., dissenting).
[4] SeeTimothy Lynch, "Ignorance of the Law: Sometimes a Valid Defense," *Legal Times*, April 4, 1994.
[5] Hart, "The Aims of the Criminal Law," p. 19.

To illustrate the rank injustice that can and does occur, take the case of Carlton Wilson, who was prosecuted because he possessed a firearm. Wilson's purchase of the firearm was perfectly legal, but, years later, he didn't know that he had to give it up after a judge issued a restraining order during his divorce proceedings. When Wilson protested that the judge never informed him of that obligation and that the restraining order itself said nothing about firearms, prosecutors shrugged, "ignorance of the law is no excuse."[6] Although the courts upheld Wilson's conviction, Judge Richard Posner filed a dissent: "We want people to familiarize themselves with the laws bearing on their activities. But a reasonable opportunity doesn't mean being able to go to the local law library and read Title 18. It would be preposterous to suppose that someone from Wilson's milieu is able to take advantage of such an opportunity."[7] Judge Posner noted that Wilson would serve more than three years in a federal penitentiary for an omission that he "could not have suspected was a crime or even a civil wrong."[8]

It is simply outrageous for the government to impose a legal duty on every citizen to "know" all of the mind-boggling rules and regulations that have been promulgated over the years. Policymakers can and should discard the "ignorance-is-no-excuse" maxim by enacting a law that would require prosecutors to prove that regulatory violations are "willful" or, in the alternative, that would permit a good-faith belief in the legality of one's conduct to be pleaded and proved as a defense. The former rule is already in place for our complicated tax laws—but it should also shield unwary Americans from all of the laws and regulations as well.[9]

B. Vague Statutes

Even if there were but a few crimes on the books, the terms of such laws need to be drafted with precision. There is precious little difference between a secret law and a published regulation that cannot be understood. History is filled with examples of oppressive governments that persecuted unpopular groups and innocent individuals by keeping the law's requirements from the people. For example, the Roman emperor Caligula posted new laws high on the columns of buildings so that ordinary citizens could not study the laws. Such abominable policies were discarded during the Age of Enlightenment, and a new set of principles—known generally as the "rule of law"—took hold. Those principles included the requirements of legality and specificity.

"Legality" means a regularized process, ideally rooted in moral principle, by which crimes are designated and prosecuted by the government. The Enlightenment

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[6] *United States v. Wilson*, 159 F.3d 280 (1998).
[7] Ibid., p. 296 (Posner, J., dissenting).
[8] Ibid. The Wilson prosecution was *not* a case of one prosecutor using poor judgment and abusing his power. See, for example, *United States v. Emerson*, 46 F.Supp. 2d 598 (1999).
[9] See, generally, Ronald A. Cass, "Ignorance of the Law: A Maxim Reexamined," *William and Mary Law Review* 17 (1976): 671.

philosophy was expressed by the maxim *nullum crimen sine lege* (there is no crime without a law). In other words, people can be punished only for conduct previously prohibited by law. That principle is clearly enunciated in the ex post facto clause of the U.S. Constitution (article I, section 9). But the purpose of the ex post facto clause can be subverted if the legislature can enact a criminal law that condemns conduct in general terms, such as "dangerous and harmful" behavior. Such a law would not give people fair warning of the prohibited conduct. To guard against the risk of arbitrary enforcement, the Supreme Court has said that the law must be clear:

> A criminal statute cannot rest upon an uncertain foundation. The crime, and the elements constituting it, must be so clearly expressed that the ordinary person can intelligently choose, in advance, what course it is lawful for him to pursue. Penal statutes prohibiting the doing of certain things, and providing a punishment for their violation, should not admit of such a double meaning that the citizen may act upon the one conception of its requirements and the courts upon another.[10]

The principles of legality and specificity operate together to reduce the likelihood of arbitrary and discriminatory application of the law by keeping policy matters away from police officers, administrative bureaucrats, prosecutors, judges, and members of juries, who would have to resolve ambiguities on an ad hoc and subjective basis.

Although the legality and specificity requirements are supposed to be among the first principles of American criminal law, a "regulatory" exception has crept into modern jurisprudence. The Supreme Court has unfortunately allowed "greater leeway" in regulatory matters because the practicalities of modern governance supposedly limit "the specificity with which legislators can spell out prohibitions."[11] During the past 50 years, fuzzy legal standards, such as "unreasonable," "unusual," and "excessive," have withstood constitutional challenge.

The Framers of the American Constitution understood that democracy alone was no guarantor of justice. As James Madison noted, "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; if they be repealed or revised before they are promulgated, or undergo such incessant changes that no man, who knows what the law is today, can guess what it will be tomorrow."[12] Unfortunately, Madison's vision of unbridled lawmaking is an apt description of our modern regulatory

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[10] *Connally v. General Construction Company*, 269 U.S. 385, 393 (1926) (internal quotation marks omitted).
[11] *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162-163 (1972).
[12] James Madison, "Federalist Paper 62," in *The Federalist Papers*, ed. Clinton Rossiter (New York: New American Library, 1961), p. 381.

state.[13] For example, the Environmental Protection Agency received so many queries about the meaning of the Resource Conservation and Recovery Act that it set up a special hotline for questions. Note, however, that the "EPA itself does not guarantee that its answers are correct, and reliance on wrong information given over the RCRA hotline is no defense to an enforcement action."[14] The situation is so bad that even many prosecutors are acknowledging that there is simply too much uncertainty in criminal law. Former Massachusetts Attorney General Scott Harshbarger concedes, "One thing we haven't done well in government is make it very clear, with bright lines, what kinds of activity will subject you to . . . criminal or civil prosecution."[15]

The first step toward addressing the problem of vague and ambiguous criminal laws would be for the Congress to direct the courts to follow the rule of lenity in all criminal cases.[16] Legal uncertainties should be resolved in favor of private individuals and organizations, not the government.

C. Strict Liability

Two basic premises that undergird Anglo-American criminal law are the requirements of *mens rea* (guilty mind) and *actus reus* (guilty act).[17] The first requirement says that for an act to constitute a crime there must be "bad intent." Dean Roscoe Pound of Harvard Law School writes, "Historically, our substantive criminal law is based upon a theory of punishing the vicious will. It postulates a free agent confronted with a choice between doing right and doing wrong and choosing freely to do wrong."[18] According to that view, a man could not be prosecuted for leaving an airport with the luggage of another if he mistakenly believed that he owned the luggage. As the Utah Supreme Court noted in *State v. Blue* (1898), *mens rea* was considered an indispensable element of a criminal offense. "To prevent the punishment of the innocent, there has been ingrafted into our system of jurisprudence, as presumably in every other, the principle that the wrongful or criminal intent is the essence of crime, without which it cannot exist."[19]

By the same token, bad thoughts alone do not constitute a crime if there is no "bad act." If a police officer discovers a diary that someone mistakenly left behind in a coffee shop, and the contents include references to wanting to steal the possessions of

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[13] See Robert A. Anthony, "Unlegislated Compulsion: How Federal Agency Guidelines Threaten Your Liberty," Cato Institute Policy Analysis no. 312, August 11, 1998.
[14] William L. Gardner and Adam H. Steinman, "'Knowing' Remains the Key Word," *National Law Journal,* September 2, 1991, p. 28.
[15] Quoted in William P. Kucewicz, "Grime and Punishment," *ECO* **(**June 1993): 54.
[16] Pennsylvania has protected its citizens from overzealous prosecutors with such a law for many years. See 1 Pa.C.S.A. 1208.
[17] Wayne R. LaFave and Austin W. Scott Jr., *Criminal Law*, 2nd. ed. (St. Paul, MN: West Publishing Co., 1986), pp. 193–94.
[18] Quoted in *Morissette v. United States*, 342 U.S. 246, 250 n. 4 (1952).
[19] *Utah v. Blue*, 53 Pac. 978, 980 (1898).

another, the author cannot be prosecuted for a crime. Even if an off-duty police officer overhears two men in a tavern discussing their hatred of the police and their desire to kill a cop, no lawful arrest can be made if the men do not take action to further their cop-killing scheme. The basic idea, of course, is that the government should not be in the business of punishing "bad thoughts."

When *mens rea* and *actus reus* were fundamental prerequisites for criminal activity, no person could be branded a "criminal" until a prosecutor could persuade a jury that the accused possessed "an evil-meaning mind with an evil-doing hand."[20] That understanding of crime—as a compound concept—was firmly entrenched in the English common law at the time of the American Revolution.

Over the years, however, the moral underpinnings of the Anglo-American view of criminal law fell into disfavor. The *mens rea* and *actus reus* requirements came to be viewed as burdensome restraints on well-meaning lawmakers who wanted to solve social problems through administrative regulations. As Professor Richard G. Singer has written, "Criminal law . . . has come to be seen as merely one more method used by society to achieve social control."[21]

The change began innocently enough. To protect young girls, statutory rape laws were enacted that flatly prohibited sex with girls under the age of legal consent. Those groundbreaking laws applied even if the girl lied about her age and consented to sex and if the man reasonably believed the girl to be over the age of consent. Once the courts accepted that exception to the *mens rea* principle, legislators began to identify other activities that had to be stamped out—even at the cost of convicting innocent-minded people.

The number of strict liability criminal offenses grew during the 20th century as legislators created scores of "public welfare offenses" relating to health and safety. Each time a person sought to prove an innocent state-of-mind, the Supreme Court responded that there is "wide latitude" in the legislative power to create offenses and "to exclude elements of knowledge and diligence from [their] definition."[22] Those strict liability rulings have been sharply criticized by legal commentators. Professor Herbert Packer argues that the creation of strict liability crimes is both inefficacious and unjust.

> It is inefficacious because conduct unaccompanied by an awareness of the factors making it criminal does not mark the actor as one who needs to be subjected to punishment in order to deter him or others from behaving similarly in the future, nor does it single him out as a socially dangerous

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[20] *Morissette v. United States*, 342 U.S. 246, 251 (1952).
[21] Richard G. Singer, "The Resurgence of *Mens Rea*: III—The Rise and Fall of Strict Criminal Liability," *Boston College Law Review* 30 (1989): 337. See also *Special Report: Federal Erosion of Business Civil Liberties* (Washington: Washington Legal Foundation, 2008).
[22] *Lambert v. California*, 355 U.S. 225, 228 (1957).

> individual who needs to be incapacitated or reformed. It is unjust because the actor is subjected to the stigma of a criminal conviction without being morally blameworthy. Consequently, on either a preventative or retributive theory of criminal punishment, the criminal sanction is inappropriate in the absence of mens rea.[23]

A dramatic illustration of the problem was presented in *Thorpe v. Florida* (1979).[24] John Thorpe was confronted by a thief who brandished a gun. Thorpe got into a scuffle with the thief and wrested the gun away from him. When the police arrived on the scene, Thorpe was arrested and prosecuted under a law that made it illegal for any felon to possess a firearm. Thorpe tried to challenge the application of that law by pointing to the extenuating circumstances of his case. The appellate court acknowledged the "harsh result," but noted that the law did not require a vicious will or criminal intent. Thus, self-defense was not "available as a defense to the crime."[25]

True, *Thorpe* was a state case from 1979. The point here is simply to show the drift of our law. As Judge Benjamin Cardozo once quipped, once a principle or precedent gets established, it is usually taken to the "limit of its logic." For a more recent federal case, consider what happened to Dane Allen Yirkovsky. Yirkovsky was convicted of possessing one round of .22 caliber ammunition and for that he received minimum mandatory 15-year sentence.[26] Here are the reported circumstances surrounding his "crime."

> In late fall or early winter of 1998, Yirkovsky was living with Edith Turkington at her home in Cedar Rapids, Iowa. Instead of paying rent, Yirkovsky agreed to remodel a bathroom at the home and to lay new carpeting in the living room and hallway. While in the process of removing the old carpet, Yirkovsky found a Winchester .22 caliber, super x, round. Yirkovsky put the round in a small box and kept it in the room in which he was living in Turkington's house.
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> Subsequently, Yirkovsky's ex-girlfriend filed a complaint alleging that Yirkovsky had [some of] her property in his possession. A police detective spoke to Yirkovsky regarding the ex-girlfriend's property, and Yirkovsky granted him permission to search his room in Turkington's house. During this search, the detective located the .22 round. Yirkovsky admitted to police that he had placed the round where it was found by the detective.

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[23] Herbert Packer, "Mens Rea and the Supreme Court," *Supreme Court Review* (1962): 109. See also Jeffrey S. Parker, "The Economics of Mens Rea," *Virginia Law Review* 79 (1993): 741; Craig S. Lerner and Moin A. Yahya, "'Left Behind' After Sarbanes-Oxley," *American Criminal Law Review* 44 (2007): 1383.
[24] *Thorpe v. Florida*, 377 So.2d 221 (1979).
[25] Ibid., p. 223.
[26] See *United States v. Yirkovsky*, 259 F.3d 704 (2001).

The appellate court found the penalty to be "extreme," but affirmed Yirkovsky's sentence as consistent with existing law.[27]

Strict liability laws should be abolished because their very purpose is to divorce a person's intentions from his actions. But if the criminal sanction imports blame—and it does—it is a perversion to apply that sanction to self-defense and other acts that are not blameworthy. Our criminal law should reflect the old Latin maxim, *actus not facit reum nisi mens sit rea* (an act does not make one guilty unless his mind is guilty).[28]

D. Vicarious Liability

Everyone agrees with the proposition that if a person commands, pays, or induces another to commit a crime on that person's behalf, the person should be treated as having committed the act.[29] Thus, if a husband hires a man to kill his wife, the husband is also guilty of murder. But it is another matter entirely to hold one person criminally responsible for the *unauthorized* acts of another. "Vicarious liability," the legal doctrine under which a person may be held responsible for the criminal acts of another, was once "repugnant to every instinct of the criminal jurist."[30] Alas, the modern trend in American criminal law is to embrace vicarious criminal liability.

Vicarious liability initially crept into regulations that were deemed necessary to control business enterprises. One of the key cases was *United States v. Park* (1975).[31] John Park was the president of Acme Markets Inc., a large national food chain. When the

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[27] In my view, Congress should not stand by secure in the knowledge that such precedents exist. Justice Anthony Kennedy has made this point quite well: "The legislative branch has the obligation to determine whether a policy is wise. It is a grave mistake to retain a policy just because a court finds it constitutional…. Few misconceptions about government are more mischievous than the idea that a policy is sound simply because a court finds it permissible. A court decision does not excuse the political branches or the public from the responsibility for unjust laws." Anthony M. Kennedy, "An Address to the American Bar Association Annual Meeting," reprinted in *In the Name of Justice* (Washington, D.C.: Cato Institute, 2009), p. 193.

[28] See Wayne R. LaFave and Austin W. Scott Jr., *Criminal Law*, 2nd. ed. (St. Paul, MN: West Publishing Co., 1986), p. 212.

[29] Francis Bowes Sayre, "Criminal Responsibility for the Acts of Another," *Harvard Law Review* 43 (1930): 689, 690.

[30] Ibid., p. 702.

[31] *United States v. Park*, 421 U.S. 658 (1975). Although many state courts have followed the reasoning of the *Park* decision with respect to their own state constitutions, some courts have recoiled from the far-reaching implications of vicarious criminal liability. For example, the Pennsylvania Supreme Court has held that "a man's liberty cannot rest on so frail a reed as whether his employee will commit a mistake in judgment." *Commonwealth v. Koczwara*, 155 A.2d 825, 830 (1959). That Pennsylvania ruling, it must be emphasized, is an aberration. It is a remnant of the common law tradition that virtually every other jurisdiction views as passe´.

Food and Drug Administration found unsanitary conditions at a warehouse in April 1970, it sent Park a letter demanding corrective action. Park referred the matter to Acme's vice president for legal affairs. When Park was informed that the regional vice president was investigating the situation and would take corrective action, Park thought that was the end of the matter. But when unsanitary warehouse conditions were found on a subsequent inspection, prosecutors indicted both Acme and Park for violations of the Federal Food, Drug and Cosmetic Act.

An appellate court overturned Park's conviction because it found that the trial court's legal instructions could have "left the jury with the erroneous impression that [Park] could be found guilty in the absence of 'wrongful action' on his part" and that proof of that element was constitutionally mandated by due process.[32] The Supreme Court, however, reversed the appellate ruling. Chief Justice Warren Burger opined that the legislature could impose criminal liability on "those who voluntarily assume positions of authority in business enterprises" because such people have a duty "to devise whatever measures [are] necessary to ensure compliance" with regulations.[33] Thus, under the rationale of *Park*, an honest executive can be branded a criminal if a low-level employee in a different city disobeys a supervisor's instructions and violates a regulation—even if the violation causes no harm whatsoever.[34]

In 1994, Edward Hanousek was employed as a roadmaster for a railroad company. In that capacity, Hanousek supervised a rock quarrying project near an Alaska river. During rock removal operations, a backhoe operator accidentally ruptured a pipeline—and that mistake led to an oil spill into the nearby river. Hanousek was prosecuted under the Clean Water Act even though he was off duty and at home when the accident occurred. The case prompted Justice Clarence Thomas to express alarm at the direction of the law: "I think we should be hesitant to expose countless numbers of construction workers and contractors to heightened criminal liability for using ordinary devices to engage in normal industrial operations."[35]

Note that vicarious liability has *not* been confined to the commercial regulation context.[36] Tina Bennis lost her car to the police because of the actions of her husband. The police found him in the vehicle with a prostitute.[37] Pearlie Rucker was evicted from

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[32] *United States v. Park*, 421 U.S. 658, 666 (1975).
[33] Ibid., p. 672.
[34] "[T]he willfulness or negligence of the actor [will] be imputed to him by virtue of his position of responsibility." *United States v. Brittain*, 931 F.2d 1413, 1419 (1991); *United States v. Johnson & Towers, Inc.*, 741 F.2d 662, 665 n. 3 (1984). See generally Joseph G. Block and Nancy A. Voisin, "The Responsible Corporate Officer Doctrine—Can You Go to Jail for What You *Don't* Know?" *Environmental Law* (Fall 1992).
[35] *Hanousek v. United States*, 528 U.S. 1102 (2000) (Thomas, J., dissenting from the denial of certiorari).
[36] See Susan S. Kuo, "A Little Privacy, Please: Should We Punish Parents for Teenage Sex?" *Kentucky Law Journal* 89 (2000): 135.
[37] *Bennis v. Michigan*, 516 U.S. 442 (1996).

her apartment in a public housing complex because her daughter was involved with illicit drugs. To crack down on the drug trade, Congress enacted a law that was so strict that tenants could be evicted if one of their household members or guests used drugs. The eviction could proceed even if the drug activity took place outside the residence. Also under that federal law, it did not matter if the tenant was totally *unaware* of the drug activity.[38]

Further, in some jurisdictions, the drivers of vehicles are exposed to criminal liability if any passenger brings contraband—such as a marijuana joint—into an automobile even if there is no proof that the driver was aware of the contraband's existence.[39]

III. Conclusion

The federal criminal code has become so voluminous that it not only bewilders the average citizen, but also the most able attorney. Our courthouses have become so clogged that there is no longer adequate time for trials. And our penitentiaries are now operating well beyond their design capacity—many are simply overflowing with inmates. These developments evince a criminal law that is adrift. To get our federal system back "on track," Congress should take the following actions:

- Discard the old maxim that "ignorance of the law is no excuse." Given the enormous body of law presently on the books, this doctrine no longer makes any sense.

- Minimize the injustice of vaguely written rules by restoring traditional legal defenses such as diligence, good-faith, and actual knowledge.

- Restore the rule of lenity for criminal cases by enacting a statute that will explicitly provide for the "strict construction" of federal criminal laws.

- Abolish the doctrine of strict criminal liability as well as the doctrine of vicarious liability. Those theories of criminal liability are inconsistent with the Anglo-American tradition and have no place in a free society.

As noted earlier, these reform measures should be only the beginning of a fundamental reexamination of the role of the federal government, as well as the role of the criminal sanction, in American law.

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[38] *Department of Housing and Urban Development v. Rucker*, 535 U.S. 125 (2002).
[39] See e.g. *Maryland v. Smith*, 823 A.2d 644, 678 (2003) ("[T]he knowledge of the contents of the vehicle can be imputed to the driver of the vehicle.").