THE REGULATORY OFFENCE REVOLUTION IN CRIMINAL JUSTICE: THE CHOICE ARCHITECTURE OF REGULATORY OFFENCES

TERRY SKOLNIK*

Courts, scholars, and lawyers tend to overlook one of the most salient features that differentiate crimes and regulatory offences: choice architecture. The concept of "choice architecture" refers to how the presentation of options shapes decision-making. This article argues that crimes and regulatory offences employ different forms of choice architecture in the criminal justice process. It advances three core arguments. First, in the charging and plea phase, regulatory prosecutions nudge defendants to plead guilty by default, while criminal prosecutions automatically enrol defendants into non-guilty pleas. Second, when assessing culpability (or moral fault), regulatory prosecutions incorporate inculpatory default rules that presume guilt and foster efficiency. In contrast, criminal prosecutions incorporate exculpatory default rules that presume innocence and aim to prevent wrongful convictions. Third, in the context of sentencing, impecunious defendants who are charged with a regulatory offence must often opt in to receive a proportionate sanction. Outside of mandatory minimum sentencing contexts, defendants who are charged with a crime enrol into a sentencing scheme that considers proportionality constraints by default. Ultimately, this article deepens our understanding of the different choice architecture that governs crimes and regulatory offences, and lays the foundation for future scholarship that explores the criminal justice system's choice architecture more generally.

TABLE OF CONTENTS

I. INTRODUCTION 40
II. AN OVERVIEW OF CHOICE ARCHITECTURE 41
  A. NUDGES 42
  B. SLUDGE 44
III. THE CHOICE ARCHITECTURE OF CHARGES AND PLEAS 47
  A. CRIMINAL CHARGES AND PLEAS 48
  B. REGULATORY OFFENCES AND PLEAS 51
IV. THE CHOICE ARCHITECTURE OF MORAL FAULT 53
  A. CRIMES AND EXCULPATORY DEFAULT RULES 54
  B. REGULATORY OFFENCES AND INCULPATORY DEFAULT RULES 57
V. THE CHOICE ARCHITECTURE OF SENTENCING 59
  A. PUNISHMENT DEFAULTS FOR CRIMES 59

* Interim Executive Director of the Academy for Justice at the Sandra Day O'Connor College of Law at Arizona State Associate (ASU). Visiting research fellow at the Center for Constitutional Design at ASU. Associate Professor, University of Ottawa, Faculty of Law. Co-director of the uOttawa Public Law Centre. I thank Anna Maria Konewka, Ben Ewing, Danardo Jones, Lili Dao, Palma Paciocco, and Sylvia Rich for comments on prior drafts. I thank the Social Sciences and Humanities Research Council of Canada for their financial support. I also thank the editors of the *Alberta Law Review* for their excellent work and suggestions. Prior versions of this article were presented at the uOttawa Public Law Centre Criminal Law Workshop. All mistakes are my own. This article is the second part of a two-part article. For the first part, see Terry Skolnik, "The Regulatory Offence Revolution in Criminal Justice: The Expansive Role of Regulatory Offences" (2024) 64:1 Alta L Rev 777.

This work is licensed under a Creative Commons Attribution-NonCommercial-NoDerivatives 4.0 International License. Authors retain copyright of their work, with first publication rights granted to the *Alberta Law Review*.

B. PUNISHMENT DEFAULTS FOR REGULATORY OFFENCES 62
VI. CONCLUSION 65

I. INTRODUCTION

The distinction between crimes and regulatory offences is nothing new. These two categories of offences are distinguished on various grounds. Compared to crimes, regulatory offences are less stigmatizing, tend to result in less severe punishments, generally impose strict liability rather than subjective or objective *mens rea*, and usually require the defendant to prove on the balance of probabilities their due diligence or a mistake of fact to be acquitted.[1] And while crimes tend to prohibit conduct that is inherently wrong (or mala in se), regulatory offences proscribe conduct that is wrong because it is prohibited (or mala prohibita).[2] Crimes also censure and sanction the most reprehensible forms of wrongdoing that constitute public wrongs, whereas regulatory offences aim to promote welfare and prevent risks in delineated spheres of activity, such as driving and occupational safety.[3] This is a rough picture of the distinctions between crimes and regulatory offences, and many of these distinctions are critiqued. But other crucial differences between crimes and regulatory offences are overlooked.

This article is the second part of a two-part article that explores the regulatory offence revolution in criminal justice. It focuses on the choice architecture of regulatory offences. It argues that crimes and regulatory offences are governed by different forms of choice architecture. The concept of choice architecture refers to "the background conditions for people's choices."[4] The ways in which options and information are presented influence how individuals make decisions.[5] Furthermore, small variations in how information and options are presented can shift individuals' conduct significantly.[6]

This article demonstrates that crimes and regulatory offences employ distinct choice architecture that influences charges and pleas, culpability, and sentencing. It focuses primarily on low-level regulatory offences that police officers enforce routinely, such as traffic codes and municipal ordinances (or bylaws).

This article advances three core arguments. First, in the charging and plea phase, criminal prosecutions impose default rules that presume innocence, while regulatory offence

---

1 See e.g. Kernaghan R Webb, "Regulatory Offences, the Mental Element and the *Charter*: Rough Road Ahead" (1989) 21:2 Ottawa L Rev 419 at 420–21; Scott Requadt, "Regulatory Offences Since *Wholesale Travel*: The Need to Re-Evaluate Sections 1, 7 and 11(d) of the Charter" (1993) 22:3 Can Bus LJ 407 at 411–21.

2 RA Duff, *Answering for Crime: Responsibility and Liability in the Criminal Law* (Oxford, UK: Hart, 2007) at 89–90; Richard Glover, "Regulatory Offences and Reverse Burdens: the 'Licensing Approach'" (2007) 71:3 J Crim L 259 at 265–66; *R v Wholesale Travel Group Inc*, [1991] 3 SCR 154 at 216–22 [*Wholesale Travel*].

3 RA Duff, *Punishment, Communication, and Community* (Oxford: Oxford University Press, 2001) at 64; *Wholesale Travel*, *ibid* at 216–22; Terry Skolnik, "Use of Force and Criminalization" (2021) 85:3 Alb L Rev 663 at 680–81.

4 Cass R Sunstein, *The Ethics of Influence: Government in the Age of Behavioral Science* (New York: Cambridge University Press, 2016) at 5.

5 Richard H Thaler, Cass R Sunstein & John P Balz, "Choice Architecture" in Eldar Shafir, ed, *The Behavioral Foundations of Public Policy* (Princeton: Princeton University Press, 2013) 428 at 428–29.

6 *Ibid*.

prosecutions impose default rules that presume guilt.[7] Second, the choice architecture of culpability (or moral fault) varies significantly for criminal versus regulatory prosecutions. Criminal prosecutions are marked by exculpatory default rules that govern moral fault and that aim to prevent wrongful convictions.[8] These exculpatory rules include a strong presumption of innocence, the prosecution's burden to prove the defendant's guilt beyond a reasonable doubt, and the presumption of subjective fault.[9] In contrast, regulatory offence prosecutions incorporate inculpatory default rules that can promote efficiency at the expense of adjudicative accuracy: a weak presumption of innocence, presumed strict liability, and the defendant's burden to prove their due diligence on the balance of probabilities.[10] Third, criminal and regulatory punishments employ different forms of choice architecture. Leaving aside mandatory minimum sentences, punishments for criminal offences tend to employ proportionality constraints by default.[11] Punishments for regulatory offences generally do not.[12] Defendants who are subject to excessive regulatory penalties must opt in to a proportionate sanction — a process that imposes heavy administrative burdens and disadvantages impecunious defendants.[13]

The structure of this article is as follows. Part II provides an overview of choice architecture, nudges, and sludge. Part III explains the choice architecture that governs charges and pleas for crimes versus regulatory offences. Part IV describes the choice architecture that applies to moral fault for crimes and regulatory offences respectively. Part V concludes this article and analyzes the choice architecture that shapes sentencing for both categories of offences. Ultimately, this article deepens our understanding of how the presentation of choices influences decision-making in criminal and regulatory offence prosecutions.

II. AN OVERVIEW OF CHOICE ARCHITECTURE

Choice architecture shapes how people make choices. The ways in which options are presented can push individuals toward some options and away from others. Choice architects — meaning those who devise the background conditions for decision-making — use various tools to influence how people make choices.[14] These tools include "nudges" and "sludge," each of which are discussed in turn, and each of which exists within the criminal justice system.

---

7 Part III, below.

8 Part IV, below.

9 *Ibid*. See also Terry Skolnik, "Precedent, Principles, and Presumptions" (2021) 54:3 UBC L Rev 935 at 968–69 [Skolnik, "Precedent"]; *R v Lifchus*, 1997 CanLII 319 at para 13 (SCC) [*Lifchus*] (presumption of innocence); Irit Weiser, "The Presumption of Innocence in Section 11(d) of the Charter and Persuasive and Evidential Burdens" (1989) 31:3 Crim LQ 318 at 319 (discussing the burden of proof for criminal prosecutions); *R v ADH*, 2013 SCC 28 at para 23 [*ADH*] (discussing the presumption of subjective fault).

10 Part IV, below; Rick Libman, "Is Presuming Guilt for Regulatory Offences Still Constitutional but Wrong?: *R v Wholesale Travel Group Inc* and Section 1 of the *Charter of Rights and Freedoms* 20 Years After" (2012) 43:3 Ottawa L Rev 455 at 457–58.

11 Athar K Malik, "Mandatory Minimum Sentences: Shackling Judicial Discretion for Justice or Political Expediency?" (2007) 53:2 Crim LQ 236 at 236 (noting that mandatory minimum sentences overlook proportionality constraints); Palma Paciocco, "Proportionality, Discretion, and the Roles of Judges and Prosecutors at Sentencing" (2014) 81:3 Can Crim L Rev 241 at 244.

12 Part V, below.

13 *Ibid*.

14 Ian D Marder & Jose Pina-Sánchez, "Nudge the Judge? Theorizing the Interaction Between Heuristics, Sentencing Guidelines and Sentence Clustering" (2020) 20:4 Criminology & Crim Justice 399 at 403.

A. NUDGES

Begin with nudges. The term "nudge" implies "any aspect of the choice architecture that alters people's behavior in a predictable way without forbidding any options or significantly changing their economic incentives."[15] Nudges thus influence the context in which individuals make decisions rather than individuals' incentives or cognition.[16] The concept of nudging is associated with libertarian paternalism.[17] Choice architects use nudges to steer individuals toward welfare-maximizing choices, but ultimately leave the decisions in their hands.[18] To be clear, nudges are distinct from other types of interventions — especially coercive ones — that shape conduct. Schemes that impose "significant material incentives" or "significant material costs" do not constitute nudges.[19] Cass Sunstein observes that "[a] subsidy is not a nudge; a tax is not a nudge; a fine or a jail sentence is not a nudge."[20] Nudges tend to be cost-effective because they impose few financial costs but can influence decision-making significantly.[21]

There are two categories of nudges: educational and architectural.[22] Sunstein explains that "[e]ducative nudges include warnings, reminders and disclosure of information."[23] Examples of educative nudges include text message reminders for doctors' appointments, warnings on cigarette labels, and menus that indicate the number of calories for each item.[24] These types of nudges engage individuals' deliberative capacities.[25] Educational nudges draw individuals' attention to relevant information that can promote their welfare and help them make better decisions.[26] Such nudges also respect individual agency and autonomy.[27] They provide individuals with more knowledge when they make choices.[28]

Architectural nudges (or non-educative nudges) are different. Whereas educative nudges stimulate individuals' deliberative capacities, architectural nudges influence individuals' intuitive or faster-paced decision-making.[29] Architectural nudges include mechanisms such as "automatic enrolment, mandatory choice, simplification or 'sludge reduction', and design of websites, forms or in-person shops to highlight and draw attention to certain options."[30] Examples of such non-educative nudges include one-click subscriptions that facilitate choice, prefilled forms that save time and reduce effort, the placement of healthy food at eye level,

---

15 Richard H Thaler & Cass R Sunstein, *Nudge: The Final Edition* (New Haven, Conn: Yale University Press, 2021) at 8.
16 Hendrik Bruns et al, "Can Nudges Be Transparent and Yet Effective?" (2018) 65 J Econ Psychology 41 at 41.
17 See e.g. Cass R Sunstein, *Why Nudge?: The Politics of Libertarian Paternalism* (New Haven, Conn: Yale University Press, 2014) at 59.
18 Thaler & Sunstein, *supra* note 15 at 8.
19 Cass R Sunstein, "Nudges Do Not Undermine Human Agency" (2015) 38:3 J Consumer Pol'y 207 at 207.
20 *Ibid.*
21 Cass R Sunstein, "The Distributional Effects of Nudges" (2022) 6:1 Nature Human Behaviour 9 at 9 [Sunstein, "Distributional Effects"].
22 *Ibid.*
23 *Ibid.*
24 Cass R Sunstein, "The Ethics of Nudging" (2015) 32:2 Yale J Reg 413 at 417, 424–25.
25 Cass R Sunstein, "People Prefer System 2 Nudges (Kind of)" (2016) 66:1 Duke LJ 121 at 127–28 [Sunstein, "System 2 Nudges"].
26 *Ibid* at 124–25.
27 *Ibid.*
28 *Ibid.*
29 *Ibid* at 128–29.
30 Sunstein, "Distributional Effects," *supra* note 21 at 9.

and so on.[31] In contrast to educative nudges, architectural nudges can leverage certain features of human nature to shape decision-making, such as decisional inertia, emotions such as fear and hope, and personal preference for the status quo.[32]

Certain types of nudges modify behaviour particularly effectively.[33] Enrolment rates increase significantly when the relevant scheme is switched from opt in to default enrolment.[34] For instance, some studies indicate that participation rates for tax-favoured savings plans increase by 50 percent when employees are automatically enrolled within these schemes rather than opt in to them.[35] Other research shows that organ donation rates roughly quadruple when individuals are automatically enrolled as donors rather than opt in to that scheme.[36] Due to inertia, procrastination, and status quo bias — meaning a preference for the present — individuals are reluctant to opt out of schemes in which they are automatically enrolled.[37]

Although the criminal justice system is primarily coercive, it can incorporate nudges in various ways.[38] Several examples illustrate this point. Consider how choice architecture can influence the likelihood that defendants appear in court. Defendants who are charged with crimes may fail to attend court for various reasons, including that they forget their appearance date.[39] This omission can result in warrants, arrests, and additional criminal charges.[40] Some jurisdictions send text message reminders to defendants to appear in court to avoid bench warrants based on a failure to appear.[41] Some studies have shown that this educative nudge increased the likelihood that defendants attend court by roughly 25 percent.[42]

Or, consider how many prior offenders do not apply to have their criminal records expunged because of the fees, paperwork, and complexity involved in the process.[43] But criminal records limit an individual's access to employment, housing, social assistance benefits, and international travel.[44] In response, a jurisdiction may automatically expunge a defendant's criminal record after a certain period provided they do not reoffend — a nudge

---

31 *Ibid*.

32 Sunstein, "System 2 Nudges," *supra* note 25 at 128–29.

33 Cass R Sunstein, "Nudges vs. Shoves" (2014) 127:6 Harv L Rev 210 at 212.

34 John Beshears et al, "The Impact of Employer Matching on Savings Plan Participation under Automatic Enrollment" in David A Wise, ed, *Research Findings in the Economics of Aging* (Chicago: University Chicago Press, 2010) 311 at 312 (providing an overview of these studies).

35 Punam Anand Keller et al, "Enhanced Active Choice: A New Method to Motivate Behavior Change" (2011) 21:4 J Consumer Psychology 376 at 376.

36 *Ibid*.

37 Shlomo Benartzi et al, "Should Governments Invest More in Nudging?" (2017) 28:8 Psychological Science 1041 at 1046; Arnand Keller et al, *ibid* at 377.

38 See e.g. Skolnik, "Precedent," *supra* note 9 at 979–80; Terry Skolnik, "Two Criminal Justice Systems" (2023) 56:1 UBC L Rev 286 at 329 [Skolnik, "Criminal Justice"].

39 Alissa Fishbane, Aurelie Ouss & Anuj K Shah, "Behavioral Nudges Reduce Failure to Appear for Court" (2020) 370:6517 Science 1 at 1.

40 Alan Tomkins et al, "An Experiment in the Law: Studying a Technique to Reduce Failure to Appear in Court" (2012) 48:3 Court Rev 96 at 99.

41 Russell Ferri, "The Benefits of Live Court Date Reminder Phone Calls during Pretrial Case Processing" (2022) 18:1 J Experimental Criminology 149 at 151–52.

42 *Ibid*; Brice Cooke et al, "Using Behavioral Science to Improve Criminal Justice Outcomes" (January 2018) at 4, online (pdf): [perma.cc/QD23-MY35].

43 Skolnik, "Criminal Justice," *supra* note 38 at 326–31.

44 *Ibid* at 289–91; James B Jacobs, *The Eternal Criminal Record* (Cambridge: Harvard University Press, 2015) at 246–74 (describing the collateral consequences of a criminal record).

that converts criminal record expungements from opt in to default enrolment.[45] This shift aims to increase criminal expungement uptake rates for prior offenders because it avoids the typical hurdles that discourage criminal expungement applications.[46] These are just two examples. But they highlight how the State can incorporate educative and architectural nudges into the criminal justice process.

B. SLUDGE

Sludge is a second form of choice architecture. Whereas nudging can facilitate decision-making, sludge does the opposite.[47] The term "sludge" implies friction that hinders individuals from making choices that are consistent with their desires or interests.[48] Nudges are generally construed to be positive while sludge is generally construed to be negative.[49]

There are various forms of sludge, each of which exacerbates the human tendency to give up on a task: time-consuming paperwork, complicated application processes, red tape, confusing architecture, and the need to acquire extensive information to make a choice.[50] Like certain forms of nudges, sludge also leverages individuals' preferences for inertia, status quo bias, and procrastination.[51] Individuals may be reluctant to complete a process due to delays that hinder progress and incentivize individuals to put off the task to tomorrow (or never).[52] They may abandon tasks or processes that they view to be inordinately complex, unclear, or burdensome.[53]

To be clear, sludge can be imposed intentionally or inadvertently.[54] Institutions may impose sludge inadvertently because they aim to ensure program eligibility and integrity, protect privacy and security, gather relevant data, and ensure the proper delivery of benefits to individuals.[55] Furthermore, sludge may persist because well-intentioned organizations do

---

45 Skolnik, "Criminal Justice," *supra* note 38 at 326–31; Sonja B Starr, "Expungement Reform in Arizona: The Empirical Case for a Clean Slate" (2020) 52:3 Ariz St LJ 1059 at 1066 (describing automatic expungement); Alexander L Burton et al, "Beyond the Eternal Criminal Record: Public Support for Expungement" (2021) 20:1 Criminology & Pub Pol'y 123 at 141 (noting that traditional expungement schemes are opt-in, which decreases uptake rates).

46 Skolnik, "Criminal Justice," *ibid* at 326–31; Alyssa C Mooney, Alissa Skog & Amy E Lerman, "Racial Equity in Eligibility for a Clean Slate under Automatic Criminal Record Relief Laws" (2022) 56:3 Law & Soc'y Rev 398 at 400.

47 Sina Shahab & Leonhard K Lades, "Sludge and Transaction Costs" (2024) 8:2 Behavioural Pub Pol'y 327 at 327–28.

48 Cass R Sunstein, "Sludge and Ordeals" (2019) 68:8 Duke LJ 1843 at 1850 [Sunstein, "Sludge and Ordeals"].

49 Stuart Mills, "Nudge/Sludge Symmetry: On the Relationship between Nudge and Sludge and the Resulting Ontological, Normative and Transparency Implications" (2023) 7:2 Behavioural Pub Pol'y 309 at 310.

50 Sunstein, "Sludge and Ordeals," *supra* note 48 at 1850–51.

51 Dilip Soman et al, "Seeing Sludge: Towards a Dashboard to Help Organizations Recognize Impedance to End-User Decisions and Action" (2019) [archived at Rotman School of Management, University of Toronto], online (pdf): [perma.cc/XAA8-K8ST].

52 *Ibid* at 12.

53 Cass R Sunstein, *Sludge: What Stops Us from Getting Things Done and What to Do About it* (Cambridge, Mass: MIT Press, 2021) at 3, 24 [Sunstein, *Getting Things Done*].

54 Cass R Sunstein, "Sludge Audits" (2022) 6:4 Behavioural Pub Pol'y 654 at 661 [Sunstein, "Sludge Audits"].

55 Sunstein, *Getting Things Done*, *supra* note 53 at 73. Note that each of these justifications are provided expressly by Sunstein. He notes:

> We can readily imagine six possible justifications for sludge:
> 1. Ensuring eligibility and program integrity
> 2. Counteracting self-control problems
> 3. Protecting privacy

not conduct "sludge audits" that aim to detect, reduce, and prevent it.[56] But organizations may also impose sludge intentionally for various reasons. They may wish to limit participation and program uptake, including for discriminatory or prejudicial reasons.[57] Or, they may complicate exit processes to maximize profits, which keeps individuals subscribed to services or subscriptions that they do not want.[58]

Sludge imposes three types of administrative burdens on individuals: learning, compliance, and psychological.[59] Learning costs imply the burdens of learning about a program, assessing whether one is eligible, evaluating participating requirements, and so on.[60] Compliance costs refer to the financial costs to participate in a program, acquire necessary documentation, prove one's eligibility, and hire legal representation or an accountant to navigate through an administrative process.[61] Psychological costs, for their part, connote the mental burdens imposed on individuals who participate in programs.[62] These costs include stigmatization, loss of autonomy, frustration, and stress.[63]

The consequences of sludge are significant. Sludge induces various negative feelings that discourage individuals from making their desired choices.[64] It can also disincentivize individuals from obtaining crucial resources or seeking necessary help.[65] Individuals may not seek medical care due to sludge-filled processes, such as the need to acquire information, fill out annoying paperwork, print forms, and make a financial payment.[66] They may not seek social benefits that involve a complex system that is difficult to navigate, especially if they face additional barriers that complicate that process.[67] Impecunious individuals may not enjoy tax benefits or educational reimbursements that are difficult to find or are challenging

4. Protecting security
5. Targeting benefits to those who most need or deserve them
6. Collecting important or even essential data.

56 Sunstein, "Sludge Audits," *supra* note 54 at 668–71.

57 See e.g. Carolyn J Heinrich, "Presidential Address: 'A Thousand Petty Fortresses': Administrative Burden in U.S. Immigration Policies and its Consequences" (2018) 37:2 J Pol'y Analysis & Management 211 at 228, 235.

58 See e.g. Jamie Luguri & Lior Jacob Strahilevitz, "Shining A Light on Dark Patterns" (2021) 13:1 J Leg Analysis 43 at 103 (describing the relationship between dark patterns — meaning design interfaces that confuse or manipulate users to make decisions against their preferences — and profit generation).

59 Pamela Herd & Donald P Moynihan, *Administrative Burden: Policymaking by Other Means* (New York: Russell Sage, 2018) at 22 (footnotes 55–58 and accompanying text are taken directly from Herd & Moynihan, including their examples of learning, compliance, and psychological costs). Furthermore, the types of sludge are taken directly from literature on administrative burdens: see e.g. Martin Baekgaard, Donald P Moynihan & Mette Kjærgaard Thomsen, "Why Do Policymakers Support Administrative Burdens? The Roles of Deservingness, Political Ideology, and Personal Experience" (2021) 31:1 J Pub Administration Research & Theory 184 at 185.

60 Herd & Moynihan, *ibid* at 23.

61 *Ibid*.

62 *Ibid*.

63 *Ibid*.

64 *Ibid* at 24.

65 Michael Anne Kyle & Austin B Frakt, "Patient Administrative Burden in the US Health Care System" (2021) 56:5 Health Services Research 755 at 761.

66 *Ibid* at 761–62.

67 See e.g. Gemma Carey, Eleanor Malbon & James Blackwell, "Administering Inequality? The National Disability Insurance Scheme and Administrative Burdens on Individuals" (2021) 80:4 Australian J Pub Admin 854 at 862–64.

to claim.[68] In some circumstances, sludge-filled processes may generate downstream effects: missed days of work, increased stress, and burnout.[69]

The effect of sludge disproportionately impacts certain individuals and groups. For one, the impact of sludge skews along socio-economic lines.[70] Impecunious persons may have less free time than others because they are burdened with other responsibilities, which exacerbates the impact of sludge.[71] They may work numerous jobs, take longer commutes because they use public transportation rather than a private vehicle, and juggle childcare responsibilities with little external assistance.[72] Empirical studies suggest that impecunious persons are less likely to apply for certain types of social benefits — such as child care benefits or social assistance — that involve burdensome administrative processes.[73] Sludge also imposes additional barriers on unhoused persons who lack a stable address, government-issued identification, and transportation — all of which may be required to access certain services.[74] Language barriers may exacerbate sludge's effects, given the added complexity of understanding and gathering information, filling out forms, and completing certain administrative requirements.[75]

Sludge is bad for another reason: it is expensive. Studies indicate that in the United States, the federal government imposed approximately 9.78 billion hours of paperwork on its residents, which equated to roughly $215 billion in lost wages.[76] By 2019, that number had increased to 11.25 billion hours of paperwork.[77] Sludge can also impose indirect financial costs. Individuals who are bombarded with enrolment information may not select insurance plans that meet their needs, which results in greater out-of-pocket expenses.[78] Employees spend significant time when they deny claims or reject applications to participate in programs, which may then be returned to applicants to modify, and then send back to employees to re-adjudicate.[79] According to certain studies, administrative complexity is the largest source of waste in the United States healthcare system.[80]

---

68 Laura M Giurge, Ashley V Whillans & Colin West, "Why Time Poverty Matters for Individuals, Organisations and Nations" (2020) 4:10 Nature Human Behaviour 993 at 999.

69 See e.g. Jeffrey Pfeffer et al, "Magnitude and Effects of 'Sludge' in Benefits Administration: How Health Insurance Hassles Burden Workers and Cost Employers" (2020) 6:3 Academy of Management Discoveries 325 at 333–34.

70 Amanda Aykanian, "Mobility-Related Barriers to Accessing Homeless Services: Implications for Continuums of Care and Coordinated Entry" (2023) 14:2 J Society for Soc Work & Research 483 at 492; Carolyn J Heinrich, "The Bite of Administrative Burden: A Theoretical and Empirical Investigation" (2016) 26:3 J Pub Administration Research & Theory 403 at 418.

71 Giurge, Whillans & West, *supra* note 68 at 999 (providing an overview of this data).

72 Mariana Chudnovsky & Rik Peeters, "The Unequal Distribution of Administrative Burden: A Framework and an Illustrative Case Study for Understanding Variation in People's Experience of Burdens" (2021) 55:4 Soc Pol'y & Administration 527 at 530.

73 Julian Christensen et al, "Human Capital and Administrative Burden: The Role of Cognitive Resources in Citizen-State Interactions" (2019) 80:1 Pub Administration Rev 127 at 129, 131 (providing and overview of these studies); Evelyn Z Brodkin & Malay Majmundar, "Administrative Exclusion: Organizations and the Hidden Costs of Welfare Claiming" (2010) 20:4 J Pub Administration Research & Theory 827 at 841–44.

74 Jack Tsai et al, "Medicaid Expansion: Chronically Homeless Adults Will Need Targeted Enrollment and Access to a Broad Range of Services" (2013) 32:9 Health Affairs 1552 at 1557.

75 Leslie Book, T Keith Fogg & Nina E Olson, "Reducing Administrative Burdens to Protect Taxpayer Rights" (2022) 74:4 Okla L Rev 527 at 545.

76 Sunstein, "Sludge and Ordeals," *supra* note 48 at 1847; Giurge, Whillans & West, *supra* note 68 at 999.

77 Sunstein, "Sludge and Ordeals," *ibid* at 1847.

78 Christensen et al, *supra* note 73 at 132.

79 Pfeffer et al, *supra* note 69 at 2.

80 *Ibid*.

Like nudges, policymakers and judges can also incorporate sludge within the criminal justice process. The previous sections offered one example: the sludge-filled process to apply for a criminal record suspension.[81] But there are others. Consider the heavy administrative process to apply for *Rowbotham* applications.[82] Defendants who do not qualify for legal aid may present a *Rowbotham* application to receive state-funded counsel for serious criminal charges.[83] Yet individuals who wish to present such an application must exhaust all other legal aid requests, satisfy eligibility requirements, and fill out various forms — all of which are more difficult for individuals who are detained pending trial.[84] Some courts have imposed additional requirements since *Rowbotham* applications' inception in 1988.[85] As Kate Kehow and David Wiseman explain, the application must satisfy the following criteria:

> [T]he applicant's financial circumstances "must be extraordinary"; … the applicant must provide detailed evidence of his or her financial circumstances and of his or her of attempts to obtain legal representation; the applicant must make efforts to save money, borrow, including from children or family members; obtain employment or additional employment; look for counsel willing to work at legal aid rates, and exhaust all efforts to utilize assets that the applicant owns to raise funds.[86]

As they explain, defendants' *Rowbotham* applications may be denied where they were not prudent with their expenses, or where they failed to "show foresight and planning of financial affairs to enable financing of counsel."[87] A defendant's application will also be rejected when courts deem that they were responsible for their own indigence.[88] *Rowbotham* applications impose heavy learning, compliance, and psychological costs that may discourage potential applicants who need legal representation. Furthermore, the adjudication of these applications monopolizes judicial resources, which lengthens delays for other defendants within the criminal justice system.[89]

III. THE CHOICE ARCHITECTURE OF CHARGES AND PLEAS

Defendants face different default enrolment schemes depending on whether they are charged with crimes or regulatory offences. Imagine two distinct default enrolment schemes for individuals charged with such offences: "not guilty" and "guilty." As discussed more below, defendants who are charged with crimes are automatically enrolled into a "not guilty"

---

81 Skolnik, "Criminal Justice," *supra* note 38 at 326–31.

82 *R v Rowbotham*, 1988 CanLII 147 (ONCA); Benjamin D Schnell, "The Journey to Universal Legal Aid: Protecting the Criminally Accuseds' Charter Rights by Introducing a Public Defender System to Ontario" (2018) 8:2 Western J Leg Studies 1 at 19 (providing an overview of *Rowbotham* applications).

83 Schnell, *ibid* at 19; Manasvin Goswami, "Reforming *Rowbotham*: Towards Fairer Financial Eligibility Standards for State-Funded Counsel in Criminal Trials" (2017) 26:1 Const Forum Const 19 at 19–20.

84 Legal Aid Ontario, "Rowbotham Applications," online: [perma.cc/6AS3-F23U]; Jennifer Bond, "The Cost of Canada's Legal Aid Crisis: Breaching the Right to State-Funded Counsel Within a Reasonable Time" (2012) 59:1 Crim LQ 28 at 36.

85 Kate Kehoe & David Wiseman, "Reclaiming a Contextualized Approach to the Right to State-Funded Counsel in Child Protection Cases" (2012) 63 UNBLJ 163 at 183.

86 *Ibid* at 181, citing *HMTQ v Malik*, 2003 BCSC 1439.

87 *Ibid*.

88 *Ibid*.

89 Christine Mainville, "Report on the CIAJ's Complex Criminal Trials Roundtable" (2015) 62:3 Crim LQ 339 at 360. See also Terry Skolnik, "Criminal Justice Reform: A Transformative Agenda" (2022) 59:3 Alta L Rev 631 at 652 [Skolnik, "Criminal Justice Reform"] (describing how some applications or motions externalize delays onto other defendants); Skolnik, "Precedent," *supra* note 9 at 984 (same).

scheme that exemplifies a commitment to the presumption of innocence.[90] To be clear, they can — and often do — opt out of that scheme and plead guilty.[91] Furthermore, powerful forces encourage defendants to opt in to guilty pleas, such as their factual guilt, coercive plea bargaining practices, trial penalties, and harsh remand conditions (more on this below).[92] Yet certain rules and features of criminal prosecutions classify defendants as not guilty by default. In contrast, defendants who are charged with regulatory offences are automatically enrolled in a "guilty" scheme.[93] They face different forms of choice architecture, nudges, and sludge — all of which exploit inertia and pull them to plead guilty. The nature of the enrolment scheme plays a fundamental role in how defendants pass through the criminal justice process, especially in how they are convicted and punished for offences.

A. CRIMINAL CHARGES AND PLEAS

Three core features distinguish the choice architecture of criminal versus regulatory accusations: arraignments, default enrolment rules, and the allocation of sludge. Consider arraignments first. Defendants who are charged with crimes must be arraigned.[94] During this process, the court reads the criminal charges and asks the defendant how they plead.[95] In response, the defendant pleads guilty, not guilty, or offers a special plea that is invoked more rarely (such as *autrefois acquit* or *autrefois convict*).[96] The arraignment and plea process serves several purposes: ensuring the proper defendant is before the court, informing the defendant of the nature of the criminal charge, and receiving their plea.[97]

Arraignments combine two aspects of choice architecture: active choosing and default rules.[98] Active choosing implies that individuals are invited to state their preferred choice.[99] For instance, individuals who renew their driver's licence can be prompted to state whether they would like to become an organ donor.[100] Similarly, during the arraignment, the court asks the defendant to state their plea.[101] This form of active choice is valuable because it counteracts the human tendency to procrastinate, especially in a process that would require

---

90 See e.g. Pamela R Ferguson, "The Presumption of Innocence and its Role in the Criminal Process" (2016) 27:2 Crim LF 131 at 150–58 (describing how the presumption of innocence shapes various aspects of the criminal justice process for criminal accusations); *Canadian Charter of Rights and Freedoms*, s 11(d), Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

91 Jerome Kennedy, "Plea Bargains and Wrongful Convictions" (2016) 63:4 Crim LQ 556 at 558.

92 Skolnik, "Criminal Justice Reform," *supra* note 89 at 645; Terry Skolnik, "The Tragedy of the Criminal Justice Commons" [forthcoming] [Skolnik, "Tragedy"] (draft on file with author).

93 See e.g. Libman, *supra* note 10 at 469 (noting that defendants who are charged with regulatory offences are presumed guilty).

94 Robert F Cochran, Jr, "'How Do You Plead, Guilty or Not Guilty?': Does the Plea Inquiry Violate the Defendant's Right to Silence?" (2005) 26:4 Cardozo L Rev 1409 at 1410–11, 1413–14; *Criminal Code*, RSC 1985, c C-46, s 606(1.1).

95 Cochran, *ibid*.

96 *Criminal Code*, *supra* note 94, s 606(1.1); *R v Van Rassel*, [1990] 1 SCR 225 at 233–35 (discussing special pleas, particularly *autrefois acquit*); Hamish Stewart, "Issue Estoppel and Similar Facts" (2008) 53:3 Crim LQ 382 at 383; *R v Tippett*, 2010 NLCA 49 at para 34.

97 Lester B Orfield, "Arraignment in Federal Criminal Procedure" (1959) 20:1 La L Rev 1 at 8.

98 Cass R Sunstein, "Choosing Not to Choose" (2014) 64:1 Duke LJ 1 at 7–8.

99 *Ibid*. Cass R Sunstein, "Default Rules Are Better than Active Choosing (Often)" (2017) 21:8 Trends in Cognitive Sciences 600 at 601–604.

100 Hugo Wellesley, "A Nudge in the Right Direction for Organ Donation: But is it Enough?" (2011) 343:7827 Brit Med J 778.

101 Robert Münscher, Max Vetter & Thomas Scheuerle, "A Review and Taxonomy of Choice Architecture Techniques" (2016) 29:5 J Behavioral Decision Making 511 at 517.

defendants to communicate their plea subsequently.[102] Active choosing functions as the primary form of choice architecture in the context of criminal accusations.

Second, in criminal proceedings, arraignments incorporate default rules as a secondary (or backup) form of choice architecture. Default rules apply when defendants do not make an active choice when required or when they do not meet the eligibility requirements to plead guilty.[103] For instance, those who refuse to plead during their arraignment are deemed to plead not guilty.[104] The same is true for equivocal guilty pleas where the court cannot discern whether the defendant pleads guilty or not guilty.[105] Other rules govern defective guilty pleas, each of which courts must reject and enrol defendants into the not guilty category by default. Courts must reject a guilty plea when the defendant disagrees with the facts that support the charge, invokes a defence, or does not appear to understand the consequences of pleading guilty.[106] In some senses, the requirements that are imposed for a valid guilty plea resemble eligibility criteria for an opt in scheme.[107] Defendants who fail to meet the eligibility requirements for a valid guilty plea cannot opt in to that scheme. Default enrolment thus functions as a secondary form of choice architecture that applies when defendants do not choose to plead or when their choice to plead guilty is vitiated.

The arraignment process' backup automatic enrolment scheme exemplifies a principled asymmetry.[108] The term "principled asymmetry" implies a default rule that protects a vulnerable party for moral reasons.[109] In the context of criminal accusations, principled asymmetries demonstrate fidelity to bedrock principles that are the foundation of a liberal criminal justice system.[110] Such principles include a commitment to fairness, dignity, and liberty.[111] The presumption of innocence is an example of a principled asymmetry — one which reflects the liberal value that it is morally preferable to presume individuals' innocence rather than their guilt.[112] The presumption of pretrial release is another example.[113] The backup choice architecture of arraignments — default enrolment into a not guilty scheme — constitutes another principled asymmetry and reflects a similar commitment to the presumption of innocence.

Third, in the context of criminal charges, the arraignment process allocates sludge on judges and prosecutors rather than on defendants. Begin with judges. They must assess the

---

[102] See e.g. Cass R Sunstein, "Nudges.gov: Behaviorally Informed Regulation" in Eyal Zamir & Doron Teichman, eds, *The Oxford Handbook of Behavioral Economics and the Law* (Oxford: Oxford University Press, 2014) 719 at 721–22 (discussing inertia and the human tendency to procrastinate).

[103] Orfield, *supra* note 97 at 8–9.

[104] *Criminal Code*, *supra* note 94, s 606(2); *R v Charles*, 1995 CanLII 5280 (QCCA).

[105] *R v Leonard*, 2007 SKCA 128 at para 17.

[106] *R v Corkum*, 1984 ABCA 226 at paras 3–4; *R v T(R)*, 1992 CanLII 2834 (ONCA).

[107] See e.g. OECD, David Grubb, *Eligibility Criteria for Unemployment Benefits*, Labour Market Policies and the Public Employment Service delivered at OECD Prague Conference, July 2000, (Paris: OECD, 2001) 187 at 187–92.

[108] Andrew Ashworth, "Four Threats to the Presumption of Innocence" (2006) 10:4 Intl J Evidence & Proof 241 at 248, citing Paul Roberts, "Double Jeopardy Law Reform: A Criminal Justice Commentary" (2002) 65:3 Mod L Rev 393 at 402–404.

[109] Skolnik, "Precedent," *supra* note 9 at 968.

[110] This argument was first advanced in Skolnik, *ibid* at 968–69.

[111] *Ibid*.

[112] Kristy A Martire & Christian Dahlman, "The Effect of Ambiguous Question Wording on Jurors' Presumption of Innocence" (2020) 26:5 Psychology, Crime & L 419 at 419–20.

[113] *Criminal Code*, *supra* note 94, s 515(1).

validity of the defendant's guilty plea.[114] Courts must ensure that the plea is voluntary.[115] Furthermore, judges must evaluate whether the defendant understands that they are admitting the essential elements of the offence, the nature and consequences of the plea, and that the court is not bound by agreements made between the prosecution and the defence.[116] Voluntariness also hinges on whether defendants received evidentiary disclosure.[117] Lastly, the court must assess whether the facts support the charge.[118] The court must reject the guilty plea when these requirements are not met, which once again, exemplifies automatic enrolment into the not guilty category.[119]

The justice system imposes sludge on prosecutors before and during the arraignment. Certain evidentiary rules aim to ensure that defendants have adequate information should they choose to plead guilty.[120] Constitutional criminal procedure requires the prosecution to disclose relevant evidence to the defence prior to the plea.[121] The disclosure obligation is automatic: the prosecution must disclose relevant evidence to the defence even without their request.[122] Furthermore, the defendant has no reciprocal obligation, which would limit their right to full answer and defence and impose greater sludge on them.[123] Since disclosure is automatic and asymmetric, the prosecution bears the pretrial sludge, not the defence.[124] Similarly, consider the allocation of sludge in parts of the bail process. Leaving aside crimes that impose a reverse onus on defendants to justify their release, the default enrolment rule is that a defendant is released on a recognizance without any bail conditions.[125] The prosecution bears the burden to show why defendants should be remanded into custody or released with bail conditions or a surety — another example that highlights how pretrial sludge is allocated away from defendants and toward prosecutors.[126]

To be clear, despite the combination of active choosing and default enrolment into not guilty pleas, certain features of the criminal justice process push defendants to plead guilty.[127] Many defendants plead guilty because they committed the alleged crime and wish to receive a lighter sentence.[128] But defendants who plead "not guilty" also face a heavy trial penalty,

---

114 *Ibid*, s 606(1.1); Chloé Leclerc & Elsa Euvrard, "Pleading Guilty: A Voluntary or Coerced Decision?" (2019) 34:3 CJLS 457 at 459.

115 Leclerc & Euvrard, *ibid*; Myles Anevich, "Disclosure in the 21st Century: A Comparative Analysis of Three Approaches to the Information Economy in the Guilty Plea Process" (2018) 41:4 Man LJ 219 at 219.

116 *Criminal Code*, *supra* note 94, s 606(2).

117 Myles Anevich, "Disclosure in the 21st Century: A Comparative Analysis of Three Approaches to the Information Economy in the Guilty Plea Process" (2018) 41:4 Man LJ 219 at 239–40.

118 *Ibid*.

119 *R v Wong*, 2018 SCC 25 at para 3.

120 Corinna Barrett Lain, "Accuracy Where it Matters: *Brady v. Maryland* in the Plea Bargaining Context" (2002) 80:1 Wash ULQ 1 at 30.

121 *R v Stinchcombe*, [1991] 3 SCR 326 [*Stinchcombe*]; Kent Roach, "A Charter Reality Check: How Relevant is the Charter to the Justness of Our Criminal Justice System?" (2008) 40 SCLR (2d) 717 at 735.

122 *Stinchcombe*, *ibid*; M Anne Stalker, "*Charter* Roadblocks to Defence Disclosure" (2002) 40:3 Alta L Rev 701 at 703.

123 *Stinchcombe*, *ibid*.

124 Brian Edward Maude, "Reciprocal Disclosure in Criminal Trials: Stacking the Deck Against the Accused, or Calling Defence Counsel's Bluff?" (1999) 37:3 Alta L Rev 715 at 715–16.

125 *Criminal Code*, *supra* note 94, s 515.

126 *Ibid*, s 515(3); *R v Antic*, 2017 SCC 27 at para 3 [*Antic*]; *R v Zora*, 2020 SCC 14 at para 101 [*Zora*].

127 These arguments were also advanced in Skolnik, "Tragedy," *supra* note 92.

128 Gerard V Bradley, "Plea Bargaining and the Criminal Defendant's Obligation to Plead Guilty" (1999) 40:1 S Tex L Rev 65 at 65, 81.

which encourages them to plead guilty and forego their trial, including if they are innocent.[129] Coercive plea bargaining practices — such as overcharging defendants and time-limited plea deals — exert additional leverage against defendants.[130] Furthermore, the costs of going to trial may invite guilty pleas. Defendants may lack the financial resources to hire a lawyer.[131] Or, they may plead guilty because they refuse to pay the metaphorical cost of harsh pretrial detention or multiple bail conditions.[132] The choice architecture that governs arraignments and pleas for criminal charges can be overwhelmed by other forces.

B. REGULATORY OFFENCES AND PLEAS

Regulatory offence prosecutions lack the three hallmarks of choice architecture associated with criminal prosecutions: arraignments, active choosing backed by automatic enrolment into a "not guilty" plea, and the minimal allocation of sludge on defendants. First, unlike criminal charges, most regulatory offence accusations do not involve an arraignment. Many routine regulatory offence charges — parking tickets, municipal ordinance violations, and traffic code infractions — are issued through a statement of offence (also referred to as "certificate of offence" or "ticket violation" in some provinces).[133] In certain provinces, such as Ontario and British Columbia, the defendant is deemed to plead guilty to the regulatory offence if they do not contest the charge within a certain period.[134] In these provinces, defendants are arraigned for regulatory offences only when they contest the charge.[135] To do so, they must generally complete the back of the certificate of offence and either mail it or bring it to court.[136]

Second, defendants who do not actively contest a regulatory offence violation can be deemed guilty by default, such that they are automatically enrolled into a guilty scheme.[137] The same is true for those who are sent a summons but fail to appear in court to contest the charge.[138] Criminal and regulatory charges impose different primary and secondary forms of choice architecture and impose distinct automatic enrolment rules. As discussed above, criminal charges use active choosing as the main form of choice architecture, and automatically enrol defendants into a not guilty scheme as backup choice architecture.[139] In contrast, regulatory offences may use default enrolment as the primary choice architecture mechanism.[140] Notably, defendants who do not actively contest their regulatory offence

---

129 Candace McCoy, "Plea Bargaining as Coercion: The Trial Penalty and Plea Bargaining Reform" (2005) 50 Crim LQ 67 at 79.

130 Brian C McCannon, "Prosecutors and Plea Bargains" in Vanessa A Edkins & Allison D Redlich, eds, *A System of Pleas: Social Sciences Contributions to the Real Legal System* (New York: Oxford University Press, 2019) 56 at 73; William J Stuntz, "The Pathological Politics of Criminal Law" (2001) 100:3 Mich L Rev 505 at 520, 537.

131 Schnell, *supra* note 82 at 10.

132 Gail Kellough & Scot Wortley, "Remand for Plea: Bail Decisions and Plea Bargaining as Commensurate Decisions" (2002) 42:1 Brit J Crim 186 at 200.

133 Véronique Fortin, "The Control of Public Spaces in Montreal in Times of Managerial Justice" (2018) 15 Champ Pénal 1 at 5, citing *Code of Penal Procedure*, CQLR c C-25.1, s 144; *Provincial Offences Act*, RSO 1990, c P.33, s 3.

134 *Provincial Offences Act*, *ibid*, s 9 (the defendant is deemed to plead guilty if they do not transmit their plea within 15 days); *Offence Act*, RSBC 1996, c 338, ss 14, 16 (the defendant is deemed to plead guilty if they do not transmit their plea within 30 days).

135 *Provincial Offences Act*, *ibid*, s 5; *Offence Act*, *ibid*, ss 15, 58.

136 *Provincial Offences Act*, *ibid*, ss 5(1), 5(2).

137 *Ibid*, s 9.

138 *Ibid*, s 9.1.

139 Part III.A, above.

140 *Provincial Offences Act*, *supra* note 133, s 9.

accusation are deemed to plead guilty.[141] Yet they may opt in to a not guilty scheme when they mail their not guilty plea or bring it to court.[142] Active choosing functions as the secondary form of choice architecture in such contexts.[143]

Third, compared to criminal charges, regulatory offence accusations impose greater sludge on defendants who wish to plead not guilty. Like everyone else, defendants who are charged with regulatory offences face inertia and are prone to procrastinate.[144] They can contest their fine tomorrow.[145] Yet eventually, tomorrow arrives and it is too late. Seemingly minor sludge can generate profound effects.[146] In certain jurisdictions, individuals must attend court or mail in a form to contest a fine.[147] However, individuals tend to be over-optimistic that they will complete and send forms.[148] Furthermore, the perceived onerousness of completing and sending the form decreases the likelihood that individuals will do so.[149]

Regulatory offence prosecutions impose three types of costs on individuals: necessary costs, opportunity costs, and prohibitive costs.[150] Necessary costs imply that costs to contest a regulatory offence violation, such as having to complete a form, mail it, and appear in court.[151] Opportunity costs connote the time and effort that individuals expend to contest a regulatory offence violation.[152] These costs include the time that individuals spend to fill out forms and travel to court for their hearing.[153] Lastly, prohibitive costs refer to barriers that prevent individuals from contesting a regulatory offence violation.[154] Examples include lost statements of offence, lack of financial resources to purchase stamps and mail a form, inability to take time off work to contest a charge, and medical disorders or disabilities that hinder court appearances.[155]

Like elsewhere in the criminal justice system, these costs skew against marginalized and socio-economically disadvantaged individuals. Unhoused persons who contest a fine may lack a fixed address, such that they do not receive mail regarding their arraignment date.[156] Defendants experiencing homelessness may lose or misplace their appearance notice and fail

---

141 *Ibid*; *Offence Act*, *supra* note 134, ss 14, 16.
142 *Provincial Offences Act*, *ibid*, s 9.
143 *Ibid*, s 45.
144 See e.g. David W Neubauer & John Paul Ryan, "Criminal Courts and the Delivery of Speedy Justice: The Influence of Case and Defendant Characteristics" (1982) 7:2 Justice System J 213 at 232; Andrew J Wistrich, "Procrastination, Deadlines, and Statutes of Limitation" (2008) 50:2 Wm & Mary L Rev 607 at 626–32.
145 Keith Marzilli Ericson, "On the Interaction of Memory and Procrastination: Implications for Reminders, Deadlines, and Empirical Estimation" (2017) 15:3 J European Econ Association 692 at 692.
146 Joshua Tasoff & Robert Letzler, "Everyone Believes in Redemption: Nudges and Overoptimism in Costly Task Completion" (2014) 107 J Econ Behaviour & Organization 107 at 108.
147 *Provincial Offences Act*, *supra* note 133, ss 5(1), 5(2).
148 Sunstein, "Sludge Audits," *supra* note 54 at 663.
149 Shane Currie & Dick Mizerski, "Rebate Redemption Requirements: Can They Discourage Redeeming?" (2016) 31 J Retailing & Consumer Services 117 at 118–19, 123.
150 Tasoff & Letzler, *supra* note 146 at 108 (describing these three costs in redemption-based regimes).
151 *Ibid.*
152 *Ibid.*
153 *Ibid.*
154 *Ibid.*
155 *Ibid.*
156 Maria Foscarinis, "Downward Spiral: Homelessness and its Criminalization" (1996) 14:1 Yale L & Pol'y Rev 1 at 54; Christine L Bella & David L Lopez, "Quality of Life: At What Price?: Constitutional Challenges to Laws Adversely Impacting the Homeless" (1994) 10:1 St John's J Leg Comment 89 at 119–20 (same).

to appear in court when required.[157] Barriers such as mental health problems, substance use disorder, and lack of access to counsel may also explain why they do not contest these fines.[158] Certain studies indicate that a significant portion of unhoused defendants miss their court dates.[159] Others may fail to appear in court due to child care responsibilities, employment obligations, or lack of transportation.[160]

These factors also help explain why impecunious persons tend to accumulate high amounts of criminal justice debt from regulatory offence violations. Research indicates that in the city of Montreal, some people experiencing homelessness have accrued tens of thousands of dollars' worth of unpaid fines.[161] Certain unhoused persons receive more than ten fines per year for regulatory offence violations, many of which remain unpaid and result in additional debt and poverty penalties.[162]

IV. THE CHOICE ARCHITECTURE OF MORAL FAULT

Crimes and regulatory offences also employ different forms of choice architecture that govern moral fault.[163] These two categories of offences incorporate distinct default rules that shape whether defendants are convicted, and how easy it is to convict them. Criminal offence prosecutions incorporate exculpatory default rules when defendants go to trial: a strong presumption of innocence, the prosecution's burden of proof, and the presumption that crimes impose a subjective fault standard.[164] In contrast, regulatory offence prosecutions employ three inculpatory default rules that facilitate convictions: a weak presumption of innocence, the presumptive lack of a moral fault requirement, and the defendant's burden to prove their due diligence on the balance of probabilities.[165] The default rules that govern moral fault normalize other default rules that disadvantage defendants, such as automatic guilty pleas and fixed financial penalties irrespective of ability to pay.[166] The choice architecture that governs moral fault for regulatory offences spills over elsewhere in the justice system.

---

157 Luis A Almodovar & Stacy Shor McNally, "Are You Worried about Going to Jail? The Public Defender's Office Homeless Outreach Program" (2006) 36:1 Stetson L Rev 183 at 189.

158 See e.g. Terry Skolnik, "Homelessness and the Impossibility to Obey the Law" (2016) 43:3 Fordham Urb LJ 741 at 779; Terry Skolnik, "The Punitive Impact of Physical Distancing Laws on Homeless People" in Colleen Flood et al, eds, *Vulnerable: The Law, Policy and Ethics of COVID-19* (Ottawa: University of Ottawa Press, 2020) 287 at 292.

159 Julianne Hill, "Home(less) Court Advantage" (2018) 104:11 ABA J 16 at 17.

160 Beth M Huebner & Andrea Giuffre, "Reinforcing the Web of Municipal Courts: Evidence and Implications Post-Ferguson" (2022) 8:1 RSF: Russell Sage Foundation J Soc Sciences 108 at 110.

161 Céline Bellot & Marie-Ève Sylvestre, "La judiciarisation de l'itinérance à Montréal: les dérives sécuritaires de la gestion pénale de la pauvreté" (2017) 47 RGD 11 at 29–35; Terry Skolnik, "Rethinking Homeless People's Punishments" (2019) 22:1 New Crim L Rev 73 at 91 [Skolnik, "Rethinking"].

162 Bellot & Sylvestre, *ibid* at 29–35.

163 *ADH*, *supra* note 9 at para 1 (the decision distinguishes between the prohibited act or omission (*actus reus*) and fault (*mens rea*)).

164 David M Paciocco, "Understanding the Accusatorial System" (2010) 14:3 CCLR 307 at 318–19 [Paciocco, "Accusatorial System"].

165 Libman, *supra* note 10 at 457–58.

166 Part III, above (default guilty pleas); Part V, below (default fixed penalties for tariff-fines).

A. CRIMES AND EXCULPATORY DEFAULT RULES

The choice architecture of moral fault for crimes involves three exculpatory default rules that protect defendants. First, defendants who are charged with crimes enjoy a strong presumption of innocence.[167] Defendants have a constitutional right to be presumed innocent until proven guilty.[168] As an exculpatory default rule, the presumption offers a starting point and predetermined outcome in criminal accusations: defendants are innocent by default until the prosecution rebuts that presumption.[169]

The presumption of innocence is one of the most fundamental rights in criminal proceedings.[170] The right is construed as a core aspect — if not *the* core aspect — of a liberal criminal justice system.[171] In *R. v. Oakes*, the Supreme Court of Canada observed that the presumption of innocence "confirms our faith in humankind; it reflects our belief that individuals are decent and law-abiding members of the community until proven otherwise."[172] The presumption of innocence establishes baseline norms that require the State to respect individuals' dignity and liberty before they are convicted.[173]

The second exculpatory default rule for criminal prosecutions is that the prosecution bears an onerous burden of proof.[174] The State must prove the defendant's guilt beyond a reasonable doubt.[175] This burden does not shift to the defendant.[176] The presumption of innocence is violated when defendants can be convicted despite a reasonable doubt that they are guilty.[177]

Several considerations exemplify the beyond a reasonable doubt standard's resilience as a default rule. For one, the State bears a significant justificatory burden when it attempts to depart from this burden of proof, either by creating a defence that imposes a reverse onus on the defendant, a crime with a reverse onus element, or through inculpatory evidentiary presumptions.[178] In such contexts, the State must prove that it limited the presumption of

---

[167] See e.g. Anne Ruth Mackor & Vincent Geeraets, "The Presumption of Innocence" (2013) 42:3 Netherlands J Leg Philosophy 167 at 167; Pamela R Ferguson, "The Presumption of Innocence and its Role in the Criminal Process" (2016) 27:2 Crim LF 131 at 133.

[168] *Charter*, *supra* note 90. See also Kenneth Pennington, "Innocent until Proven Guilty: The Origins of a Legal Maxim" (2003) 63:1 Jurist 106 (providing an overview of "innocent until proven guilty" as a legal maxim).

[169] Sherman J Clark, "The Juror, the Citizen, and the Human Being: The Presumption of Innocence and the Burden of Judgment" (2014) 8:2 Crim L & Philosophy 421 at 423–24.

[170] Daniel Kiselbach, "Pre-Trial Criminal Procedure: Preventive Detention and the Presumption of Innocence" (1989) 31:2 Crim LQ 168 at 174–75; Larry Laudan, "The Presumption of Innocence: Material or Probatory?" (2005) 11:4 Leg Theory 333 at 334.

[171] Hamish Stewart, "The Right to Be Presumed Innocent" (2014) 8:2 Crim L & Philosophy 407 at 408–409; Andrew Stumer, *The Presumption of Innocence: Evidential and Human Rights Perspectives* (Oxford, UK: Hart, 2010) at xl.

[172] *R v Oakes*, 1986 CanLII 46 at para 29 (SCC) [*Oakes*].

[173] Rinat Kitai, "Presuming Innocence" (2002) 55:2 Okla L Rev 257 at 272.

[174] Paciocco, "Accusatorial System," *supra* note 164 at 318–19; RA Duff, "Pre-Trial Detention and the Presumption of Innocence" in Andrew Ashworth, Lucia Zedner & Patrick Tomlin, eds, *Prevention and the Limits of the Criminal Law* (Oxford: Oxford University Press, 2013) 115 at 119.

[175] *Lifchus*, *supra* note 9; Weiser, *supra* note 9 at 319.

[176] *Lifchus*, *ibid* at para 36.

[177] *Oakes*, *supra* note 172 at para 59.

[178] See e.g. *R v Chaulk*, [1990] 3 SCR 1303 [*Chaulk*] (analyzing the constitutionality of the mental disorder defence's reverse onus provision); *R v Whyte*, 1988 CanLII 47 (SCC) (analyzing the constitutionality of the presumption that an individual sitting in the front seat of a motor vehicle while impaired was in the care and control of that vehicle); Moshe Cohen- Eliya & Iddo Porat, "Proportionality and the Culture of Justification" (2011) 59:2 Am J Comp L 463 at 466–67.

innocence in a manner that is reasonable and demonstrably justified in a free and democratic society.[179] This justificatory burden imposes sludge on the State and holds it to account when it attempts to limit the presumption of innocence.[180]

Furthermore, the beyond a reasonable doubt standard's resilience is exemplified by the infrequency of reverse onus provisions in substantive criminal law. Defences that impose a reverse onus on defendants — automatism, mental disorder, and extreme intoxication — are seldom invoked, and succeed even more rarely.[181] And relatively few crimes presume some element of the offence or impose a reverse onus (many were repealed in 2018).[182]

Additionally, the proof beyond a reasonable doubt standard's constitutional status reinforces its stickiness as a default rule.[183] The constitutional right to be presumed innocent is inexorably connected to the prosecution's burden to prove the defendant's guilt beyond a reasonable doubt.[184] The State violates the presumption of innocence when the prosecutor is not required to prove an essential element of the offence beyond a reasonable doubt, or when the State imposes a persuasive burden of proof on the defendant.[185] Together, the constitutional right to be presumed innocent and the prosecutor's default burden of proof show why defendants enjoy a strong presumption of innocence in criminal trials.

Third, as an exculpatory default rule, the presumption of subjective fault structures the criminal law's choice architecture in important ways.[186] Unlike strict liability regulatory offences, criminal offences impose a subjective or objective moral fault requirement.[187] The subjective fault standard requires the prosecution to prove the defendant's actual state of mind, such as intent, recklessness, knowledge, or willful blindness.[188] In contrast, for the objective fault standard, the prosecution must prove that the defendant's conduct constituted a marked departure from the reasonable person in the same circumstances.[189]

Various Supreme Court of Canada decisions have affirmed that the legislator is presumed to impose a subjective standard of fault for crimes.[190] This presumption aims to ensure that

---

179 *Charter*, *supra* note 90, s 1; *Oakes*, *supra* note 172 at para 49; Sujit Choudhry, "So What is the Real Legacy of Oakes? Two Decades of Proportionality Analysis under the Canadian Charter's Section 1" (2006) 34 SCLR (2d) 501 at 501–502.

180 Matthias Klatt & Moritz Meister, *The Constitutional Structure of Proportionality* (Oxford: Oxford University Press, 2012) at 48.

181 See e.g. Frances E Chapman, "The Presumption of Sanity, Automatism and *R. v. H. (S.)*: Is it Insane to Have a Presumption of Insanity?" (2015) 62 Crim LQ 168 at 185; Susan Yamamoto, Evelyn M Maeder & Kristin L Fenwick, "Criminal Responsibility in Canada: Mental Disorder Stigma Education and the Insanity Defense" (2017) 16:4 Intl J Forensic Mental Health 313 at 326.

182 *An Act to amend the Criminal Code and the Department of Justice Act and to make consequential amendments to another Act*, SC 2018, c 29.

183 Richard Mahoney, "The Presumption of Innocence: A New Era" (1988) 67:1 Can Bar Rev 1 at 18, 34.

184 *Lifchus*, *supra* note 9.

185 *Oakes*, *supra* note 172 at para 57.

186 *Pappajohn v The Queen*, 1980 CanLII 13 at 138–39 (SCC) (describing the fault requirement).

187 *R v DeSousa*, [1992] 2 SCR 944 at 956–57; Terry Skolnik, "Objective *Mens Rea* Revisited" (2017) 22:3 CCLR 307 at 308, 310–13 [Skolnik, "*Mens Rea*"].

188 Skolnik, "*Mens Rea*," *ibid* at 308.

189 *Ibid* at 310–11; *ADH*, *supra* note 9 at para 3.

190 Kent Roach, "Mind the Gap: Canada's Different Criminal and Constitutional Standards of Faults" (2011) 61:4 UTLJ 545 at 553; *ADH*, *ibid* at para 23, citing *Gaunt and Watts v The Queen*, 1953 CanLII 40 at 511 (SCC); *The Queen v Rees*, 1956 CanLII 60 at 652 (SCC); *Beaver v The Queen*, 1957 CanLII 14 at 542–43 (SCC); *R v Sault Ste Marie*, 1978 CanLII 11 at 1303, 1309–10 (SCC) [*Sault Ste Marie*]; *R v Prue*, 1979 CanLII 227 at 551, 553 (SCC); *R v Bernard*, [1988] 2 SCR 833 at 871; *R v Martineau*, [1990] 2 SCR 633 at 645; *R v Théroux*, [1993] 2 SCR 5 at 18; *R v Lucas*, 1998 CanLII 815 at para 64 (SCC). These decisions and the relevant pinpoints are taken directly from *ADH*, *ibid* at para 23.

morally innocent persons are not convicted of criminal offences.[191] But it also makes convictions more difficult. It is easier to prove a marked departure from the norm than to prove the defendant's actual state of mind. Furthermore, when a crime imposes the subjective standard of fault, the defendant will be acquitted if their state of mind is non-culpable, even if their conduct would have constituted a marked departure from the norm.[192]

Like reverse onuses, crimes that impose the objective standard of fault are the exception rather than the rule. The Supreme Court of Canada has recognized five categories of crimes that impose an objective standard of fault.[193] But the crimes that criminal courts try most frequently — thefts, mischief, physical and sexual assault, breaking and entering, driving while impaired, drug possession and trafficking — all impose the subjective standard of fault.[194] Together, the three main features of choice architecture for crimes — a strong presumption of innocence, the prosecutor's burden to prove the defendant's guilt beyond a reasonable doubt, and the presumption of subjective fault — all aim to prevent wrongful convictions and maximize fairness in the criminal justice system.

The default rules that govern moral fault for crimes align with default rules that govern the pretrial phase. The alignment of default rules prior to and during the trial exemplifies the internal coherence of the justice process for criminal accusations. Previous sections illustrated how the presumption of innocence shapes the secondary choice architecture of arraignments.[195] Recall that defendants who refuse to state their plea, plead equivocally, or make a vitiated guilty plea are deemed to plead not guilty — default rules that exemplify a commitment to the presumption of innocence.[196] Similarly, bail law imposes a presumption that defendants should be released without conditions unless the prosecutor shows cause why their pretrial liberty should be restrained.[197] The presumption of pretrial release incorporates two interrelated default rules that embody a commitment to the presumption of innocence.[198] Defendants are presumptively released pending trial because they are presumed to be innocent.[199] And the prosecution bears the burden to justify pretrial coercion much like they bear the burden to prove the defendant's guilt at trial.[200] To be clear, certain crimes impose a reverse onus on defendants who must justify their release — a reverse onus that satisfies

---

191 See e.g. *R v Brown*, 2022 SCC 18 at para 48.

192 See e.g. *ADH*, *supra* note 9 at para 3.

193 *Ibid* at paras 56–63; Joseph J Arvay & Alison M Latimer, "The Constitutional Infirmity of the Laws Prohibiting Criminal Negligence" (2016) 63:3 Crim LQ 324 at 332 (Arvay and Latimer note that these categories are: "(a) duty-based offences in ss 215-217.1; (b) offences which are expressed in terms of careless conduct; (c) offences defined in terms of dangerous conduct; (d) offences based on criminal negligence; and (e) predicate offences").

194 Greg Moreau, *Police-Reported Crime Statistics in Canada, 2021*, Catalogue No 85-002-X (Ottawa: Statistics Canada, 2022) at 46–47 (detailing the number and rate of various criminal offences in Canada). Note that administration of justice offences are also one of the most frequent crimes (*ibid*). Bail breaches — a type of administration of justice offence — also impose a subjective standard of fault: *Zora*, *supra* note 126 at paras 3–4.

195 Part III.A, above.

196 *Ibid.*

197 *Criminal Code*, *supra* note 94, s 515(1); *Antic*, *supra* note 126 at para 45.

198 Skolnik, "Precedent," *supra* note 9 at 983–84; Benjamin Berger & James Stribopoulos, "Risk and the Role of the Judge: Lessons from Bail" in Benjamin Berger et al, eds, *To Ensure that Justice is Done: Essays in Memory of Marc Rosenberg* (Toronto: Thomson Reuters, 2017) at 310.

199 Nicoles Marie Myers, "Eroding the Presumption of Innocence: Pre-Trial Detention and the Use of Conditional Release on Bail" (2017) 57:3 Brit J Crim 664 at 668.

200 See e.g. David Hamer, "The Presumption of Innocence and Reverse Burdens: A Balancing Act" (2007) 66:1 Cambridge LJ 142 at 148 (describing how reverse onuses are inconsistent with the presumption of innocence because they place the burden of proof on the defendant).

constitutional scrutiny because there may be a just cause for certain crimes and because the defendant can provide information to justify their release.[201] Yet as some scholars suggest, such reverse onus provisions are at odds with the presumption of innocence.[202] In the context of criminal prosecutions, the default rules that govern moral fault align with those that govern the pretrial phase.

B. REGULATORY OFFENCES AND INCULPATORY DEFAULT RULES

In contrast to crimes, regulatory offences impose three inculpatory default rules related to moral fault: presumed strict liability, the defendant's burden to prove their due diligence for strict liability offences, and a weak presumption of innocence.[203] And as discussed more below, the default rules that apply to moral fault align with other inculpatory default rules in the pretrial and sentencing phase for regulatory offences.

The first inculpatory default rule for regulatory offences is the presumption of strict liability.[204] This presumption can be displaced by statutory language indicating that an offence imposes a *mens rea* requirement or absolute liability.[205] Strict liability offences imply that the prosecution must only prove the *actus reus* (or physical element) of the offence beyond a reasonable doubt to secure a conviction.[206] Since most regulatory offences impose strict liability, most regulatory offences impose no moral fault requirement whatsoever.[207]

As a second inculpatory default rule for regulatory offences, defendants can be acquitted of a strict liability offence if they prove their due diligence or a mistake of fact on the balance of probabilities.[208] This reverse onus violates the presumption of innocence because the defendant bears a persuasive burden to prove their due diligence.[209] Notably, they can be convicted despite a reasonable doubt that they are guilty.[210] Furthermore, the prosecution is absolved from proving an essential element of most offences: the defendant's moral fault.[211]

---

201 *Criminal Code*, *supra* note 94, s 515(6); *R v Pearson*, [1992] 3 SCR 665 at 693–99.

202 See e.g. Hamer, *supra* note 200 at 148; Daniel Kiselbach, "Pre-Trial Criminal Procedure: Preventive Detention and the Presumption of Innocence" (1989) 31:2 Crim LQ 168 at 194–95.

203 Libman, *supra* note 10 at 457–58.

204 *Sault Ste Marie*, *supra* note 190 at 1325–26; *Lévis (City) v Tétreault; Lévis (City) v 2629-4470 Québec inc*, 2006 SCC 12 at para 16 [*Lévis*].

205 *Lévis*, *ibid* at paras 16–18.

206 *Sault Ste Marie*, *supra* note 190 at 1325–26.

207 *Ibid*; RA Duff, "Strict Liability, Legal Presumptions, and the Presumption of Innocence" in AP Simester, ed, *Appraising Strict Liability* (Oxford: Oxford University Press, 2005) 125 at 125.

208 Duff, *ibid*.

209 John Keefe, "The Due Diligence Defence: A Wholesale Review" (1993) 35:4 Crim LQ 480 at 486–87; See also Marie Comiskey, "Justice Peter de Carteret Cory and His Charter Approach to Regulatory Offences" (2007) 65:2 UT Fac L Rev 77 at 85–86. As Comiskey notes in *Wholesale Travel*, *supra* note 2, some of the justices concluded that the reverse onus did not violate the presumption of innocence. Most of the justices, however, concluded that the defendant's burden to prove their due diligence violated the presumption of innocence. Within that subset of justices, some concluded that the violation was saved by section 1 of the *Charter*, while others concluded that the violation could not be justified in a free and democratic society. Ultimately, the plurality that formed the majority was comprised of the justices that decided that the presumption of innocence was respected and those that concluded that the reverse onus violated the presumption of innocence but was reasonably justifiable in a free and democratic society. For this reason, although the majority concluded that the presumption of innocence was violated, the justices disagreed as to whether the limitation was saved by section 1 of the *Charter*.

210 See e.g. *Chaulk*, *supra* note 178 at 1329–30.

211 NJ Strantz, "Beyond *R. v. Sault Ste. Marie*: The Creation and Expansion of Strict Liability and the 'Due Diligence' Defence" (1992) 30:4 Alta L Rev 1233 at 1236 (noting that the prosecution is only required to prove the *actus reus* of a strict liability offence).

These two default rules — the presumption of strict liability and the defendant's burden to prove their due diligence on the balance of probabilities — exemplify the third inculpatory default rule that governs regulatory offences: a weak presumption of innocence. Defendants are presumptively guilty when the prosecution proves the *actus reus* of a strict liability offence beyond a reasonable doubt.[212] And they can be convicted even when their due diligence defence only raises a reasonable doubt.[213]

Notice how these inculpatory default rules that govern moral fault for regulatory offences cohere with those that apply in the pretrial and sentencing phases of regulatory prosecutions. Previous sections showed that in some jurisdictions, defendants are convicted by default for regulatory offence violations when they fail to plead within a certain time.[214] This pretrial default rule exemplifies a weak commitment to the presumption of innocence. Like a form of automatic enrolment, defendants who are charged with a regulatory offence are deemed to plead guilty when they issue no plea.[215] In contrast, defendants who are charged with crimes are deemed to plead not guilty when they fail to plea.[216]

Or, consider the relationship between defendants' default guilty pleas and their burden of proof in the context of regulatory offence accusations that impose strict liability. Recall how defendants bear the burden to prove their due diligence at trial.[217] Yet they also bear the burden to actively contest the regulatory offence accusation to avoid a default conviction and to enjoy a weak presumption of innocence at trial.[218] They must complete the notice of intention to appear and deliver it to the court by mail, in person, or in another approved manner.[219] These default rules diverge significantly from those that govern criminal trials.[220] In criminal trials, defendants who issue no plea are deemed to be not guilty by default.[221] And they need not opt in to a scheme to enjoy their presumption of innocence during the pretrial phase. The default rules that govern moral fault for regulatory offences dovetail with those that apply to the pretrial phase.

Regulatory offences' default inculpatory rules also align with the default rules that govern sentencing (more on this below).[222] Regulatory offence convictions generally impose fixed financial penalties that ignore the defendant's degree of moral blameworthiness and personal circumstances.[223] Indigent defendants can receive expensive fines despite their lack of moral

212 See e.g. Don Stuart, "Wholesale Travel: Presuming Guilt for Regulatory Offences is Constitutional but Wrong" (1992) 8 CR (4th) 225.

213 Libman, *supra* note 10 at 467.

214 Part III.B, above.

215 *Provincial Offences Act*, *supra* note 133, s 9; *Offence Act*, *supra* note 134, ss 14, 16.

216 *Criminal Code*, *supra* note 94, s 606(2).

217 *Sault Ste Marie*, *supra* note 190 at 1325–26.

218 *Provincial Offences Act*, *supra* note 133, s 5(1) (noting that a defendant must give notice of their intention to appear in court to plead and have a trial); *Offence Act*, *supra* note 134, ss 14, 16.

219 *Provincial Offences Act*, *ibid*, s 5(2); *Offence Act*, *ibid*, ss 15(1), 15(2).

220 Part IV.A, above.

221 Part III.A, above.

222 Part V.A, below.

223 Alec Schierenbeck, "The Constitutionality of Income-Based Fines" (2018) 85:8 U Chicago L Rev 1869 at 1873–74; Lindsay Bing, Becky Pettit & Ilya Slavinski, "Incomparable Punishments: How Economic Inequality Contributes to the Disparate Impact of Legal Fines and Fees" (2022) 8:2 RSF: Russell Sage Foundation J Soc Sciences 118 at 119; Skolnik, "Rethinking," *supra* note 161 at 84–88; Terry Skolnik, *Homelessness, Liberty, and Property* (Cambridge: Cambridge University Press), ch 6 [forthcoming in 2024].

fault and regardless of their ability to pay the fine.[224] The fact that most regulatory offence charges ignore the defendant's degree of moral fault is consistent with how fixed financial penalties overlook the defendant's blameworthiness and personal circumstances.[225] To be clear, this does not suggest that these default rules are fair or just. But it does demonstrate that the default rules that govern regulatory offences are internally coherent across charges and pleas, moral culpability, and sentencing.

This section's analysis of inculpatory default rules highlights new concerns regarding regulatory offences and their connection to choice architecture. Scholars' predominant concern about regulatory offences — that they impose a reverse onus and lack a moral fault element for defendants who go to trial — impacts the minority of regulatory offence prosecutions. Since most defendants plead guilty, the reverse onus and lack of moral fault requirement are irrelevant in most cases. Another problem — one that few scholars discuss — is that many defendants are convicted by default and are imposed automatic penalties that ignore their blameworthiness, discount their personal circumstances, and breach proportionality constraints. Like how the exculpatory default rules that govern fault for crimes align with other parts of the criminal justice process, the inculpatory default rules that govern fault for regulatory offences shape the pretrial and posttrial phase. Choice architecture both shapes the overarching rules that govern the criminal justice process for crimes and regulatory offences, and influences defendants' trajectories through the criminal justice system.

V. THE CHOICE ARCHITECTURE OF SENTENCING

In the context of sentencing, crimes and regulatory offences employ different choice architecture in three key respects, each of which is discussed more below. First, although criminal prosecutions generally incorporate proportionality constraints by default as part of the sentencing process, regulatory offences may require defendants to opt in to receive a proportionate sanction. Second and interrelatedly, while criminal prosecutions impose sludge on judges to justify a punishment's fitness, regulatory prosecutions allocate sludge on defendants to contest their sentence and demonstrate its excessiveness. Third, in contrast to crimes, the punishments associated with regulatory offences can impose penalties by default that increase the sentence's gravity, which exacerbates proportionality concerns.

A. PUNISHMENT DEFAULTS FOR CRIMES

Begin with the first feature that distinguishes the choice architecture of criminal versus regulatory punishment: default proportionality constraints. Proportionality is the organizing principle that governs criminal sentencing.[226] The concept of "proportionality" implies that an individual's punishment is "commensurate with the gravity of the offence committed and the moral blameworthiness of the offender."[227] The *Criminal Code* codifies proportionality

224 Skolnik, "Rethinking," *ibid* at 84–88.
225 *Ibid*.
226 Marie Manikis, "The Principle of Proportionality in Sentencing: A Dynamic Evolution and Multiplication of Conceptions" (2022) 59:3 Osgoode Hall LJ 587 at 604; Marie-Eve Sylvestre, "The (Re)Discovery of the Proportionality Principle in Sentencing in *Ipeelee*: Constitutionalization and the Emergence of Collective Responsibility" (2013) 63 SCLR (2d) 461 at 461.
227 See e.g. *R v M(CA)*, 1996 CanLII 230 at para 40 (SCC); *R v Hills*, 2023 SCC 2 at para 50 [*Hills*].

as a fundamental principle in sentencing.[228] Similarly, numerous Supreme Court of Canada decisions note that proportionality is a bedrock principle of punishment.[229]

As a default rule, judges typically consider proportionality when they impose a sentence. The Supreme Court has observed that sentencing is "highly individualized"[230] and that sentences must be custom-tailored to match the particular offence, as well as the offender.[231] Judges must consider various factors to impose a proportionate and fit sentence. Beyond the gravity of the offence and the defendant's blameworthiness, judges must assess the facts of the case, the objectives and principles of sentencing, aggravating and mitigating circumstances, sentencing ranges and starting points, and existing case law.[232]

Sentencing judges who ignore proportionality constraints face various consequences. For one, a judge's "demonstrably unfit" sentence can be overturned by an appellate court.[233] Judges who impose excessive sentences may also face reputational harm or a decreased standing amongst colleagues, especially when their sentencing decision is harshly admonished by an appellate court.[234] Erroneous legal decisions may also harm a trial level judge's potential to be promoted to a court of appeal.[235] These considerations reinforce proportionality analysis as a default rule in criminal sentencing.

To be clear, there are some exceptions to the default rule that judges must impose a proportionate sentence. Statutory provisions can limit a judge's ability to automatically consider proportionality when they impose a sentence for a criminal offence. For instance, mandatory minimum sentences may remove a judge's discretion to impose a sentence that is proportionate to the crime's gravity and the defendant's culpability.[236] Furthermore, *Criminal Code* amendments have removed sentencing options — such as conditional sentences — that would achieve more proportionate punishments in particular

228 *Criminal Code*, *supra* note 94, s 718.1.

229 See e.g. *R v M(CA)*, *supra* note 227 at paras 40–41 (noting that "proportionality expresses itself as a constitutional obligation"); *R v Lacasse*, 2015 SCC 64 at para 12 [*Lacasse*] (noting that "proportionality is the cardinal principle that must guide appellate courts in considering the fitness of a sentence imposed on an offender"); *R v Friesen*, 2020 SCC 9 at para 30 (noting that "proportionality has long been central to Canadian sentencing"); *R v Parranto*, 2021 SCC 46 at para 10 [*Parranto*] (noting that proportionality is the organizing principle of sentencing); *Hills*, *supra* note 227 at para 56 (noting that "[p]roportionality is a 'central tenet' of Canada's sentencing regime"). However, note that the Court rejected proportionality as a principle of fundamental justice: *R v Safarzadeh-Markhali*, 2016 SCC 14 at para 67.

230 *Lacasse*, *ibid* at 58.

231 *R v M(CA)*, *supra* note 227 at para 62, citing *R v Suter*, 2018 SCC 34 at para 4; *R v Bottineau*, 2011 ONCA 194; *R v Angelillo*, 2006 SCC 55; *R v Shoker*, 2006 SCC 44. See also Andrea S Anderson, "Analysis: Considering Social Context Evidence in the Sentencing of Black Canadian Offenders" (2022) 45:6 Man LJ 152 at 155, 169.

232 *Hills*, *supra* note 227 at paras 53–61.

233 *R v Proulx*, 2000 SCC 5 at para 125; *Parranto*, *supra* note 229 at para 30; Julian V Roberts, "Unearthing the Sphinx: The Evolution of Conditional Sentencing" (2001) 80:3 Can Bar Rev 1019 at 1030.

234 See e.g. Virginia A Hettinger, Stefanie A Lindquist & Wendy L Martinek, *Judging on a Collegial Court: Influences on Federal Appellate Decision Making* (Charlottesville, Va: University of Virginia Press, 2006) at 23; Michael Taggart, "Should Canadian Judges Be Legally Required to Give Reasoned Decisions in Civil Cases?" (1983) 33:1 UTLJ 1 at 22–23.

235 See e.g. Geoffrey P Miller, "Bad Judges" (2004) 83:2 Tex L Rev 431 at 473 (although Miller focuses on the reputation of trial judges, similar concerns apply to appellate judges).

236 Morris J Fish, "An Eye for an Eye: Proportionality as a Moral Principle of Punishment" (2008) 28:1 Oxford J Leg Stud 57 at 69. Note that judges use various means to mitigate the effects of mandatory minimum penalties: David M Paciocco, "The Law of Minimum Sentences: Judicial Responses and Responsibility" (2015) 19 CCLR 173 at 207–15.

circumstances.[237] Yet leaving aside these exceptions, proportionality evaluations generally operate as a default rule in criminal sentencing.

The second interrelated feature of criminal punishments is that they impose sludge on judges. The *Criminal Code* requires judges to state the terms of a punishment and the reasons why it is imposed.[238] The duty to provide reasons for sentencing is justified by several considerations. Reasoned sentencing decisions facilitate appellate review.[239] They also help hold unelected judges accountable within a democracy.[240] Furthermore, the duty to provide reasoned decisions encourages judges to exercise their judicial tasks carefully and to justify their punishments rationally.[241] Lastly, reasoned sentencing decisions fulfil a justificatory role; they rationalize the sentence to the legal community, the public, the victim, and the defendant.[242]

Various considerations incentivize judges to justify a particular sentence — a process that imposes an administrative burden on them. Judges wish to appeal-proof their decisions so that they are not reversed.[243] They wish to insulate themselves against reputational harm that flows from a poorly reasoned decision, or that harms their chances of being promoted to an appellate court.[244] Judges also seek to ensure that their decisions respect the law, are consistent with bedrock values and principles, and exemplify a commitment to fairness and justness — all of which enhance the public's confidence in the justice system.[245]

The third architectural feature of criminal punishments is that defendants who fail to respect the terms of their non-custodial sentences are not automatically penalized. Take the example of probation. Defendants who breach their probation conditions are not automatically subjected to additional penalties. Instead, they can be charged with a new criminal offence — breaching a probation order — that is governed by standard constitutional and due process safeguards: the presumption of innocence, evidentiary disclosure, the right to full answer and defence, and so on.[246] Or, front line actors may favour diversion or restorative justice mechanisms over criminal charges.[247] Front line actors' discretion permeates the decisions to report, charge, or prosecute the defendant.[248] Probation

---

[237] Andrew A Reid & Julian V Roberts, "Revisiting the Conditional Sentence of Imprisonment After 20 Years: Is Community Custody Now an Endangered Species?" (2019) 24:1 CCLR 1 at 4–5.

[238] *Criminal Code*, *supra* note 94, s 726.2; Wayne K Gorman, "The Filing of Additional Reasons in Canada" (2020) 56:2 Court Rev 84 at 84; *R v Sheppard*, 2002 SCC 26 at para 20 [*Sheppard*]; *R v Nguyen*, 2008 BCCA 252 at para 29.

[239] *Sheppard*, *ibid* at para 20.

[240] *Ibid* at para 55; Terry Skolnik, "Hot Bench: A Theory of Appellate Adjudication" (2020) 61:4 Boston College L Rev 1271 at 1279, citing Suzanne Ehrenberg, "Embracing the Writing-Centered Legal Process" (2004) 89:4 Iowa L Rev 1159 at 1195.

[241] *Sheppard*, *supra* note 238 at para 20.

[242] See e.g. Alec Samuels, "Giving Reasons in the Criminal Justice and Penal Process" (1981) 45:1 J Crim L 51 at 51.

[243] Shimon Shetreet & Sophie Turenne, *Judges on Trial: The Independence and Accountability of the English Judiciary*, 2nd ed (Cambridge: Cambridge University Press, 2013) at 13.

[244] Nuno Garoupa & Tom Ginsburg, "Judicial Audiences and Reputation: Perspectives from Comparative Law" (2009) 47:3 Colum J Transnat'l L 451 at 455–58 (discussing how judicial behaviour is shaped by reputational incentives).

[245] See e.g. Gerald Lebovits, Alifya V Curtin & Lisa Solomon, "Ethical Judicial Opinion Writing" (2008) 21:2 Geo J Leg Ethics 237 at 237–38; Nina Varsava, "Professional Irresponsibility and Judicial Opinions" (2021) 59:1 Hous L Rev 103 at 118.

[246] *Criminal Code*, *supra* note 94, s 733.1 (failure to comply with a probation order).

[247] Michael Weinrath & Braeden Broschuk, "Police and Crown Prosecutor Use of Restorative Justice and Diversion for Adults and Youth in a High-Crime Area" (2022) 64:4 Can J Corr 21 at 25.

[248] *Ibid* at 22.

officers may not report the defendant's breach. A police officer may be reluctant to lay a criminal charge. Or a prosecutor may decline to prosecute or withdraw a criminal charge for a probation breach. Yet as discussed next, regulatory offences tend to incorporate automatic penalties when defendants fail to respect the terms of their sentence and do not pay their fines — an aspect of choice architecture that distinguishes criminal offences from their regulatory counterparts.[249]

B. PUNISHMENT DEFAULTS FOR REGULATORY OFFENCES

Compared to criminal sentences, regulatory offences incorporate different choice architecture in several respects. First, unlike crimes, regulatory offences do not employ proportionality constraints by default in sentencing. Regulatory offence convictions typically result in tariff fines (or fixed financial penalties) that do not consider the defendant's ability to pay.[250] For this reason, tariff fines can result in excessive sanctions that ignore the offender's personal circumstances.[251] Furthermore, by imposing fixed financial penalties, tariff fines may not tailor the fine's severity to the defendant's level of moral blameworthiness.[252]

Fixed financial penalties may be accompanied by mandatory fees and surcharges that also overlook proportionality constraints.[253] For instance, in Quebec, drivers who change lanes without signalling are liable to a minimum fine of $100 and a maximum fine of $200.[254] The $100 fine results in $50 of additional fees and a $20 surcharge for a total of $170, while the $200 fine results in $77 of fees and a $40 surcharge for a total of $317.[255] These penalties also do not vary according to the defendant's financial capacity or their degree of culpability.

The automatic incorporation of proportionality constraints is one of the core differences between day fines and tariff fines.[256] Day fines (or graduated economic sanctions) are imposed in certain European jurisdictions — such as Finland, Sweden, and Norway — and automatically evaluate the defendant's financial capacities to calculate the cost of a fine.[257] A day fine calibrates the quantum of the fine in proportion to the offence's severity and a portion of the defendant's daily adjusted income.[258] The concept of "daily adjusted income"

---

249 Part V.B, below.

250 Beth A Colgan, "Graduating Economic Sanctions According to Ability to Pay" (2017) 103:1 Iowa L Rev 53 at 55 [Colgan, "Economic Sanction"] (describing tariff-fines irrespective of ability to pay).

251 Alec Schierenbeck, "The Constitutionality of Income-Based Fines" (2018) 85:8 U Chicago L Rev 1869 at 1873.

252 Skolnik, "Rethinking," *supra* note 161 at 85–86.

253 *Tariff of Court Costs in Penal Matters*, CQLR c C-25.1, r 6, s 1 [*Tariff of Court Costs*] (additional fees); *Code of Penal Procedure*, *supra* note 133, s 8.1 (mandatory surcharge). Note that municipal bylaw violations do not result in a mandatory surcharge in Quebec (*Code of Penal Procedure*, *ibid*).

254 *Highway Safety Code*, CQLR c C-24.2, ss 372, 509.

255 *Tariff of Court Costs*, *supra* note 253, s 1(7)(d) (providing that a guilty plea results in a $50 fee for fines that range between $100–$150, and a $77 fee for fines that range between $150–$300); *Code of Penal Procedure, supra* note 133, s 8.1 (20$ surcharge for fines that do not exceed $100, and $40 surcharge for fines between $100–$500). See also Radio Canada, "La question de la semaine sur où va l'argent des contraventions" (29 October 2019), online: [perma.cc/9STC-BXTS].

256 Sally T Hillsman, "Fines and Day Fines" (1990) 12 Crime & Justice 49 at 62–63, 76–77; Tapio Lappi-Seppälä & Michael Tonry, "Crime, Criminal Justice, and Criminology in the Nordic Countries" (2011) 40:1 Crime & Justice 1 at 18.

257 Elena Kantorowicz-Reznichenko, "Day Fines: Reviving the Idea and Reversing the (Costly) Punitive Trend" (2018) 55:2 Am Crim L Rev 333 at 335, 337–39.

258 *Ibid* at 338.

connotes the defendant's daily income after subtracting their "personal and familial living expenses."[259] The portion of daily adjusted income varies between jurisdictions.[260]

Day fines are calculated through a two-step process.[261] First, the offence is assigned a number of "day units" (or points) that vary according to its gravity.[262] Second, the number of day units is multiplied by a percentage of the defendant's daily adjusted income, which dictates the quantum of the fine.[263] Jurisdictions can also impose statutory caps to ensure that affluent defendants do not receive excessive financial sanctions.[264]

Notice how day fines and tariff fines employ different default rules for defendants. Day fines impose the equivalent of an automatic enrolment scheme that considers proportionality constraints by default.[265] Defendants who receive day fines are not required to petition a court for a lower fine that is commensurate to their financial capacities. They need not opt in to an arrangement that considers their ability to pay. In contrast, fixed financial penalties resemble an opt in scheme where defendants must request a proportionate sanction that reflects their economic capabilities.[266] In some jurisdictions, the defendant bears the burden of justifying the reduction of a tariff fine.[267]

Within a fixed penalty scheme, various factors dissuade defendants from requesting a lower fine and opting in to a proportionate punishment. They may not know that they can request a lower fine.[268] Administrative burdens — such as travelling to court and compiling documentation to support one's claim — may deter requests for lower fines, especially for persons who must fulfil a range of other employment or childcare duties.[269] Others do not request fine reductions because the process can be humiliating and demeaning.[270]

These considerations highlight the second difference between the choice architecture of criminal versus regulatory punishments: the allocation of sludge. Recall how criminal prosecutions impose administrative burdens on judges.[271] In the context of criminal convictions, sentencing judges must justify a punishment's fitness and proportionality.[272] In contrast, regulatory offences impose various administrative burdens on defendants who wish to receive a proportionate sentence.

---

259 Colgan, "Economic Sanctions," *supra* note 250 at 56.

260 Terry Skolnik, "Criminal Law During (and After) COVID-19" (2020) 43:4 Man LJ 145 at 178.

261 Peter G Farrell, "The Day-Fine Comes to America" (1990) 38:2 Buff L Rev 591 at 591.

262 *Ibid*; Terry Skolnik, "Beyond *Boudreault*: Challenging Choice, Culpability, Punishment" (2019) 50 CR (7th) 283 at 292–93.

263 Kantorowicz-Reznichenko, *supra* note 257 at 338.

264 Elena Kantorowicz-Reznichenko & Michael Faure, "Comparative Law and Economics Perspective on Day Fines" in Elena Kantorowicz-Reznichenko & Michael Faure, eds, *Day Fines in Europe: Assessing Income-Based Sanctions in Criminal Justice Systems* (Cambridge: Cambridge University Press, 2021) 366 at 374.

265 Cortney E Lollar, "Eliminating the Criminal Debt Exception for Debtors' Prisons" (2020) 98:2 NCL Rev 427 at 435–36; Karin D Martin et al, "Monetary Sanctions: Legal Financial Obligations in US Systems of Justice" (2018) 1 Annual Rev Criminology 471 at 488–89.

266 See e.g. *Provincial Offences Act*, *supra* note 133, ss 69(9), 69(10), 69(15).

267 *Provincial Offences Act*, *ibid*, s 69(10).

268 Stephanie Ben-Ishai & Arash Nayerahmadi, "Over-Indebted Criminals in Canada" (2019) 42:4 Man LJ 207 at 212.

269 Shannon Salter, "Court Fee-Waiver Processes in Canada: How Wrong Assumptions, Change Resistance and Data Vacuums Hurt Vulnerable Parties" (2020) 96 SCLR (2d) 237 at 242.

270 *Ibid* at 237, 243.

271 Part V.A, above.

272 *Ibid*.

The fee waiver process is a good example.[273] Defendants can request a fee waiver due to financial hardship.[274] Yet they must satisfy various conditions.[275] First, they must inform themselves of eligibility requirements and ascertain whether they can apply for a waiver.[276] Second, unless they are represented by legal aid, they must present supporting documentation such as an income tax return, a notice of assessment, a paystub, or an itemized list of income sources and amounts.[277] Third, they must download, print, and fill out a form that they submit to the registrar or a judge.[278] The form that must be submitted to the registrar is three pages long, while the form that must be submitted to the court is nine pages long.[279] When filling out the form, defendants must include information such as the case name and number, the court where the fee waiver request is being made, and certain financial information.[280] They must append the supporting financial information described above to their document, or explain why they lack that information and provide estimates of their income.[281] Defendants must then ensure that their form is sworn or affirmed by a notary public or commissioner of oaths (the form states that individuals can do so free of charge at the court or enforcement office).[282] The form indicates in bold font that it is a crime to submit a false affidavit.[283] Unsurprisingly, studies indicate that heavy administrative burdens result in low uptake rates for fee waiver programs.[284]

The third feature that distinguishes criminal versus regulatory punishments is the imposition of automatic penalties. In Quebec, a $68 fee is imposed for a judgment of guilty rendered by default,[285] while unpaid fines can result in a $24 fee for a notice of judgment for a sum due, a $52 fee for a notice of execution prepared by the collector, a $39 fee for execution instructions given by the collector to the bailiff, a $40 fee for the collector to obtain information regarding the defendant's address and employment, a $40 fee for the court's issuance of a warrant of committal, and $64 for the peace officer's execution of a warrant of committal.[286] The cumulative cost of these penalties and fees is $323. This example illustrates how the aggregate cost of penalties can significantly exceed the initial cost of the fine.[287]

---

[273] Salter, *supra* note 269 at 237 (note that these rules vary between provinces).
[274] *Ibid*; Ben-Ishai & Nayerahmadi, *supra* note 268 at 211–12.
[275] Ben-Ishai & Nayerahmadi, *ibid* at 211–12 (setting out these requirements).
[276] *Ibid*; *Administration of Justice Act*, RSO 1990, c A.6, ss 4.1, 4.3, 4.4; *Fee Waiver*, O Reg 2/05, s 2.
[277] *Administration of Justice Act*, *ibid*; *Fee Waiver*, *ibid*, s 2.1.
[278] *Fee Waiver*, *ibid*, s 5; *Administration of Justice Act*, *ibid*, ss 4.3, 4.4. See also Ontario Ministry of the Attorney General, "Court Fee Waiver Forms," online: [perma.cc/38HD-GBT4] (forms on file with author).
[279] Ontario Ministry of the Attorney General, *ibid*.
[280] *Ibid*.
[281] *Ibid*.
[282] *Ibid*.
[283] *Ibid*.
[284] Carolyn Barnes & Virginia Riel, "'I Don't Know Nothing about That': How 'Learning Costs' Undermine COVID-Related Efforts to Make SNAP and WIC More Accessible" (2022) 54:10 Administration & Soc 1902 at 1903 (listing these studies).
[285] *Tariff of Court Costs*, *supra* note 253, s 2(1).
[286] *Ibid*, s 13.
[287] Notably, these fees and penalties amount to three times the cost of a $170 fine for changing lanes without signaling in Quebec: see the text accompanying notes 253–54.

The default quantum of fines, fees, and surcharges subject socio-economically disadvantaged defendants to poverty penalties that generate proportionality concerns.[288] In contrast to affluent defendants, those who cannot afford to pay their initial fine are subject to additional fees and penalties for non-payment, which results in a more expensive fine.[289] Fines and poverty penalties consume a higher proportion of an indigent defendant's income.[290] Poverty penalties disparately impact low-income defendants. They may be required to forego necessities such as rent, medication, or food to pay their criminal justice debts.[291] Poverty penalties are objectionable for a simple reason. These penalties subject impecunious persons to harsher financial penalties because of their poverty rather than a morally relevant factor, such as their moral blameworthiness or the gravity of the offence.[292]

VI. CONCLUSION

This second part of a two-part article on the regulatory offence revolution in criminal justice argued that crimes and regulatory offences are governed by distinct choice architecture. It showed how regulatory offence charges incorporate an automatic enrolment scheme that convicts defendants by default unless they actively contest the accusation. It explained how the pretrial process imposes sludge on defendants who wish to plead "not guilty" to a regulatory offence charge. It demonstrated how the choice architecture of fault for regulatory offences employs three inculpatory default rules: a weak presumption of innocence, presumed strict liability, and the defendant's burden to prove their due diligence on the balance of probabilities. And it highlighted how the choice architecture of moral fault for regulatory offences structures the pretrial and punishment phases, which promotes internal coherence throughout the criminal justice process for these offences. The concluding parts of this article illustrated how regulatory offences impose default penalties that may overlook defendants' financial capacities and moral blameworthiness. The article's final section showed how Scandinavian countries' day fine scheme default enrol defendants into a penalty system that automatically considers their income when calculating the severity of a fine. In contrast, Canada's tariff fine system requires defendants to request a lower financial penalty — a form of opt in arrangement with lower uptake rates. Furthermore, the fee waiver process allocates heavy sludge on defendants who wish to contest their fees.

Although this article analyzed the choice architecture of crimes versus regulatory offences, it also highlighted the role of choice architecture within a legal system more generally. The law can impose automatic enrolment schemes, default rules, and primary and secondary choice architecture that nudges the parties — or criminal justice actors more generally — toward certain options. And the justice system can inadvertently or intentionally impose sludge on criminal justice actors that increase friction in the justice process. Substantive,

---

288 Criminal Justice Policy Program at Harvard Law School, "Confronting Criminal Justice Debt: A Guide for Policy Reform" (2016) at 15, online (pdf): [perma.cc/2FGE-KHY8]; Tia Lee Kerkhof, "Small Fines and Fees, Large Impacts: Ability-to-Pay Hearings" (2021) 95:2 S Cal L Rev 447 at 449 (describing poverty penalties).

289 Neil L Sobol, "Charging the Poor: Criminal Justice Debt and Modern-Day Debtors' Prisons" (2016) 75:2 Md L Rev 486 at 519.

290 *Ibid* at 518.

291 Beth A Colgan, "Reviving the Excessive Fines Clause" (2014) 102:2 Cal L Rev 277 at 293.

292 Richard S Frase, "Excessive Prison Sentences, Punishment Goals, and the Eighth Amendment: 'Proportionality' Relative to What?" (2005) 89:3 Minn L Rev 571 at 590 (discussing retributive proportionality).

procedural, and evidentiary rules all embody different forms of choice architecture that influence decision-making. Furthermore, a justice system's choice architecture will affect access to justice in important ways that we may overlook.

This article thus offers a starting point to analyze the criminal justice process' choice architecture more specifically, and the choice architecture of other areas of law more generally, such as private law, constitutional law, tax law, administrative law, and more. Choice architecture surrounds us and influences our decisions, even if we do not notice it. The choice architecture within criminal law is no different.