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# Criminalizing America

*How Big Government Makes a Criminal of Every American*

## I. Executive Summary

Every year, federal, state, and local lawmakers needlessly spend millions of taxpayer dollars incarcerating hardworking Americans who had innocent intentions. While some criminal laws and sanctions are certainly necessary to preserve safety and ensure justice, many laws ensnare individuals who unknowingly violate vaguely written criminal statutes. This places a tremendous economic burden on state budgets and threatens the lives and liberties of every American, while doing little to protect public safety.

Our Founding Fathers fought to ensure life, liberty, and the pursuit of happiness, but those cherished values are now under attack by an expansive government. Traditionally, criminal law has been used to hold individuals accountable for inherently wrongful behavior. However, the size and scope of criminal law has expanded so greatly that it has become a tool for regulating behavior that elected officials and unelected bureaucrats deem undesirable. As a result, well-meaning, law-abiding American citizens and business owners spend innumerable hours and

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## QUICK FACTS

- Rapid expansion in both the scope and breadth of America’s criminal law threatens the livelihoods and liberties of well-intentioned, hardworking Americans and diverts limited public safety resources away from deterring and prosecuting violent career criminals.
- Many nonviolent criminal offenses, such as failing to comply with specific regulatory or reporting requirements, criminalize conduct that is not inherently wrongful.
- The Criminal Intent Act will strengthen our criminal justice system by ensuring that no person is convicted of a crime without the government proving that the individual intended to violate the law or knew that the conduct was unlawful.



dollars fending off criminal prosecution for actions they never suspected were illegal, and states spend millions incarcerating unthreatening individuals.

The rapid expansion of criminal law has been accompanied by an equally concerning change to the character of criminal offenses. For centuries, the principle of *mens rea*, the Latin term for “guilty mind,” was required in order to charge an individual with a crime. Often referred to as “criminal intent,” applying the principle of *mens rea* ensures that, in order to be charged with a crime, an individual must have acted with the intent to do harm—or, at least, had the knowledge that his or her voluntary actions would naturally lead to harm.<sup>1</sup> In other words, under the principle of *mens rea* individuals must knowingly and willfully violate the law in order to be criminally charged. However, the recent erosion of *mens rea* requirements and the expansive growth of laws that codify new forms of criminal conduct have left Americans with little protection from the proliferation of vague and ambiguous crimes.

This paper outlines the problem of overcriminalization in the states, explains how it harms both the U.S. economy and individual liberty, and proposes common-sense solutions for state policymakers seeking to stem the tide of overreaching criminal laws.

## II. The Problem of Overcriminalization Threatens Every American

The untethered and brisk growth in both the size and scope of criminal law is known as overcriminalization. There are so many criminalized actions that no one has been able to determine a definitive count. At the federal level, the American Bar Association’s Task Force on the Federalization of Crime found it challenging to determine an accurate count, stating the reason as “not only that the criminal provisions are now so numerous and their location in the books so scattered, but also that federal criminal statutes are often complex.”<sup>2</sup> Best estimates, provided by Professor John S. Baker, put the number of federal crimes at 4,450 and the number of regulatory violations with criminal penalties at as many as 300,000.<sup>3</sup>

Overcriminalization is not solely a federal problem. The phenomenon has been documented at the state level in several case studies of New York, Texas, and the Gulf Coast states.<sup>4</sup> For example, many western states, including Colorado, Oregon, Utah, and Washington, have laws that forbid citizens from

collecting rainwater on their own land. In Oregon, Gary Harrington was sentenced to 30 days in jail and fined \$1,500 for collecting rain and snow runoff on his property. Water is publicly owned in Oregon, so one must apply for a permit before collecting rainwater. Harrington applied for and received his permits, which were then withdrawn by the state when a state court ruled that the city of Medford holds the exclusive rights to “core sources of water” in the Big Butte Creek watershed and its tributaries. Harrington was convicted of breaking a 1925 law by having three illegal reservoirs on his property.<sup>5</sup>

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Charges were based on the claim that Harrington had violated Oregon’s water use law because he had diverted state-owned water. Harrington argued that the law does not mention rainwater or snow runoff, so he was well within the confines of legal activity. Despite a prolonged legal battle, Harrington reported to jail for a 30-day sentence.

Regardless of whether Harrington violated the 1925 law, regulations that prohibit collecting rainwater on one’s property should be enforced through fines and market forces, not through criminal sanctions. Harrington will now carry the stigma of a criminal record and associated collateral consequences, such as increased difficulty finding employment.

Harrington’s case is not rare. As government grows larger and more intrusive, average Americans find themselves ensnared by laws that prohibit activities they had little way of knowing were illegal. In Montgomery County, Md., officials imposed a \$500 criminal fine on six 10-year-old children running a lemonade stand without a permit.<sup>6</sup> Jennifer Hughes of Montgomery’s Department of Permitting Services told the Washington Post, “It wasn’t that we were the big hand of county government



trying to come down and squash anything. ... We were attempting to do what a government is charged with doing, which is protecting communities and protecting the safety of people.”<sup>7</sup> Thirteen-year-old Isabella, who was present at the scene of the lemonade-selling crime, said, “I just think the whole thing was kind of insane that they made such a big deal about a small problem. In the first place, I don’t know how a 10-year-old could get a permit.”<sup>8</sup>

The list of examples continues. In Virginia, it is illegal to buy, sell, or dispose of any milk case or crate bearing the name or label of the owner without written consent of the owner.<sup>9</sup> In New York, 12-year old Alexa Gonzalez was arrested for doodling on her school desk.<sup>10</sup> She did not write any profanities, simply “I love my friends Abby and Faith. Lex was here 2/1/10.” For this, Alexa was handcuffed and arrested. In Chicago, a food fight at a middle school resulted in the arrests of 25 children, some as young as 11.<sup>11</sup>

In a report, “Engulfed by Environmental Crimes: Overcriminalization on the Gulf Coast,” Marc Levin and Vikrant Reddy of Right on Crime found that under the statute Louisiana RS 56:332 (G), a shrimper who catches an unserviceable crab trap shall keep it on board his vessel and properly dispose of it at a designated disposal site if one is available. In other words, failing to store and discard another person’s trash can result in up to 60 days of incarceration—and a mandatory minimum stay in prison for repeat offenders.<sup>12</sup> The same authors also reported that there are 11 felonies related to harvesting oysters in Texas.<sup>13</sup>

These examples are evidence of a concerning change to the character of criminal offenses. For centuries, *malum in se* conduct—actions that are inherently wrong—comprised the majority of criminal offenses. Crimes such as murder, rape, burglary, arson, and theft fall into this category. An individual who commits such a crime cannot reasonably claim ignorance

“The abundance and growth of *malum prohibitum* offenses has destroyed the link between which actions constitute a crime and which are inherently wrong.”



of the law as a defense because everyone knows these actions are wrong.

On the other hand, behavior that is illegal only because a statute makes it so—*malum prohibitum* conduct—is becoming an increasing percentage of all criminal offenses.<sup>14</sup> Paperwork violations, jaywalking, and modifying a building without a license are examples of this type of conduct. The abundance and growth of *malum prohibitum* offenses has destroyed the link between which actions constitute a crime and which are inherently wrong. Without this link, Americans are susceptible to innocently transgressing the law by behaving in ordinary ways that they had no reason to suspect were criminal.

### III. Overcriminalization’s Negative Economic Impact

Beyond the costs to individual liberty, the rapid expansion of criminal conduct and the erosion of *mens rea* requirements place an economic burden on average law-abiding citizens and waste precious criminal justice resources. Given the impossibility of knowing every action that constitutes a crime, individuals and businesses can find themselves facing expensive prosecutions and lengthy prison stays after making honest mistakes. This leads them to spend their limited time and money avoiding investigation, prosecution, and imprisonment by an overreaching government. Every dollar spent on overly burdensome compliance requirements or legal representation is a dollar that cannot be invested to create new jobs or provide better goods and services to consumers. Further, there are the indirect costs of lost opportunities for entrepreneurialism as individuals are discouraged from pursuing business interests.

Taxpayers are footing the bill for imprisoning nonviolent individuals who did not intend to commit a crime and pose no danger to the community. As of 2010, there were more than 1.4 million Americans behind bars, under the jurisdiction of state prison authorities.<sup>15</sup> Each inmate costs taxpayers approximately \$31,286 each year.<sup>16</sup> Collectively, states spend more than \$50 billion every year on their corrections systems.<sup>17</sup> This excludes the indirect costs to society that these systems entail, such as social services, child welfare and education, and collateral consequences for convicted individuals, such as decreased ability to find employment or ineligibility for government benefits and programs. States can control their corrections costs by focusing resources on offenders who are justly convicted for morally blameworthy behavior and should be behind bars because they intended to commit a wrongful act. Incarceration

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In state legislatures around the country, new crimes and criminals are created by the stroke of a pen without full consideration of the impact that such arbitrary laws have on the rights and freedoms of citizens and businesses, or of the cost to taxpayers. These laws destroy businesses, liberty, and lives. Overcriminalization is a symptom of the increasing size and reach of government. State lawmakers, especially those concerned with the growth of government, must take proactive steps to ensure their state's citizens and businesses are protected from vague, ambiguous, and non-blameworthy crimes.

#### IV. The Solution: Default *Mens Rea* Requirements

In order to protect well-meaning individuals from being prosecuted for crimes that are not fundamentally evil, adequate legal protections are necessary. One protection comes in the form of *mens rea* requirements. This centuries-old legal notion of “guilty mind” requires the government to prove that an individual intended to commit a crime in order to convict them for that crime. In other words, *mens rea* requirements restrict criminal sanctions to those who are truly blameworthy. However, an increasing number of statutes and regulatory offenses disregard this notion and do not require one's intent to be proven. This means that an individual can be sentenced to criminal penalties in the absence of any personal fault.

Criminal sanctions are appropriate when an individual intentionally does harm to other people or their property. However, criminalized actions often include normal, everyday activities. Given the expansive, complex, and vague nature of criminal activities, average Americans and business owners cannot be expected to know every action that constitutes a crime. This lack of basing criminal statutes on inherent wrongfulness creates a climate of legal uncertainty, leaving individuals vulnerable to prosecution for actions they did not know were illegal.

To protect individuals against unjust charges and convictions, state policymakers should consider default *mens rea* rules. The American Legislative Exchange Council's ***Criminal Intent Protection Act*** would apply default *mens rea* protections to criminal offenses in cases where the statute is silent

on the necessary culpable mental state.

Requiring that criminal offense statutes include a criminal intent requirement will reserve criminal sanctions for individuals who intended to commit an unlawful act. It will ensure that criminal law focuses on dangerous offenders that have participated in crimes such as murder, arson, rape, theft and robbery, rather than hardworking Americans who are often unaware of vague and ambiguous laws. This will help states ensure public safety while protecting individual liberties.

“Codifying default *mens rea* requirements is not about letting violent or career criminals off the hook; it is about protecting innocent Americans from overreaching, vague laws and about reining in big government.”



Under these reforms, state legislatures will still be able to enact laws under which an individual can be charged without the presence of criminal intent. To do so, the legislature would simply have to state clearly that no willful or purposeful intent

is required to be convicted of that particular crime. Codifying default *mens rea* requirements is not about letting violent or career criminals off the hook; it is about protecting innocent Americans from overreaching, vague laws and about reining in big government.

State legislators can further protect their state from overcriminalization by carefully considering whether the actions outlawed by a proposed criminal statute should actually be a

crime. A wide range of organizations—including the American Legislative Exchange Council, the Texas Public Policy Foundation, the Heritage Foundation, the National Association of Criminal Defense Lawyers, the Washington Legal Foundation, and Families Against Mandatory Minimums—has put together a criminal law checklist for federal lawmakers. Many of the same questions should be asked at the state level, and several are available in the accompanying table.

## Criminal Law Checklist

Developed by the American Legislative Exchange Council, the Heritage Foundation, the Texas Public Policy Foundation, the National Association of Criminal Defense Lawyers, the Washington Legal Foundation, and Families Against Mandatory Minimums, the following are some questions to ask when crafting new laws defining or punishing certain conduct as criminal:<sup>18</sup>

### Should it be a crime?

- Is the conduct inherently wrong (such as murder, rape, robbery, or embezzlement) and therefore to be prohibited in all circumstances?
- Does the conduct pose a substantial threat to public safety and create individual victims?
- Would civil or administrative penalties or other remedies be equally effective in discouraging or penalizing the conduct?
- Do the costs to taxpayers of investigating, prosecuting, and punishing the new crime outweigh its potential societal benefits?

### If it should be a crime, what should the criminal intent requirement be?

- Does the crime have a criminal intent requirement that is adequate to protect the innocent, therefore ensuring that criminal punishment is imposed only for conduct the person accused of the crime knew was unlawful or otherwise wrongful—and thus could have been avoided?

### If it should be a crime, what is the appropriate punishment?

- Is incarceration necessary, or would probation, fines, restitution, and/or community service satisfy the needs of justice?
- Should the offense be classified as a misdemeanor rather than as a felony that deprives offenders of constitutional rights and could permanently hamper their ability to obtain employment, occupational licenses, and housing?

## V. Conclusion

In the 1939 Supreme Court case *Lanzetta v. New Jersey*, the court ruled that “no one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids.”<sup>19</sup> When criminal statutes and regulations bearing criminal sanctions are as extensive, unclear, and complex as they are today, speculation about which actions are criminal becomes commonplace.

The recent explosion in criminal statutes has little to do with protecting our communities; it is yet another symptom of the expansive reach of big government. By carefully considering whether an action should be a crime, including explicit *mens rea* language in criminal statutes, and applying the prescribed criminal intent requirement to all elements of an offense or penalty, states can take an important step toward controlling the size and scope of their criminal laws. These reforms will protect citizens and business owners from unjust charges and strengthen our criminal justice system.



## Criminal Intent Protection Act

### **Summary**

To protect persons from unjust punishment under vague or ambiguous criminal offenses by codifying default rules of application for criminal intent (*mens rea*) requirements within criminal law.

### **Model Policy**

{Title, enacting clause, etc.}

**Section 1. {Title.}** This Act may be cited as the “The Criminal Intent Protection Act.”

### **Section 2. {Legislative Purpose and Findings.}**

The purpose of this Act is to enact default rules of application to ensure that criminal intent (*mens rea*) requirements are adequate to protect persons against unjust charges and convictions where the law has heretofore failed to clearly and expressly set forth the criminal intent (*mens rea*) requirements in the text defining the offense or penalty.

### **Section 3. {Culpability Requirements.}**

(A) Culpability Requirements.

(1) The provisions of this section shall apply to any criminal offense or penalty.

(2) Criminal Intent Required Unless Otherwise Provided – When the language defining a criminal offense or penalty does not specify the criminal intent required to establish an element of the offense or penalty, then such element shall be established only if a person acts:

(a) with the conscious object to engage in conduct of the nature constituting the element;

(b) with the conscious object to cause such a result required by the element;

(c) with an awareness of the existence of any attendant circumstances required by the element or with the belief or hope that such circumstances exist; and

(d) with either specific intent to violate the law or with knowledge that the person’s conduct is unlawful.

(3) Prescribed Criminal Intent Requirement Applies To All Elements – When the language defining a criminal offense or penalty specifies the criminal intent required to establish commission of an offense or imposition of a penalty without specifying the particular elements to which the criminal intent requirement applies, such criminal intent requirement shall apply to all elements of the offense or penalty, including jurisdictional elements.

(4) For the purposes of this section, the following definitions apply:

(a) The term “criminal offense” shall include any portion of a statute, rule, or guidance that defines one or more elements of a violation of law that may be punished by a criminal penalty.

(b) The term “penalty” shall include any criminal fine, criminal restitution, criminal forfeiture, term of imprisonment or confinement, probation, debarment, or sentence of death imposed upon a defendant by the authority of the law and the judgment and sentence of a court.



(c) The terms “person,” “he,” and “actor” shall include any natural person, corporation, or unincorporated association.

(d) The term “rule” shall have the definition set forth in section \_\_\_\_ of this title and shall include any interpretive rule, guidance, or other agency publication that may have the effect of altering the scope of state criminal liability of any person or entity, but shall not include any order issued as part of an adjudication under section \_\_\_\_ of this title.

(e) The term “guidance” shall include any guidance, interpretative statement, or binding enforcement policy issued by any agency.

(f) The term “agency” shall have the definition set forth in Title 5, United States Code, Section 551(1) [or cite to state equivalent if applicable].

(g) The term “element” shall mean (i) such conduct, (ii) such attendant circumstances, or (iii) such a result of conduct as:

(i) is included in the description of the forbidden conduct in the definition of the offense; or

(ii) establishes the required kind of culpability; or

(iii) negatives an excuse or justification for such conduct; or

(iv) negatives a defense under the statute of limitations; or

(v) establishes jurisdiction or venue.

#### **Section 4. {Severability clause.}**

If any provision of this [Act] or the application thereof to any person or circumstance is held unconstitutional or otherwise invalid, the remaining provisions of this [Act] and the application of such provisions to other persons or circumstances shall not be affected thereby.

#### **Section 5. {Repealer clause.}**

#### **Section 6. {Effective date.}**

Approved by ALEC Board of Directors on June 7, 2011.

## Endnotes

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