

12 Steps for Overcoming Overcriminalization

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12 Steps

1. Identify weak *mens rea* protections.
2. Adopt a default *mens rea* statute.
3. Enact the Rule of Lenity.
4. Don't criminalize offenses based on voluntary economic transactions.
5. Eliminate unnecessary occupational licensing requirements.
6. Eliminate delegation of power to agencies through rulemaking.
7. Require that criminal laws unrelated to controlled substances include potential or actual harm.
8. Require that criminal laws unrelated to controlled substances include potential or actual harm.
9. Reclassify misdemeanors to remove jail time when unnecessary or convert to a civil violation.
10. Reclassify misdemeanors to remove jail time when unnecessary.
11. Create commission to identify criminal laws that are redundant, unnecessary, or overbroad.
12. Apply Tenth Amendment to criminal law.

In 2010, the Texas Public Policy Foundation published a checklist titled “Analyze before You Criminalize.”¹ The checklist was—and still is—intended to assist legislators in halting the rise of overcriminalization. Policymakers welcomed the checklist, but many consistently asked a follow-up question: “This checklist helps us prevent new overcriminalization, but how do we reverse the overcriminalization that has already occurred?” Here are some answers.

1. Identify weak *mens rea* protections.

Identify criminal laws containing weak or nonexistent *mens rea* protections and either eliminate the laws or amend them so that the appropriate culpable mental state is included. Civil and criminal law are distinguished by the requirement that a criminal must have a guilty state of mind (*mens rea*), but an increasing number of regulatory offenses nevertheless dispense with the *mens rea* requirement or require merely criminal negligence rather than intentional, knowing, or reckless conduct.²

2. Adopt a default *mens rea* statute.

The American Legislative Exchange Council (ALEC) has enacted model legislation that would apply a strong *mens rea* element to all criminal laws that are silent on this issue.³

3. Enact the Rule of Lenity.

This is a rule of statutory interpretation instructing a court to resolve ambiguities concerning whether the conduct at issue is criminally prohibited in favor of the defendant. This approach to statutory interpretation, which has

been approved as ALEC model legislation, is consistent with the presumption of innocence and the need for laws to provide warning so that individuals and businesses are put on notice about what conduct is criminal. Enshrining the rule of lenity will also discourage the careless drafting that results in vague laws.⁴

4. Don't criminalize offenses based on voluntary economic transactions.

In many spheres of economic activity, voluntary transactions have been criminalized. Many antitrust laws, for example, provide for either civil or criminal penalties for transactions to which both buyer and seller have voluntarily consented.⁵ Criminalization of activities of this sort should be eliminated. Fraudulent transactions, meaning those that involve coercion, would not be included in this category.

5. Eliminate unnecessary occupational licensing requirements.

Eliminate unnecessary occupational licensing requirements when the licensing is not needed to protect the health and safety of a consumer. Licensing now subjects nearly a third of the workforce to government control, going beyond such traditional areas as doctors and lawyers to embrace such professions as athletic trainers, egg brokers, sports agents, and tattooists. In many cases, this criminalizes work for no good reason. In addition to the evidence that unnecessary licensing reduces competition while failing to improve quality, the application of criminal penalties drains prosecutorial and judicial resources.⁶

6. Eliminate delegation of power to agencies through rulemaking.

Eliminate provisions that delegate the power to agencies to create criminal offenses through rulemaking. Many provisions in state and federal statutes authorize regulatory agencies to designate any violation of their rules as a criminal offense. Such provisions transfer the power to take away an individual's liberty from duly elected officials to unelected bureaucrats. Moreover, as each day brings new agency rules and revisions of existing rules, these broad delegation provisions make it virtually impossible for businesses and individuals to keep track of what constitutes criminal conduct, undermining the fair warning principle.⁷

7. Require that criminal laws unrelated to controlled substances include potential or actual harm to an individual victim as an element of the offense.

Require that criminal laws unrelated to controlled substances include potential or actual harm to an individual victim as an element of the offense. Eleven felonies in Texas relating to harvesting oysters do not require that the conduct at issue involve actual or potential danger to health or safety. With such regulatory offenses, the purpose of criminal law to protect one individual from harm by another is subverted because the purported "victim" is the government. Allowing state agencies and prosecutors to bring cases that involve no harm to an individual victim expands the coercive power of government and diverts resources from prosecutions that are necessary to obtain restitution for individual victims and to promote public safety. While administrative rulemaking and civil proceedings may utilize a cost-benefit analysis to evaluate whether the conduct at issue was on balance harmful, no such balancing occurs in criminal proceedings because, traditionally, criminal law applies only to those activities that are inexcusable precisely because of the harm to others that is involved. Thus, criminal law is an overly blunt instrument for regulating many non-fraudulent business activities.⁸

8. Identify and consolidate duplicative laws which sanction essentially the same behavior.

Identify duplicative laws which sanction essentially the same behavior and consolidate these laws. A variety of different laws punishing the same behavior imbues governments with the power to decide how to craft criminal charges, and it lessens the government's obligation to demonstrate the elements of a particular charge. Overlapping criminal laws undermine the clarity of criminal law. Clarity is necessary because it allows individuals and a business to understand what conduct is criminal. Overlapping criminal laws also needlessly complicate the work of courts.⁹

9. Reclassify misdemeanors to remove jail time when unnecessary or convert to a civil violation.

Overly harsh classifications of petty crimes not only waste state prosecutorial resources, they sometimes waste state indigent defense resources because defendants are constitutionally entitled to state-paid counsel if accused of a crime punishable by possible jail time. By identifying misdemeanors for which individuals are rarely sentenced to jail, policymakers can lower the misdemeanor to a level that does not carry jail time, thereby conserving both prosecutorial and indigent defense resources.¹⁰ In the state of Texas, for example, making silent calls to 911¹¹ and the possession of two ounces or less of marijuana¹² might be examples.

10. Apply consistent criteria in distinguishing felonies from misdemeanors.

Felonies typically carry a more severe punishment, including more collateral consequences affecting the offender's ability to earn a living. Criteria should include:

- 1) whether, and to what extent, the conduct causes lasting damage to others (for example, assault could be a misdemeanor or felony depending on the extent of the injury);
- 2) the extent of blameworthiness that typically accompanies the type of offense, including in repeatedly perpetrating the offense in cases where it only becomes a felony upon multiple convictions (for example, there is greater culpability upon a third DWI conviction than upon an initial one); and
- 3) the impact on future public safety (asking whether the danger posed by the offense necessitates incapacitating the person in a substantial number of cases for more than a year or two).

11. Create a commission to examine and identify all criminal laws that are redundant, unnecessary, or overbroad.

Create a commission of key stakeholders to examine all criminal laws to identify those that are redundant, unnecessary, or overbroad. The commission should consist of key stakeholders such as judges, prosecutors, criminal defense lawyers, and business leaders. The goal would be to develop a consensus for omnibus legislation that would streamline criminal laws, recognizing that such laws are so numerous and complex that legislators would have difficulty drafting a comprehensive rewrite of them during the short legislative sessions in many states.¹³

12. Apply the Tenth Amendment to criminal law.

The Tenth Amendment is increasingly ignored by a federal government that seizes an ever-larger role in health care, environmental regulation, and other economic matters. Less remarked upon, but equally troubling, is its increased jurisdic-

tion over routine matters of criminal law. Lawmakers should remove ‘the ordinary administration of criminal justice,’ as Federalist 17 referred to it, from the purview of the federal government, and return this authority to state and local governments.¹⁴ ★

¹ Marc A. Levin, *Analyze Before You Criminalize: A Checklist for Legislators*, Texas Public Policy Foundation (Mar. 2008).

² “[T]o ensure that only persons who are truly culpable can be convicted and punished, the definitions of *malum prohibitum* offenses must include protective *mens rea* requirements. Unfortunately, many of the thousands of *malum prohibitum* offenses in federal law do not. . . . Over 57 percent of the offenses considered by the 109th Congress contained inadequate *mens rea* requirements, putting the innocent at risk of criminal punishment.” Brian Walsh and Tiffany Joslyn, *Without Intent: How Congress Is Eroding the Criminal Intent Requirement in Federal Law*, Heritage Foundation and National Association of Criminal Defense Lawyers (May 2010) 3-4. The arguments made by Walsh and Joslyn focus on federal overcriminalization, but may reasonably extend to state overcriminalization too. Criminalizing ordinary business conduct is not sound public policy merely because the law is enacted by a state legislature or state agency rather than by Congress or a federal agency.

³ *Ibid.*, 29-30.

⁴ “Under a long line of our decisions, the tie must go to the defendant. The rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them. This venerable rule not only vindicates the fundamental principle that no citizen should be held accountable for a violation of a statute whose commands are uncertain, or subjected to punishment that is not clearly prescribed. It also places the weight of inertia upon the party that can best induce Congress to speak more clearly and keeps courts from making criminal law in Congress’s stead.” *United States v. Santos*, 128 S. Ct. 2020, 2025 (2008) (citations omitted).

⁵ “As Berkeley law professor Sanford Kadish once noted, some economic crimes, such as violations of securities regulations, antitrust statutes, and unfair competition laws, more closely resembles acceptable aggressive business behavior.” Erik Luna, “Overextending the Criminal Law” available in Gene Healy, *Go Directly to Jail: The Criminalization of Almost Everything*, Cato Institute (2004) 3.

⁶ Testimony of Marc A. Levin, *Interim Charge on Occupational Licensing & Overcriminalization Before the Texas House Government Reform Comm.*, 80th Leg. 1 (July 16, 2008) (“Law enforcement and correctional resources can be conserved by simply issuing citations either requiring a court appearance or offering payment by mail or online for many Class A and B misdemeanors, including occupational and other business regulatory offenses.”).

⁷ Erik Luna, *The Overcriminalization Phenomenon*, 54 Am U. L. Rev. 703, 708 (2005) (“The impact of [overcriminalization] has been exacerbated by the rise of the modern administrative state, erecting a vast legal labyrinth buttressed by criminal penalties in areas ranging from environmental protection and securities regulation to product and workplace safety. Many public welfare offenses, such as submitting an incorrect report or serving in a managerial role when an employee violates agency regulations, expose otherwise law-abiding people to criminal sanctions.”) (citations omitted).

⁸ Marc A. Levin, *Not Just for Criminals: Overcriminalization in the Lone Star State*, Texas Public Policy Foundation (Apr. 2005) 2.

⁹ Justice Antonin Scalia addressed this issue eloquently in a 2011 opinion: “It should be no surprise that as the volume [of criminal laws] increases, so do the number of imprecise laws. And no surprise that our indulgence of imprecisions that violate the Constitution encourages imprecisions that violate the Constitution. Fuzzy, leave-the-details-to-be-sorted-out-by-the-courts legislation is attractive to the Congressman who wants credit for addressing a national problem but does not have the time (or perhaps the votes) to grapple with the nittygritty. In the field of criminal law, at least, it is time to call a halt.” *Sykes v. United States*, 131 S. Ct. 2267, 2288 (2011) (Scalia, J., dissenting).

¹⁰ Testimony of Erik Luna, *Hearing on Indigent Representation: A Growing National Crisis before the Subcomm. on Crime, Terrorism, and Homeland Security of the House Comm. on the Judiciary*, 111th Cong. 23 (4 June 2009). (“In practice, the states have brought any [indigent defense representation] crisis upon themselves through, inter alia, overcriminalization—abusing the law’s supreme force by enacting dubious criminal provisions and excessive punishments, and overloading the system with arrests and prosecutions of questionable value.”) (citations omitted).

¹¹ TEX. PENAL CODE ANN. § 42.061 (Vernon 2011).

¹² TEX. HEALTH & SAFETY CODE ANN. § 481.121 (Vernon 2011).

¹³ Former United States Attorney General Dick Thornburgh has called for such a commission at the federal level. See Testimony of Dick Thornburgh, *Hearing on Overcriminalization and the Need for Legislative Reform Before the Subcomm. on Crime, Terrorism, and Homeland Security of the House Comm. on the Judiciary*, 111th Cong. 8 (22 July 2009). (“A Commission should be constituted, perhaps in connection with Senator Webb’s National Criminal Justice Commission Act, to review the federal criminal code, collect all similar criminal offenses in a single chapter of the United States Code, consolidate overlapping provisions, revise those with unclear or unstated *mens rea* requirements, and consider overcriminalization issues.”).

¹⁴ Erik Luna and Paul G. Cassell, *Mandatory Minimalism*, 32 CARDOZO L. REV. 1, 48-49 (citing THE FEDERALIST NO. 17 (Alexander Hamilton) (noting that “[o]ne of the areas that the Framers sought to reserve to the states was ‘the ordinary administration of criminal and civil justice’”)).

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