



Overcriminalization: Big Government and Criminal Law

The United States has the best criminal justice system in the world, but we are drifting further and further away from the basic constitutional and legal principles that have laid the foundation for such success. For much of our history, the responsibility and duties associated with “crime-fighting” were clearly understood to be an issue for state and local governments. Over the years, however, Congress has continued to pass more and more federal criminal laws.

Many of these laws make innocent actions subject to criminal prosecution. This practice, called overcriminalization, is an attack on the foundational principles of justice and contrary to the fundamental principles of fairness.

The Ballooning of the Federal Criminal Code

One of the first laws Congress enacted created approximately 20 federal crimes.¹ Determining the number of federal crimes in existence today, however, is no small task. It has been estimated that Congress “enacted 452 new crimes over the eight-year period between 2000 and 2007—a rate of about 57 new crimes per year—for a total of 4,450 federal crimes in the U.S. Code.”² While the growth of this number is alarming, it is only the tip of the iceberg. In addition to the near 4,500 statutory federal crimes, there are estimated to be between 100,000–300,000 federal regulations.³ Average citizens cannot reasonably be expected to know the content of so many regulations, yet violations of any of these regulations may incur criminal culpability. The practice of overcriminalization compounds the already burgeoning criminal justice system, and the fact that Congress is directly exacerbating this problem by continually passing more criminal laws and regulations should raise some chief concerns.

The Eroding of *Mens Rea*—Creating “Innocent” Criminals

One of the fundamental principles of Western criminal law is expressed in the legal maxim *actus non facit reum nisi mens sit rea*—an act alone does not subject one to criminal culpability, unless it is done with criminal intent. This is commonly known as the principle of *mens rea*. Literally translated, *mens rea* means “guilty mind,” and refers to the intent of the criminal actor. For example, common law larceny (theft) is generally defined as the trespassory taking and carrying away of another person’s personal property with the intent to permanently deprive that person of that property. The “trespassory

¹ Act of Apr. 30, 1790, Chap. IX (the “1790 Crimes Act”), 1 Stat. 112.

² John S. Baker, *Revisiting the Explosive Growth of Federal Crimes*, HERITAGE.ORG, June 16, 2008, <http://www.heritage.org/research/reports/2008/06/revisiting-the-explosive-growth-of-federal-crimes>.

³ See, e.g., John C. Coffee, Jr., *Does “Unlawful” Mean “Criminal”?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. REV. 193, 216 (1991) (stating “there are over 300,000 federal regulations that may be enforced criminally”).

taking” is the criminal act, or *actus reus*, and the intent to permanently deprive another person of their property is the *mens rea*. Thus, if a person takes a backpack at the airport because he mistakenly thinks it is his, he cannot be held criminally responsible. Though he committed the *actus reus* by taking another person’s personal property, he did not have the *mens rea*, or criminal intent, to permanently deprive someone else of their property. The presence of *mens rea* is crucial in criminal law and fundamentally acts as the separation point between criminal culpability and civil liability within the law. In civil law, for example, one does not need to have a “guilty mind” in order to be found liable—in most civil cases, one only needs to perform an act negligently to be held liable for damages.

This is an important distinction, and one that has been fundamental to America’s criminal justice system since its inception. William Blackstone, a foundational legal thinker, advocated strongly for the requirement of *mens rea* in criminal law when he wrote, “And, as a vicious will without a vicious act is no civil crime, *so on the other hand, an unwarrantable act without a vicious will is no crime at all*. So that to constitute a crime against human laws, there must be, first, a vicious will; and, secondly, an unlawful act consequent upon such vicious will.”⁴ In other words, “The notion of [just] desert—of punishment earned—demarcates criminal punishment from the rest of the law.”⁵ Justice Robert Jackson judiciously articulated this point for the Supreme Court, “The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.”⁶

Not only is *mens rea* a fundamental principle of criminal law, it is a principle founded in biblical truth. The Bible expressly determines a person’s culpability depending on that person’s knowledge or mental state. Perhaps the best example of this is found in the delineating punishments for murder. According to Exodus 21,

He who strikes a man so that he dies shall surely be put to death. But if he did not lie in wait for him, but God let him fall into his hand, then I will appoint you a place to which he may flee. If, however, a man acts presumptuously toward his neighbor, so as to kill him craftily, you are to take him even from My altar, that he may die.⁷

The difference between first and second degree murder rests on whether the killing was intentional. If the killing was intentional, it was punishable by death, while a lack of intent provided for clemency. Additionally, unintended offenses were not punished on the same scale as intentional offenses.⁸ The Bible clearly identifies the importance of *mens rea* in dealing with guilty individuals. Indeed, it is the integral concept of *mens rea* that distinguishes between a crime and innocent mistake. This fundamental criminal and biblical law principal, however, is being eroded by Congress. As a result, Americans are in danger of a criminal justice system that criminalizes every day innocent behavior.

⁴ 4 WILLIAM BLACKSTONE, COMMENTARIES *21 (emphasis added).

⁵ W. Robert Thomas, Note, *On Strict Liability Crimes: Preserving a Moral Framework for Criminal Intent in an Intent-Free Moral World*, 110 MICH. L. REV. 647, 654 (2012).

⁶ *Morrisette v. United States*, 342 U.S. 246, 250 (1952).

⁷ *Exodus* 21: 12–14 (NASB); see also *Numbers* 35:9–25, *Deut.* 19:4–13, *Joshua* 20:1–9.

⁸ Compare *Leviticus* 4–5 (stating punishment for “unintentional” offenses) with *Leviticus* 6:1–7 (stating punishments for offenses with an intent requirement).

Overcriminalization and You: The Hazardous Results

Due to the vast number of federal criminal laws and regulations and the lack of *mens rea* requirements in those laws, the Federal Government is criminalizing everyday activity. For example, a person could face federal criminal charges and time in federal prison for diverting a backed-up sewage system,⁹ abandoning a snowmobile in a life-threatening blizzard,¹⁰ digging up arrowheads,¹¹ or even violating another country's laws by packing frozen lobsters in plastic bags, instead of paper.¹² These are just a few examples of how American citizens have been caught in the overcriminalization web. The fact that the federal government is passing laws and regulations that are difficult, if not impossible, to find or decipher and several of these laws have weak or no *mens rea* requirements should make all American citizens uneasy.

How to Fix this Problem: Possible Solutions

There are several potential remedies for addressing the overcriminalization problem, but with so many federal regulations already on the books, the practicality of effectively addressing this issue becomes problematic. Some viable solutions are listed below.¹³

➤ Create A Statutory Default *Mens Rea* Term

This remedy requires Congress to enact a statute that would allow courts to apply a default *mens rea* term (e.g., “willfully”) in statutes and regulations where Congress failed to list one or where the *mens rea* term is ambiguous. This remedy would also direct courts to apply an introductory *mens rea* term to each element of the criminal offense, instead of applying it only to the first element.

➤ Codify the Common Law Rule of Lenity

The rule of lenity instructs courts, when construing an ambiguous statutory criminal term, to resolve the ambiguity in a way that is most favorable to the defendant. This reform would protect due process by not allowing a person to be convicted based on a law that cannot be clearly understood. In addition, this reform would also strengthen the Constitution's requirement for separation of powers—it is within the power of Congress, not the courts, to decide what conduct is criminal.

⁹ Gary Fields, *A Sewage Blunder Earns Engineer a Criminal Record*, THE WALL STREET JOURNAL, Dec. 12, 2011, http://online.wsj.com/article_email/SB10001424052970204903804577082770135339442-1MyQjAxMTAxMD EwMjExNDIyWj.html.

¹⁰ *Reining in Overcriminalization: Assessing the Problems, Proposing Solutions: Hearing Before the H. Subcomm. on Crime, Terrorism, and Homeland Security*, 111th Cong. (2010) (statement of Robert “Bobby” Unser), available at <http://judiciary.house.gov/hearings/pdf/Unser100928.pdf>.

¹¹ Gary Fields, *As Criminal Laws Proliferate, More Are Ensnared*, THE WALL STREET JOURNAL, July 24, 2011, <http://online.wsj.com/article/SB10001424052748703749504576172714184601654.html>.

¹² See *McNab v. United States*, 331 F.3d 1228.

¹³ These solutions were developed by The Heritage Foundation. See, e.g., BRIAN WALSH, THE HERITAGE FOUNDATION, THE CRIMINAL INTENT REPORT: CONGRESS IS ERODING THE *MENS REA* REQUIREMENT IN FEDERAL CRIMINAL LAW (2010), http://thf_media.s3.amazonaws.com/2010/pdf/wm_2900.pdf; PAUL LARKIN, THE HERITAGE FOUNDATION, THE NEED FOR A MISTAKE OF LAW DEFENSE AS A RESPONSE TO OVERCRIMINALIZATION (2013), http://thf_media.s3.amazonaws.com/2013/pdf/lm91.pdf.

➤ Broaden the “Mistake of Law” Defense

Currently, the “mistake of law” defense is so narrow that it is virtually no defense at all. This is because of the legal maxim “ignorance of the law is no excuse.” This maxim, however, dates back to a time when criminal law was constructed solely around *malem in se* crimes, or crimes such as murder and rape that are inherently wrong by nature. Today, however, our criminal law is riddled with *malem prohibitum* crimes, crimes that are not inherently wrong, but are deemed by the state to incur criminal sanction. Because of the vast number of *malem prohibitum* crimes within federal statutes and regulations, allowing a defendant to raise a defense to a *malem prohibitum* offense safeguards society’s interest in not punishing the morally blameless.

These solutions are not mutually exclusive and are not exhaustive. Each of these solutions has limitations, and the best solution, perhaps, would be the adoption of all three options.

How You Can Get Involved!

You can also [write your U.S. Congressmen](#) and demand Congress to stop the increasing passage of federal criminal laws and regulations. Lastly, sign up for Justice Fellowship’s e-Alerts at justicefellowship.org to get informed and involved in federal criminal justice reforms and criminal justice reforms in your state.