# Five Solutions for Addressing Environmental Overcriminalization

BY VIKRANT P. REDDY AND MARC A. LEVIN

In recent years, advocates from across the political spectrum have increasingly criticized overcriminalization, the tendency of government to use criminal law to regulate behavior that is not traditionally criminal.

In January, we authored a report for the Texas Public Policy Foundation that described the U.S. Gulf Coast as Ground Zero for state-level overcriminalization. Indeed, between Texas, Louisiana, Mississippi, Alabama and Florida nearly 1,000 laws have passed to criminalize activities involving the environment. Criminal sanctions are of course appropriately applied to an individual who intentionally contaminates another person's property. Too often, however, the activity that is governed by these myriad laws is non-blameworthy, ordinary business activity.

In Louisiana alone, more than one hundred offenses that relate to hunting, fishing and wildlife could result in imprisonment—and virtually none of these offenses carry the *mens rea* (or culpable state of mind) requirement that has been a foundation of American criminal law for centuries. In Florida, it is a first-degree misdemeanor to "transport by vessel over water both wild and aquaculture products of the same species at the same time," but it is not clear why it is necessary to ban this practice in all circumstances. In Mississippi, individuals can face up to six months in prison for hunting deer from a boat. Texas has 11 felonies related to oyster harvesting.

Overcriminalization along the Gulf Coast is inevitably a significant burden to businesses. Ordinary business activity that is vital for the health of a state—fishing, drilling, hunting, building, etc.—is curtailed. Businesses do not have clear rules under which to operate, and when they do, the rules can be unduly harsh. Ultimately, it is the business' consumers who suffer. In our report, we offered five possible policy fixes.

First and foremost, policymakers should review whether certain offenses are properly characterized as "crimes" in the first place. If not, criminal penalties for these offenses should be removed. The remaining offenses, if they are attached to criminal penalties, ought to appear in the state's penal code.

Secondly, states should strengthen their *mens rea* protections. Civil and criminal law have always been distinguished by the requirement that a criminal must have a guilty state of mind, but an increasing number of regulatory offenses disregard the *mens rea* requirement because it is inconvenient for a speedy prosecution. Similarly, some statutes require mere criminal negligence rather than intentional, knowing, or reckless conduct for culpability. Negligence is a low standard, which is more appropriate in civil cases. In the criminal justice context, mere negligence or the lack of a culpable mental state requirement leads to the punishment of accidental conduct with potentially the same consequences as if it had been knowing or intentional. The American Legislative Exchange Council has developed model policies that would apply a strong *mens rea* element to all criminal laws that are silent on this issue.

Third, states should codify the rule of lenity to environmental offenses, and not simply trust the court will apply it. The rule of lenity is a canon of statutory interpretation instructing a court to resolve ambiguities about whether conduct is criminally prohibited in favor of the defendant. The U.S. Supreme Court has explained the rule using a sports analogy: "the tie must go to the defendant." This approach to statutory interpretation is almost universally unquestioned in criminal prosecutions—except when it comes to regulatory offenses. As Timothy Lynch of the Cato Institute has written, "[n]ot only has the rule of lenity been ignored in the context of regulatory offenses, it has also been turned on its head. When an ordinary criminal statute is ambiguous, the courts give the benefit of the doubt to the accused, but when a regulatory provision is ambiguous, the benefit of the doubt is given to the prosecutor." Just as the Exchange Council has approved model policy codifying a strong *mens rea* protection, it has also approved the rule of lenity as model policy.

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Fourth, states should eliminate provisions that delegate to agencies the power 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 administrators. 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.

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The Gulf Coast may be a known hotbed for the proliferation of environmental laws, but the phenomenon of overcriminalization is not limited to one area of the country. In Oregon, Gary Harrington was sentenced to 30 days in jail and fined $1,500 for collecting rain and snow runoff on his property.

Mr. Harrington was convicted of breaking a 1925 law by having "three illegal reservoirs on his property." Authorities based their charges on the claim that Harrington violated Oregon's water use law because he diverted state water.

All water is publically owned in Oregon. Before a person can store any type of water, they must first apply for a permit. Harrington applied for and received his permits, but they were withdrawn by the state when an Oregon court ruled the city of Medford holds exclusive rights to "core sources of water" in the Big Butte Creek watershed and its tributaries. Harrington argued that he was well within the confines of the law, as there was no mention of rainwater or snow run-off. After a prolonged legal battle, Mr. Harrington reported to jail for his 30-day sentence.

Regardless of whether Harrington violated the 1925 law, regulations such as collecting rainwater on one's property should be enforced through fines and market forces rather than criminal sanctions. Mr. Harrington will now carry the stigma of a prior incarceration and increased difficulty finding employment.

Civil remedies can serve as consequences for behavior deemed undesirable by the government and achieve the government's regulatory goals yet protect individuals and businesses from expensive prosecutions and lengthy prison stays. Civil sanctions for non-criminal violations also preserve prison space for dangerous, violent or habitual offenders who pose a threat to our communities.

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While many people may find such labels humorous, these seemingly unnecessary warning labels are an unfortunate side effect of excessive litigation.

A company out of Massachusetts was sued for millions of dollars for exercise equipment that was used incorrectly and resulted in injury. Gas can manufacturers have been sued after customers poured gasoline onto a live fire and were surprised when the gas can exploded.

The Council develops model policy to inject common sense and accountability into the legal system and monetary awards. Sixty percent of those polled believe lawsuits filed against businesses hurt the U.S. economy. The Council's common sense lawsuit reform policies reduce the harm unmerited lawsuits can have on the U.S. economy.

According to the survey, most Americans agree that lawsuit abuse poses a serious threat to business productivity and competiveness. Seventy-two percent agree that the existing liability lawsuit system makes it harder for employees to do business and 88 percent support creating safeguards to protect small businesses from groundless lawsuits that could put them out of business. The Council's "Private Enforcement of Consumer Protection Statutes Act" would protect small businesses against lawsuit abuse brought under the guise of consumer protection while still allowing injured consumers to recover their due.

Seventy-eight percent of the poll's respondents believe there are too many lawsuits, while a mere eight percent believe there are too few. The Council developed a "Resolution on the Lawsuit Abuse Reduction Act" to temper the incentive to file frivolous lawsuits. The model policy is designed to dissuade complaints groundless in fact or legal standing. Specifically, the model resolution would encourage courts to levy sanctions and award attorneys' fees to any attorney or party who brings a lawsuit deemed frivolous by a judge. Such a safeguard would provide reasonable protection for defendants who may not have done anything wrong, yet are still forced to pay the often significant costs of litigation under the current tort system.

The polling data finds that 78 percent of people agree to the posed statement that "enacting lawsuit reform is an important part of improving the U.S. business environment and attracting and keeping jobs." Lawsuit reform is widely-appreciated policy that can improve the business environment for companies large and small. The Council's Task Force on Civil Justice works to develop fair reforms that help the free enterprise system function more fairly and effectively.

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Finally, states should implement safe harbor provisions. A safe harbor provision is an element in a statute or regulation that affords protection from liability or penalty if certain conditions are met. Often these conditions require that no harm has occurred as a result of the violation and that the offender take prompt steps to come into compliance with the statute or regulation that has been violated. In the byzantine world of environmental regulation in which it is nearly impossible to be in total compliance at all times, safe harbor provisions are particularly sensible.

For a business owner along the Gulf Coast of Texas, Louisiana, Mississippi, Alabama and Florida, dozens—and in some cases, hundreds—of activities that one could not possibly know to be criminal put business owners at significant risk. The risk is not just of monetary loss, but of actual prison time. The five Gulf Coast states mentioned in this report can seize a significant opportunity for leadership by reforming their laws to conform better to traditional legal norms. They may also set an example that can be followed by the federal government, which has made notorious overcriminalization headlines such as imprisoning a lobster fisherman for six years for improperly harvesting lobster tails.

Fundamentally, governments are instituted to secure liberty, and, although our report focused primarily on the economic ramifications of overcriminalization, the most important reason for reform is simply that overcriminalization is a dereliction of the government's responsibility to secure individual liberty. A few modest reforms would do a great deal to address this problem.

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Small businesses will not be the only ones effected, however. A 2012 report from actuarial consulting firm Milliman, Inc. estimated that state governments would pay over $13 billion over ten years in new taxes as a result of the health insurance tax.[4] Ironically, this will affect states with larger Medicaid programs that utilize managed care: that is, Medicaid programs that contract with private plans in the fully insured market.

The general consensus that premiums will rise is consistent with what many predicted based on examples in several states; essentially, guaranteed issue and community rating come at a cost.