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## The End and How to Breakthrough: The Number of Laws Criminalizing Innocent Conduct is a Touch Too Much

By Ronald Lampard

### Executive Summary

With the explosion in the number of criminal statutes and criminal regulations, it is particularly difficult for an individual to know what conduct has been deemed criminal or noncriminal. In addition, each year lawmakers at the federal, state and local levels pass criminal laws that do not prescribe a standard of culpability. Furthermore, many of these crimes punish conduct that is not morally blameworthy. As a direct result, innocent, noncriminal conduct carries potential criminal penalties.<sup>1</sup> Finally, some of these regulations place an unnecessary burden on ordinary economic activity.<sup>2</sup>

Historically, proof of *mens rea*—which means “guilty mind”—has been a requirement to punish someone for committing a crime simply because intentional wrongdoing is more morally culpable than accidental wrongdoing. For example, the United States justice system has generally treated an unintentional automobile accident as a civil wrong and not a criminal offense. Criminal punishment is typically used for people who do bad acts on purpose. Unfortunately, as the size and scope of criminal law has expanded, it has become a tool for the government

to regulate conduct that elected officials and bureaucrats find merely unacceptable.

This paper discusses overcriminalization, *mens rea*, and instances of where states and the federal government have sought to address these issues. It also outlines why the states and the federal government should enact legislation nearly identical to the ALEC model [Criminal Intent Protection Act](#) to

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Arlington, VA 22202  
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“Unauthorized use of Smokey the Bear’s image carries a potential prison sentence. So does the unauthorized use of the slogan “Give a Hoot, Don’t Pollute.”

provide for a default *mens rea* standard in instances where a criminal statute or regulation is silent as to the level of criminal culpability needed to convict someone of a crime.<sup>3</sup> Simultaneously, states and the federal government ought to address the number of criminal laws using the ALEC model [Review of Penal Laws Act](#) as a blueprint.<sup>4</sup> Similar measures have already been passed in Michigan, Ohio and Texas.<sup>5</sup>

## Too Many Criminal Laws Penalize Innocent Conduct

### a. The Sheer Number of Criminal Offenses

Unauthorized use of Smokey the Bear’s image carries a potential prison [sentence](#).<sup>6</sup> So does the unauthorized use of the slo-

gan “Give a Hoot, Don’t Pollute.” While it is difficult to imagine the government ever criminally prosecuting anyone for either of these two “criminal” acts, there have been numerous examples of individuals being prosecuted under federal law for conduct that should not be criminalized. For example, individuals have been charged criminally for conduct such as [nursing a woodpecker](#) back to health or [shipping undersized lobsters](#) in plastic bags instead of cardboard boxes.<sup>7</sup> Prosecuting Americans who had innocent intentions is a poor use of taxpayer dollars and does not preserve law and order. In addition, [there are roughly](#) 5,000 federal criminal statutes and an additional 300,000 regulations that carry criminal penalties with additional crimes prescribed by the states.<sup>8</sup> To put that in perspective, the United States Constitution mentions three crimes by citizens: treason, piracy and counterfeiting. In addition, from the late 1800s until the early 1900s, there were approximately dozens of federal criminal statutes. By comparison, the *Dodd-Frank Wall Street Reform & Consumer Protection Act* contains more than 800 single-spaced pages and over two dozen criminal offenses.<sup>9</sup> In essence, one statute passed by Congress has roughly the same number of federal criminal laws as there were in the early 1900s.

In response to the explosion in the number of federal criminal laws, Senate Committee on the Judiciary Chairman Chuck Grassley introduced the [Sentencing Reform and Corrections Act](#), which would mandate that the attorney general create a list of all federal criminal offenses.<sup>10</sup> If this bill were to become law, it would enable all branches of government and the American people to view all conduct that can be punished criminally. Disturbingly, this means that Congress, and likely the Department of Justice, neither know how many federal crimes there are nor what conduct is punishable via criminal law. Elected officials ought to know what conduct has already been deemed “criminal” before creating additional laws that criminalize conduct.

The skyrocketing rate of new crimes being created is not limited to the federal level. Many states also have been creating new crimes at an alarming rate. For [example](#), the state of North Carolina created 204 new crimes from 2009-2014.<sup>11</sup> In addition, during the 2015–16 legislative session, the North Carolina General Assembly created 114 new criminal offenses.<sup>12</sup> Furthermore, many of the new crimes enacted in 2015 and 2016

concern ordinary business activity, such as those governing the manufacture and sale of bedding.<sup>13</sup> In addition, Minnesota's Penal Code contains 327 sections. By contrast, the Model Penal Code, created by prominent scholars and attorneys as a blueprint for criminal law in 1962, contains only 114 sections.<sup>14</sup> The contrast in the size of Minnesota's Penal Code vis-à-vis the Model Penal Code is indicative of the trend of the rising number of crimes that are being created.

Overcriminalization undermines respect for the legal system, as it effectively criminalizes non-morally blameworthy conduct and makes a law-abiding citizen a "criminal." A basic principle of criminal law is that the government must provide notice of what is outlawed by the criminal code. Many, if not most, of these new criminal laws are *malum prohibitum* offenses, which on their face do not violate any moral code. They are only crimes because Congress or an agency has said they are, not because they prohibit morally blameworthy conduct.<sup>15</sup> Due to the size and scope of criminal law, nearly every aspect of society is now affected by the criminal laws at the federal level or the state level.

#### b. Driving Force Behind the Number of Crimes is Inconsistent with the Constitution

Article I of the Constitution states, "All legislative Powers herein granted shall be vested in a Congress of the United States."<sup>16</sup> The vesting clause of Article I grants the entirety of the legislative powers to the legislative body.<sup>17</sup> Articles II and III similarly grant specific powers to the executive and judicial branches, respectively. As a result, the Supreme Court has consistently held that the different branches cannot claim for themselves powers vested in the other branches.<sup>18</sup> In addition, one branch cannot give its own defined authority to another branch. For example, the Constitution prevents Congress from giving away its legislative powers to the executive branch.<sup>19</sup> This principle was greatly influenced by John Locke, an English philosopher who wrote in 1690, "The power of the Legislative being derived from the People by a positive voluntary Grant and Institution . . . the Legislative can have no Power to transfer their Authority of making Laws."<sup>20</sup> Roughly one-hundred years later, James Madison also recognized the importance of separation of powers. "The accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very defini-



"During the 2015–16 legislative session, the North Carolina General Assembly created 114 new criminal offenses."

tion of tyranny," he wrote.<sup>21</sup> In essence, the Constitution sought to prevent one branch from accumulating too much power via taking or delegation.

The Supreme Court has consistently acknowledged the importance of separation of powers. In fact, in 1892 Justice John Harlan, in a majority opinion of the Court wrote, "That congress cannot delegate legislative power . . . is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution."<sup>22</sup> Furthermore, over 100 years later, Justice Antonin Scalia, writing for a unanimous Court, declared that the Constitution "permits no delegation of (legislative) powers" by Congress.<sup>23</sup> Interestingly, in both of these cases and in practically every court challenge to the "delegation doctrine (or nondelegation doctrine)," the Court did not overturn the statute at issue.<sup>24</sup> However, the Supreme Court has held that Congress is permitted to delegate





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“the ability to fill up the details” to executive branch agencies as long as Congress provides an “intelligible principle” in the underlying statute to guide an agency.<sup>25</sup> Despite the nondelegation doctrine’s broad acceptance that it is consistent with the structure and text of the Constitution, it is viewed as being an unrealistic constraint.<sup>26</sup> Therefore, Congress is effectively permitted to delegate much of its power to agencies within the executive branch.

As a result of this framework, Congress has the ability to write bills with regulatory “catch-all” provisions that deem criminal any violation of any regulation created pursuant to the statute. For [example](#), a federal regulation promulgated by the Department of Homeland Security prohibits bringing a bicycle into a

building of the National Institutes of Health. That regulation is authorized in a statute passed by Congress. Specifically, it is permitted by Section 1315(c) of Title 40 of the U.S. Code, which criminalizes any “regulation prescribed” pursuant to that provision of law.<sup>27</sup> That is, the violation of any regulation authorized by that particular statute, even those regulations criminalizing innocent conduct, such as bringing a bicycle into a building, could make an individual a federal criminal.<sup>28</sup>

Recent opinions from Justice Samuel Alito and Justice Clarence Thomas indicate that the Supreme Court may revisit laws that permit Congress to cede their legislative authority to the executive branch. Both Alito and Thomas expressed concern about Congress granting expansive authority and power to make

rules regulating private conduct.<sup>29</sup> In addition, Justice Neil Gorsuch expressed concern about Congress delegating legislative power in a 2015 case when he served on the 10<sup>th</sup> Circuit. “[A]ll this delegated legislative activity by the executive branch raises interesting questions about the separation of powers ... [including] troubling questions about due process and fair notice ... like whether and how people can be fairly expected to keep pace with and conform their conduct to all this churning and changing ‘law,’” he [opined](#).<sup>30</sup> In essence, executive agencies today are permitted not only to enforce legislation, but also to revise and reshape it through the exercise of so-called “delegated” legislative authority.

Overall, the Supreme Court’s reluctance to apply the nondelégation doctrine has allowed Congress to cede much of its rulemaking authority to executive agencies. However, simply because this conduct is permissible does not mean that it serves the best interest of the public. This framework has led to an extensive number of government regulations that carry criminal penalties. Hence, legislators at the state and federal level should be especially cautious before delegating their authority to agencies. These agencies are then permitted to promulgate regulations that can cause a person or entity to be unfairly branded a criminal.<sup>31</sup> As a result, it undermines both the moral authority of our legal system and respect for the rule of law.

The explosion of the number of criminal statutes and regulations that carry criminal penalties has grown nearly parallel with the growth of the administrative state. As the number and size of government bureaucracies have ballooned, so have the number of criminal laws that have been promulgated. Remarkably, the administrative state has been the primary driving force behind the explosion in criminal laws. For example, close to 99% of crimes on the books were created by a network of government bureaucracies.<sup>32</sup> These government bureaucrats who create these laws are unelected—meaning they are accountable to no one. They need not face the concerns of constituents like a member of Congress must do. In essence, Congress and legislatures in the states,<sup>33</sup> have delegated a substantial amount of their rulemaking and legislative authority to government agencies. The vast majority of criminally enforce-

able laws were never presented to a congressional committee or debated on the floor of any legislative chamber. They did not survive a vote; nor were they presented to the president for a ratifying signature. Therefore, they should not form the basis for anyone’s imprisonment.

## **Mens Rea: Requiring Criminal Intent**

The regulations created by government agencies that carry criminal penalties often lack an adequate, or at times any, *mens rea* requirement.<sup>34</sup> To criminally punish individuals who have acted unwittingly serves to draw little distinction between civil justice and criminal justice. In a criminal case, requiring proof of *mens rea* has [conventionally been required](#) to punish someone for a crime because intentional wrongdoing is more morally culpable than accidental wrongdoing.<sup>35</sup> Typically, the justice system has been content to treat accidents that injure others as civil wrongs, but criminal punishment has been reserved for people who do bad acts on purpose.<sup>36</sup> Strict-liability criminal offenses do not require the government to establish that the alleged offender knew or had reason to know they were committing a crime. Furthermore, the increasing number of strict liability criminal laws around the country is a stark contrast from centuries of Western and American legal tradition.<sup>37</sup> In essence, it should not be enough that the government proves the individual possessed an “evil-doing hand.” The government should also have to prove that the accused had “an evil-meaning mind.”<sup>38</sup>

The notion that a crime must involve a purposeful culpable intent is grounded in American legal history. For example, James Madison [wrote](#) in Federalist Paper 62, “It will be of little avail to the people that laws are made by men of their own choice if the laws be . . . so incoherent that they cannot be understood . . . [so] that no man who knows what the law is today, can guess what it will be like tomorrow.”<sup>39</sup> Moreover, in 1952 Supreme Court Justice Robert Jackson [wrote](#) in *Morissette v. United States*: “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 . . . and took deep and early root on American soil.”<sup>40</sup> Essentially, significantly before the explosive growth of the administrative state and the passing of numerous new criminal laws as a result, there were stern warnings about the serious problem presented when people are branded criminals for violating laws or regulations that they did not know existed and had no intention to violate.

In light of the sheer number of crimes, a *mens rea* requirement would serve the public well. There are different levels of culpability that provide differing levels of protection to an accused. [First](#), the standard that provides the highest level of protection to an accused is “willfully,” which essentially requires proof that the accused acted with actual knowledge that their conduct was unlawful. Another standard is “purposely” or “intentionally,” which requires proof that the accused engaged in conduct with the conscious objective to cause harm. An additional standard of “recklessly” requires proof that the accused knew what he was doing, that he knew of the substantial risk that his conduct could cause harm, and that he still acted in a manner that grossly deviated from the standard of conduct that a reasonable, law-abiding individual would have used in those circumstances.<sup>41</sup> Since a large number of regulatory crimes and other *malum prohibitum* offenses do not possess a *mens rea* standard as an element of the crime,<sup>42</sup> individuals are left without basic protection against prosecution if they commit one of these crimes accidentally.

The Court has held that a *mens rea* requirement exists in certain criminal cases, albeit not as broad as would be prescribed by a default *mens rea* standard. For example, in *Elonis v. United States* in 2015, the Court noted that an individual’s mental state is crucial when they face a potential criminal conviction. Furthermore, the majority opinion stated that in instances when a federal law is “silent on the required mental state . . . (a court ought to read into the law) only that *mens rea* which is necessary to separate wrongful conduct from ‘otherwise innocent conduct.’”<sup>43</sup>

Unfortunately, there have been numerous examples of individuals who have been convicted of a crime because the law

that they violated did not have a *mens rea* standard. One example is the case of Wade Martin, a native Alaskan fisherman, who sold ten sea otters to an individual who he believed was a native Alaskan. However, the authorities informed him that the buyer was in fact not a native Alaskan, which violated the [Marine Mammal Protection Act](#).<sup>44</sup> Because the law did not prescribe a level of criminal culpability, meaning prosecutors would not have to prove that Martin knew the buyer was not from Alaska, he pleaded guilty and lives with the stigma of a felony conviction.<sup>45</sup> Perhaps a more troubling [example](#) is the story of eleven-year-old Skylar Capo who saw a baby woodpecker about to be consumed by a cat. The child rescued the woodpecker and her mother, Alison Capo, agreed to help her take care of it before releasing it back into the wild. Unfortunately, they were spotted by an undercover U.S. Fish and Wildlife Services agent, who informed the duo that they were committing a crime by violating the *Migratory Bird Treaty Act*. Two weeks later, the agent showed up to their residence and delivered a citation to Alison stating she violated federal law and faced a fine and potential imprisonment. After the story received significant media attention, the Fish and Wildlife Service decided to drop the case, calling it a “misunderstanding.”<sup>46</sup> However, the offense for which she was charged carried no *mens rea* requirement. Therefore, individuals who commit the same “criminal” conduct could be similarly charged. In essence, Wade Martin and Alison Capo are concrete examples of the dangers individuals face when a statute or regulation prescribes no level of criminal culpability.

## Practical Solutions to Address Overcriminalization and *Mens Rea*

There are various methods in which Congress and legislatures in the states can pursue to address both the ballooning number of criminal offenses and having a requisite criminal culpability standard. To start, legislatures could pass a law establishing a commission to undertake a comprehensive review to identify unnecessary criminal laws and make recommendations for reform. In tandem, the attorney general and all other executive agencies at the state and federal levels ought to be required to identify all statutes and regulations that carry



“Oklahoma and Tennessee have criminalized the unlicensed practice of cosmetology.”

criminal penalties and publish them in a location that is widely available and free to the public. The previously discussed [Sensitizing Reform and Corrections Act](#) would establish a National Criminal Justice Commission for the very purpose of reviewing criminal laws and making public all laws that carry criminal penalties.<sup>47</sup> The ALEC model [Review of Penal Laws Act](#) provides for a similar commission to be created at the state level.<sup>48</sup> Identifying and listing all criminal violations will provide members of the public the information to determine what is and is not a crime. The voluminous nature of criminal law only reinforces the need to publish such a list and allow policymakers and the public to see the vast amount of conduct that has been criminalized.

In addition, legislators ought not to give into the demands of lobbyists representing special interests who push for legislation that criminalizes the business practices of their competitors or seeks to stifle competition. This is particularly evident in the field of occupational licensing restrictions.<sup>49</sup> For example, [Oklahoma](#)<sup>50</sup> and [Tennessee](#)<sup>51</sup> have criminalized the unlicensed practice of cosmetology. In addition, these anti-competitive “criminal”

regulations are at times promulgated by regulatory agencies.<sup>52</sup> Shutting out competition via criminalizing innocent conduct is a severe violation of liberty and free market principles.

Furthermore, Congress and state legislatures should pass a default *mens rea* standard for statutes and regulations that do not prescribe a requisite level of criminal intent. Under this standard, if the statute or regulation prescribes a level of criminal conduct below a *mens rea* standard, then the law would not be affected. However, if the law is silent as to the level of criminal culpability, then the default standard would require proof beyond a reasonable doubt that the person acted with the intent to violate the law.<sup>53</sup> The ALEC model [Criminal Intent Protection Act](#) would 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 . . . failed to clearly and expressly set forth the criminal intent *mens rea* requirements in the text defining the offense or penalty.”<sup>54</sup>

Fortunately, states have begun to address this issue. For example, fifteen states have passed laws that put in place a default *mens rea* provision in instances where the statute is silent as to the level of criminal intent.<sup>55</sup> For example, in 2015 Michigan passed [House Bill 4713](#), which imposed a default culpable mental state if the statute or regulation did not prescribe a level of culpability.<sup>56</sup> The law still permits the legislature to create strict-liability criminal offenses, but it must explicitly state its intention to do so. The law was directed at a large number of the most harmful regulatory crimes that could have negatively impacted well-meaning individuals and small businesses in criminal prosecutions.<sup>57</sup> In Michigan, the number of criminal violations has ballooned to over 3,100,<sup>58</sup> making it particularly necessary for a provision of law requiring the government to prove that an individual acted with the intent to violate the law. One year earlier, Ohio passed its own default *mens rea* law. Like Michigan’s default *mens rea* law, the Ohio measure provided that in the event a criminal offense does not prescribe a level of criminal culpability, “the element of the offense is established only if a person acts recklessly.”<sup>59</sup> Ohio and Michigan may disagree sharply on Buckeyes and Wolverines; however, they both



recognized the importance of passing a default *mens rea* law to provide protections against criminalizing innocent conduct.

At the federal level, Senators Orrin Hatch, Mike Lee, Ted Cruz, David Perdue, and Rand Paul introduced the [Mens Rea Reform Act](#), which would create a default *mens rea* provision.<sup>60</sup> In this manner, the bill is similar to the legislation passed in Michigan, Ohio and other states. “The *Mens Rea Reform Act* will . . . ensure that honest, hardworking Americans are not swept up in the criminal justice system for doing things they did not know were against the law,” Hatch said.<sup>61</sup> “Unfortunately our federal laws contain far too many provisions that do not require prosecutors to prove a defendant intended to commit a crime. The result is a criminal justice system that over penalizes innocent acts which only undermines the rule of law,” Lee [said](#).<sup>62</sup> The supporters of this legislation include John Malcolm of the Heritage Foundation and David Patton of the Federal Defenders of New York.<sup>63</sup> States have shown that this problem merits being addressed and members of Congress have taken notice.

Some are opposed to imposing a default *mens rea* standard because they believe that it will make it difficult to prosecute individuals accused of white collar crimes and therefore only serve to benefit Wall Street and similarly situated corporate elites and “fat cats.” For example, Senator Sheldon Whitehouse has [called](#) *mens rea* reform a “corporate protection” scheme.<sup>64</sup> However, large corporations employ numerous attorneys whose jobs are to ensure compliance with existing laws. Smaller companies and individuals do not enjoy that luxury, as having an in-house counsel or a personal attorney is almost always prohibitively expensive for a small business or the average American.<sup>65</sup> Hence, the average individual would benefit quite substantially from a default *mens rea* standard, while a corporation or a wealthy individual would benefit only marginally at best.

Lastly, unelected bureaucrats should not create any additional crimes. Congress has enacted only about 1% of the federal laws and rules that Americans must live by and unelected bureaucrats have promulgated the rest.<sup>66</sup> Additionally, as seen by the explosive growth of criminal regulations in the states and the federal government, unelected bureaucrats are indeed creating a massive amount of regulatory crimes. Therefore, Congress and state legislatures should not delegate their power to unelected bureaucrats to write criminal laws.<sup>67</sup> If certain conduct is grave

enough to incarcerate someone, then it ought to be considered and voted upon by individuals who have been elected by the people.<sup>68</sup> Elected officials are accountable to constituencies, but unelected bureaucrats are not. Furthermore, even if the Supreme Court does not reconsider applying the nondelegation doctrine, which would effectively prohibit agencies from creating federal crimes, Congress and state legislatures can still reclaim their lawmaking authority by not delegating their legislative powers.<sup>69</sup>

## Conclusion

The astronomical number of federal and state criminal laws is a tremendous problem. The massive amount of power possessed by unelected bureaucrats—accountable to no constituency—to write laws prescribing criminal conduct is particularly troubling. In addition, the existence of nearly 5,000 criminal statutes and roughly 300,000 regulations that carry criminal penalties diminishes the American public’s respect for the criminal justice



“The existence of nearly 5,000 criminal statutes and roughly 300,000 regulations that carry criminal penalties diminishes the American public’s respect for the criminal justice system.”



system. This is particularly true when conduct that is not morally blameworthy is criminalized. The high risk of an individual being caught up in the widespread conduct that has been deemed “criminal” is fundamentally unfair and should be of concern to the public and those who represent them.

Fortunately, due to legislation passed by certain states addressing some of the issues at hand, there is demonstrable proof that these issues can be addressed. Ohio and Michigan have provided concrete examples of sound legislation that serves to protect innocent conduct when they both passed a default *mens rea* law. Hopefully, those successes will aid in the prog-

ress of the *Mens Rea Reform Act* as it proceeds through Congress. In addition, the proposal by the *Sentencing Reform and Corrections Act* to establish a commission to review criminal laws can serve as a template for states to pass similar legislation. Ultimately, there are sound policy solutions available that will both reverse the disturbing trend regarding the large number of criminal laws and protect innocent conduct from being criminalized. It will be up to the states and the federal government to enact these measures and foster a better criminal justice system that would be in the best interests of the constituents that they represent.

## Summary of Solutions

- I. Legislatures ought to pass a law establishing a commission to undertake a comprehensive review to identify unnecessary criminal laws and make recommendations for reform. In tandem, the attorney general and all other executive agencies at the state and federal levels ought to be required to identify all statutes and regulations that carry criminal penalties and publish them in a location that is widely available and free to the public. (P. 6).
- II. Lawmakers ought not to give into the demands of lobbyists representing special interests who push for legislation that criminalizes the business practices of their competitors or seeks to stifle competition. This is particularly evident in the number of occupational licensing restrictions. (P. 6).
- III. Congress and state legislatures should pass a default *mens rea* standard for statutes and regulations that do not prescribe a requisite level of criminal intent. Under this standard, if the statute or regulation prescribes a level of criminal conduct below a *mens rea* standard, then the law would not be affected. However, if the law is silent as to the level of criminal culpability, then the default standard would require proof beyond a reasonable doubt that the person acted with the intent to violate the law. (P. 7).
- IV. Unelected bureaucrats should not create any additional crimes. Congress has enacted only about 1% of the federal laws and rules that Americans must live by and unelected bureaucrats have promulgated the rest. Additionally, as seen by the explosive growth of criminal regulations in the states and the federal government, unelected bureaucrats are indeed creating a massive amount of regulatory crimes. Therefore, Congress and state legislatures should not delegate their power to unelected bureaucrats to write criminal laws. (P. 8).

## [End Notes]

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