At the State Level, So-Called Crimes Are

Here, There, Everywhere

By Marc A. Levin

By definition, lawmakers make laws and validate the truism that if one only has a hammer, every problem is a nail. The number of criminal laws has grown exponentially over the last decades to more than 4,500 federal statutory offenses. (John S. Baker Jr., *Measuring the Explosive Growth of Federal Crime Legislation*, 5 ENGAGE 23 (2004), *available at* http://tinyurl.com/a3agva3; Gene Healy, *Making Criminals Out of All Americans*, WASH. EXAMINER (Dec. 15, 2009), http://tinyurl.com/ampa4ko.) Moreover, former US Attorney General Dick Thornburgh noted in his testimony at a July 2009 congressional hearing on overcriminalization and overfederalization that there are some 300,000 regulatory offenses created by federal agencies that have not been approved by Congress. (*Over-Criminalization of Conduct/Over-Federalization of Criminal Law: Hearing Before the Subcomm. on Crime, Terrorism & Homeland Sec. of the H. Comm. on the Judiciary*, 111th Cong. 7 (2009), *available at* http://tinyurl.com/bgfj4rf (statement of Hon. Richard Thornburgh, Former Att'y Gen. of the United States).) While the perils of federal overcriminalization are increasingly recognized, the issue at the state level is just as serious.

In Texas, lawmakers have created over 1,700 criminal offenses, including 11 felonies relating to harvesting and handling oysters. (Marc A. Levin, Ctr. for Effective Justice, *Business Overcriminalization*, TEX. PUB. POL'Y FOUND. (Dec. 2008), http://tinyurl.com/b6ktyhn.) Under Texas's agriculture code, chapter 76, it is a Class A misdemeanor to "use, handle, store, or dispose of a pesticide in a

manner that injures vegetation, crops, wildlife, or pollinating insects." And under chapter 26 of the state's water code, it is a second degree felony (up to 20 years in prison) for a person who "fails to remit any fees collected by any person required to hold a permit under this section." (*Id.*)

Arizona has more than 4,000 statutory offenses. (*Current Criminal Codes as of November 21, 2012*, Ariz. Crim. Just. Commission (Nov. 21, 2012), http://tinyurl.com/a26kroq.) Residents in Rhode Island can face a year in prison for selling or exchanging pillows, hammocks, or or other bedding missing statutorily required tags, and those who rebuild their own cars without a license face up to two years in prison. (R.I. Ctr. for Freedom & Prosperity, Innocents Found Guilty: Mens Rea and Criminal Justice in Rhode Island (2012), *available at* http://tinyurl.com/asmp3n4.)

These figures for the number of state criminal offenses exclude those offenses created by state agencies through agency rule making and city ordinances. For example, Texas has catch-all agency delegation statutes such as occupations code section 165.151 that makes it a Class A misdemeanor (up to one year in jail) for violating "any rule" of any professional licensing board. Traditional offenses such as murder, rape, and theft are typically found in state penal codes, but the proliferation of crimes now extends to nearly every other body of state law. Indeed, in Texas, just 254 of these offenses are traditional crimes found in the penal code. Most of the other nearly 1,500 offenses interspersed throughout other codes concern business activities, some of which could be better addressed through incentives created by competitive markets or civil penalties.

Excessive criminalization not only leads to injustice and unfairness, it also deters and even reduces productive activity. The Sarbanes-Oxley legislation and the labyrinth of rules it has spawned impose criminal penalties for accounting errors, and has saddled US businesses with an estimated $100 million in compliance and opportunity costs. This does not include the costs associated with the shift in initial public offerings overseas or an estimated $1.4 trillion stock market value decline that correlated with congressional and executive actions in enacting the bill. (*A Price Worth Paying?*, Economist, May 19, 2005, *available at* http://tinyurl.com/ams9cr7; Ivy Xiying Zhang, Economic Consequences of the Sarbanes-Oxley Act of 2002 (Feb. 2005), *available at* http://tinyurl.com/979ro; Loren Heal, *Sarbanes-Oxley Costs Hurting New Tech Industries, IPOs*, Heartland Inst. (Mar. 1, 2009), http://tinyurl.com/avkbc8n.) Truly fraudulent business activities must be penalized and, most importantly, the shareholders or consumers restored as much as possible, but we must also ask whether some legislative and bureaucratic cures are worse than the disease. Federal prosecutors deployed broad criminal laws to deal a death blow to Arthur Andersen and tens of thousands of innocent employees, all based on the misdeeds of a few. While the US Supreme Court eventually overturned the verdict, the company was already out of business.

Less known is the case of retiree George Norris of Spring, Texas, who imported orchids. He was sentenced to federal prison for such mistakes as failing to produce the proper documents. Norris went to trial under the Lacey Act, a federal law that prosecutes US citizens for violating another country's criminal codes. (Andrew M. Grossman, *The Unlikely Orchid Smuggler: A Case Study in Overcriminalization*, Heritage Found. (July 27, 2009), http://tinyurl.com/3u3ycnj.) Similarly, following a Siberian moose hunting trip, a hunting guide to a Texas billionaire was indicted in 2007 under the Lacey Act for importing antlers and horns obtained illegally and in violation of Russian law. (Tom Fowler, *Houston Tycoon Duncan's Hunting Guide Indicted*, Hous. Chron., Sept. 13, 2007, http://tinyurl.com/bed3zvp.) Russian authorities, however, expressed no qualms about the trip or the trophies, leading one attorney to observe, "What the hell is the U.S.' interest in bringing felony charges here for hunting on Russian soil, where not one single person has complained? Is this really the best use of our prosecutorial resources?" (Tom Fowler, *Houston Tycoon in Big Trouble over Big Game Hunt*, Hous. Chron., July 19, 2007, http://tinyurl.com/bkr3vf8.)

Significant differences between criminal and civil law make criminal law an overly blunt instrument for regulating nonfraudulent activities. Whereas administrative rule making and civil proceedings may utilize cost-benefit analysis to evaluate the conduct at issue, no such balancing occurs in criminal proceedings. Rather, it is assumed that criminal laws cover only those activities that are inherently wrong. Also, criminal law, because it is enforced entirely by state prosecution, tends to minimize the role of the victim, if there actually is one. In fact, the prototypical malum prohibitum offense, such as mislabeling fruit under chapter 93 of the Texas agriculture code, does not include anyone actually being harmed as an element of the offense.

Civil and criminal law have traditionally been distinguished by the requirement that a criminal must have a guilty state of mind, expressed in the Latin term mens rea. However, there are increasing numbers of federal, state, and local criminal offenses that dispense with a culpable mental state or require mere negligence instead of intent, knowledge, or recklessness. Federal courts have issued mixed rulings in such cases, recognizing exceptions to the constitutional due process requirement for a mens rea element for minor offenses that do not carry jail time and "public welfare" offenses. (Wash. Legal Found., Special Report: Federal Erosion of Business Civil Liberties ch. 1 (2d ed. 2010), *available at* http://tinyurl.com/ao82f97.) The classic example of the latter is someone who is holding a grenade, as courts have ruled it can be assumed that the person knew it was illegal. However, many of the criminal laws at the state and federal level that specify that no mens rea is required for conviction or are silent on the question go well beyond any reasonable construction of either exception.

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Additionally, with so many sweeping and often ambiguous criminal laws, including those that are created every week by regulatory agencies without the approval of elected officials, it is impossible for any person or business to stay abreast of what is legal and what is criminal. Moreover, the deluge of overly broad and vague criminal laws gives police and prosecutors virtually untrammeled authority to arrest and indict anyone. In Texas, a person can be arrested for any crime—even a Class C misdemeanor—other than speeding or an open container of alcohol. A Baytown, Texas, woman was arrested for an overdue library book. (*Texas Woman Arrested for Overdue Book*, KWTX.com (June 29, 2006), http://tinyurl.com/awrtou.) Indeed, Boston civil liberties attorney Harvey Silverglate estimates every American unwittingly commits felonies on a daily basis. (L. Gordon Crovitz, *You Commit Three Felonies a Day*, Wall St. J., Sept. 27, 2009, http://tinyurl.com/yadrtc4.) Conservative commentator and former prosecutor Tony Blankley observed that criminal law was once a series of clearly demarcated "tall oak trees" whereas now it is a vast meadow in which "blades of grass" are virtually indistinguishable. (*The Criminalization of (Almost) Everything*, Cato Inst. Book Forum (Oct. 1, 2009), *available at* http://tinyurl.com/b555jty.)

Overcriminalization has become a cradle-to-grave phenomenon. Hundreds of thousands of Texas students as young as 10 years old receive tickets for Class C misdemeanors in school, most commonly for disrupting class. They must then appear in municipal or justice of the peace court with their parent where they face a fine of up to $500. If they do not appear or don't pay, the case is typically referred to juvenile probation and, if not cleared up by the time the youth turns 17, an arrest warrant is issued.

The Texas Public Policy Foundation joined with lawmakers in developing House Bill 278 in 2007, which eliminated a provision in the US education code authorizing school districts to create offenses not in state law for violations of school policies. (*Bill Digest of House Bill 278*, House Res. Org. (May 4, 2007), http://tinyurl.com/b8yrwtv.) This ended the issuance of citations to students for conduct such as chewing gum that schools had criminalized through their codes of conduct. However, the disruption of class offense that remains in the US education code is overly broad, including, for example, "emitting noise of an intensity that prevents or hinders classroom instruction." (Tex. Educ. Code Ann. § 37.124.) Students convicted of these "crimes" may have to answer affirmatively to questions on job applications asking whether they have ever been convicted of a nontraffic offense. Such collateral consequences illustrate yet another problem with overcriminalization.

Yet another troublesome aspect of overcriminalization can be seen in curfew ordinances adopted in many cities that impose a criminal penalty on business owners if a youngster is on their premises when the child is supposed to be in school or at home, effectively transferring the responsibility for keeping kids in line from the parents and schools to retailers and other businesses. (*See* Austin, Tex., Code § 9-3-2(D) ("The owner, operator, or employee of an establishment commits an offense if the person knowingly allows a juvenile to remain on the premises of the establishment during curfew hours.").) In such instances, criminal law, which was intended to promote personal responsibility, is being used to impose a duty on a third party who has not committed a wrongful act.

Analyze Before You Criminalize

If the tide of overcriminalization is going to be stemmed, it is clear that policy makers must more carefully evaluate whether creating or enhancing criminal penalties is the best solution to the problem at hand. To facilitate this process, we have developed the following checklist that outlines key factors to consider before imposing criminal penalties.

Should It Be against State Law?

- Should the conduct be prohibited at all, or will the free market provide a sufficient disincentive?
- Should the conduct be regulated by state government, or might it be better addressed by local government entities that can tailor policies to their own communities?
- Is the conduct, to the extent it is harmful, already prohibited by existing laws, such as laws against fraud and disorderly conduct?

Should It Be a Crime?

- Is there an individual victim? Does the conduct present a threat to public safety? If not, civil penalties may be more appropriate.
- Is the conduct inherently wrong and therefore properly prohibited regardless of its benefits in some circumstances? If not, criminal penalties may be too rigid of an enforcement mechanism.
- Should enforcement be dependent entirely on the discretion of local prosecutors? Would civil penalties, forfeiture of state licenses and permits, a private cause of action, or other remedies be equally or more effective in providing redress to the victim and discouraging the conduct?
- If the conduct is part of a business activity, does criminalization unfairly place the burden of personal criminal liability on employees for acts committed within the scope of employment?
- How much will it cost state and local taxpayers to enforce the law, including the costs of prosecution, operating courts, incarceration, and indigent legal defense if jail time is possible?

If It's a Crime, Should There Be a State-of-Mind Requirement?

- Should a culpable state of mind be an element of the offense? Unless the conduct at issue involves an inherently dangerous item, such as a grenade or toxic chemical, the US Supreme Court has suggested that imposing strict criminal liability may violate due process.

- Is criminal negligence sufficient, or is a higher culpable mental state, such as "knowingly" or "willfully," warranted? Consider factors such as whether the penalty would be fairly applied to a mistake made as the result of negligence and the severity of the punishment.

If It's a Crime, What Should the Punishment Be?

- Does the individual pose a danger to society? If not, incarceration is likely an unnecessary expense. Probation, fines, restitution, and community service may provide a sufficient deterrent.
- Should the offense be classified as a misdemeanor or a felony? Felony convictions are more likely to permanently interfere with the offender's ability to obtain employment, occupational licenses, and housing, undermining efforts to promote community reintegration.
- Should there be a mechanism for alternative dispute resolution, such as victim-offender mediation or, if a regulatory offense with no victim, a requirement that the state first send a cease-and-desist notice and provide a safe harbor in which to come into compliance before prosecution?

Reining in Overcriminalization

While the checklist above can help avoid creating more excessive criminal laws in the future, we must also seek to eliminate or revise those current criminal laws that are either unnecessary, lacking an appropriate mens rea element, overbroad, vague, or otherwise defective. The following reforms should be considered:

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, 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.

> [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 W. Walsh & Tiffany M. Joslyn, Without Intent: How Congress Is Eroding the Criminal Intent Requirement in Federal Law 1–2 (Heritage Found. & Nat'l Ass'n of Crim. Def. Law. 2010), *available at* http://tinyurl.com/am4by4n.)

The arguments made by Walsh and Joslyn focus on federal overcriminalization, but they also apply to state overcriminalization.

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, which the Heritage Foundation and the National Association of Criminal Defense Lawyers have also supported. (Walsh & Joslyn, *supra*.) Professor John Baker cataloged for the Federalist Society each state's current law in this area, showing that fewer than 20 states have a default mens rea provision and that many of these provisions either do not apply in all circumstances or require mere negligence. (John S. Baker Jr., Mens Rea and State Crimes (Federalist Soc'y 2012), *available at* http://tinyurl.com/b54gnks.) Legislation based on the ALEC model bill was filed in Rhode Island in 2012. It specifies that, if a statute creating an offense is silent on mens rea, culpability requires a person act:

> (1) With the conscious object to engage in conduct of the nature constituting the element;
> (2) With the conscious object to cause such a result required by the element;
> (3) 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
> (4) With either specific intent to violate the law or with knowledge that the person's conduct is unlawful.

(H.R. 8119, 2012 Leg., Reg. Sess. (R.I. 2012).)

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. The US Supreme Court has noted:

> 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, 553 U.S. 507, 514 (2008) (citations omitted).)

Eliminate 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. "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*, *in* Go Directly to Jail: The Criminalization of Almost Everything 3 (Gene Healy ed., 2004).) Criminalization of activities of this sort should be eliminated. Fraudulent transactions, meaning those that involve coercion, would not be included in this category.

Eliminate unnecessary occupational licensing requirements. Licensing now subjects nearly a third of the workforce to government control, going beyond such traditional areas as doctors and lawyers to embrace professions such as athletic trainers, egg brokers, sports agents, and tattooists. In addition to the evidence that unnecessary licensing reduces competition while failing to improve quality, the application of criminal penalties drains law enforcement, prosecutorial, judicial, and correctional resources. Such 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.

Eliminate the power of agencies to create criminal offenses through rule making. Many provisions in state and federal statutes authorize regulatory agencies to designate any violation of their rules as a criminal offense. The power to take away an individual's liberty should rest with duly elected officials, not unelected bureaucrats. Moreover, as each day brings new and revised agency rules, these provisions to delegate power make it virtually impossible for businesses and individuals to keep track of what constitutes criminal conduct, undermining the fair warning principle. (Marc Levin, *Not Just for Criminals: Overcriminalization in the Lone Star State*, Pol'y Persp. (Tex. Pub. Policy Found.), Apr. 2005, at 2, *available at* http://tinyurl.com/bhb6vdz.)

Require that nondrug-related criminal laws include harm to an individual. Eleven felony statutes in Texas related 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 expands the coercive power of government and diverts resources from prosecutions that are necessary to obtain restitution for individuals and to promote public safety. While administrative rule making 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 nonfraudulent business activities.

Identify and consolidate duplicative laws. A variety of different laws punishing the same behavior imbues governments with the power to decide how to craft criminal charges and lessens the government's obligation to demonstrate the elements of a particular charge. Overlapping laws undermine the clarity that allows businesses and individuals to understand what conduct is criminal. Overlapping laws needlessly complicate the work of courts. As Justice Scalia noted:

> 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 nitty-gritty. 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).)

Reclassify misdemeanors to remove jail time 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, policy makers can lower the misdemeanor to a level that does not carry jail time, thereby conserving both prosecutorial and indigent defense resources. Professor Erik Luna testified: "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." (*Indigent Representation: A Growing National Crisis: Hearing Before the Subcomm. on Crime, Terrorism & Homeland Sec. of the H. Comm. on the Judiciary*, 111th Cong. 23 (2009).) In Texas, for example, making silent calls to 911 and the possession of two ounces or less of marijuana are among the examples of misdemeanors that carry jail time though rarely result in the offender being sentenced to jail.

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 the first); 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).

Create a commission to examine and identify redundant, overbroad, and unnecessary laws. 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. Former United States Attorney General Richard Thornburgh has called for such a commission at the federal level, urging:

> [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 over-criminalization issues.

(*Over-Criminalization of Conduct/Over-Federalization of Criminal Law: Hearing Before the Subcomm. on Crime, Terrorism & Homeland Sec. of the H. Comm. on the Judiciary*, 111th Cong. 8 (2009), *available at* http://tinyurl.com/bgfj4rf (statement of Hon. Richard Thornburgh, Former Att'y Gen. of the United States).)

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 jurisdiction over routine matters of criminal law. Lawmakers should remove "the ordinary administration of criminal justice," as *Federalist No. 17* referred to it, from the purview of the federal government, and return this authority to state and local governments. It has been noted that "[o]ne of the areas that the Framers sought to reserve to the states was 'the ordinary administration of criminal and civil justice.'" (Erik Luna & Paul G. Cassell, *Mandatory Minimalism*, 32 Cardozo L. Rev. 1, 48–49 (citing The Federalist No. 17 (Alexander Hamilton)).)

Conclusion

The question of whether the scope of criminal law should be virtually unlimited or instead confined to its traditional role of addressing conduct that is blameworthy and harms others ultimately implicates two competing theories of government. On the one hand, James Madison wrote in the *Federalist* papers:

> It will be of little avail to the people, that the laws are made by men of their own choice, if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood; if they be repealed or revised before they are promulgated, or undergo such incessant changes that no man, who knows what the law is today, can guess what it will be tomorrow. Law is defined to be a rule of action; but how can that be a rule, which is little known, and less fixed?

(The Federalist No. 62 (James Madison), *available at* http://tinyurl.com/yf8v2bu.)

In contrast, Lavrentiy Pavlovich Beria, the apparatchik who headed the Soviet secret police under Joseph Stalin, declared proudly, "Show me the man and I'll find you the crime." (*A Nation of Criminals?*, Where We Live (Conn. Public Broadcasting Network Dec. 7, 2009), http://tinyurl.com/atnj27h.)

In sum, policy makers must:

- Refocus criminal law, and its enforcement and prosecution, on activities that harm individual victims and neighborhoods;
- Ensure there are strong but carefully tailored and proportionate laws that penalize truly fraudulent activities and make shareholders or other victims whole; and
- Enable individuals and businesses to better find the increasingly blurry line between legal and criminal activities. ■