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The Heritage Foundation

LEGAL MEMORANDUM

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A Judicial Cure for the Disease of Overcriminalization

Stephen F. Smith

Abstract

The dangers of "overcriminalization" are widely appreciated across the political spectrum, but confusion remains as to its cause. Standard critiques fault legislatures alone. The problem, however, is not simply that too many criminal laws are on the books, but that they are poorly defined in ways that give unwarranted sweep to the criminal law, raising the danger of punishment absent or in excess of moral blameworthiness. Instead of narrowing ambiguous criminal laws to more appropriate bounds, courts frequently expand them, even when this ratchets up the punishment that offenders face, and fail to insist on proof of sufficiently culpable states of mind to render the resulting punishment just. By changing how they interpret criminal statutes, taking narrow construction principles and state-of-mind requirements more seriously, courts can help to cure the overcriminalization disease.

As issues of public policy go, few are as strange as overcriminalization. Once largely the subject only of academic complaint, the problems associated with overcriminalization are now more widely understood. Major think tanks,[1] media outlets,[2] civil libertarian groups,[3] and legal professional associations[4] have shined a harsh light on the injustices that federal prosecutors have committed against people who had no reason to know their actions were wrongful, much less illegal.

These are not isolated cases of abusive prosecution; they take place from coast to coast and have ruined the lives and reputations of people who were like other law-abiding citizens except for their misfortune of having attracted the attention of an overzealous federal agent or prosecutor.[5] From left and right of political center to

Key Points

- Congress has created an average of 56 new crimes every year since 2000, roughly the same rate as in the two prior decades.
- Federal judges have repeatedly used ambiguous statutes as a basis for creating new federal crimes and have expanded the reach of overlapping federal crimes to drive up the punishment for comparatively minor federal crimes.
- The rule of lenity requires a court to construe ambiguous criminal laws narrowly, in favor of the defendant, not to show lenience to lawbreakers, but to protect important societal interests against the many adverse consequences that the judicial expansion of crimes produces.
- The state-of-mind, or *mens rea*, requirements are vital to preventing morally undeserved punishment and guaranteeing the fair warning necessary to enable law-abiding citizens to avoid committing crimes.
- Although comprehensive legislative reform is ultimately needed to reverse overcriminalization, the reform effort can and should take place in federal courtrooms as well as in Congress.

This paper, in its entirety, can be found at **http://report.heritage.org/lm135**

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Nothing written here is to be construed as necessarily reflecting the views of The Heritage Foundation or as an attempt to aid or hinder the passage of any bill before Congress.

points in between, there is an impressive consensus that overcriminalization gravely threatens the liberty of ordinary citizens.

Nevertheless, reports of overcriminalization's demise would be greatly exaggerated. Congress has repeatedly held hearings on the subject, and members of both parties have criticized the present state of affairs in which the law virtually "makes everyone a felon."[6] Yet Congress has taken no action.

Even that bleak statement is too optimistic: Congress, while at times professing concern over the federalization of crime,[7] has continued to pass new federal criminal laws at a relentless pace. Congress has created an average of 56 new crimes every year since 2000, roughly the same rate of criminalization from the two prior decades.[8] This is no aberration. As Professor John Baker has noted, "for the past 25 years, a period over which the growth of the federal criminal law has come under increasing scrutiny, Congress has been creating over 500 new crimes per decade."[9]

Much like the addict who repeatedly breaks promises to quit, Congress cannot seem to kick the overcriminalization habit. Some addicts eventually seek help through third-party "interventions," but the federal courts, committed as they are to expan-

1. For example, The Heritage Foundation has played a leading role in the overcriminalization debate, establishing the Overcriminalization Project to educate lawmakers and citizens on the subject. *See* The Heritage Foundation, *Legal Issues: Overcriminalization*, http://www.heritage.org/issues/legal/overcriminalization (last visited May 28, 2014). Heritage has also published a series of reports documenting the problems associated with overcriminalization and proposing common-sense reforms. *See*, *e.g.*, One Nation Under Arrest: How Crazy Laws, Rogue Prosecutors, and Activist Judges Threaten Your Liberty (2d ed. 2013) (Paul Rosenzweig ed.); Brian Walsh & Tiffany M. Joslyn, *Without Intent: How Congress Is Eroding the Criminal Intent Requirement in Federal Law* (2010).
2. Major newspapers and magazines, including *The Wall Street Journal* and *The New York Times*, have carried news and opinion pieces in recent years on overcriminalization. *See*, *e.g.*, Gary Fields & John R. Emshwiller, *As Federal Crime List Grows, Threshold of Guilt Declines*, Wall St. J. (Sept. 27, 2011); Gary Fields & John R. Emshwiller, *As Criminal Laws Proliferate, More Are Ensnared*, Wall St. J. (July 23, 2011); Adam Liptak, *Right and Left Join Forces to Take on U.S. in Criminal Justice Cases*, N.Y. Times, at A1 (Nov. 24, 2009). *See also*, *e.g.*, Ed Feulner, *"The Trial," American Style: Who Can Avoid Running Afoul of Overcriminalization?* Wash. Times, at B3 (Aug. 13, 2013); Wendy Kaminer, *When Everyone Is an Offender*, The Atlantic (Sept. 28, 2011); *Rough Justice in America: Too Many Laws, Too Many Prisoners*, The Economist (July 22, 2010).
3. The American Civil Liberties Union (ACLU) includes overcriminalization reform as part of its Mass Incarceration project.
4. The American Bar Association (ABA) and the National Association of Criminal Defense Lawyers (NACDL) have long been critical of overcriminalization at the federal level. In 1998, an ABA task force issued a report decrying the steady expansion of federal criminal laws. *See* American Bar Association, The Federalization of Criminal Law (1998). The ABA remains active in calling attention to the costs of overcriminalization. *See American Bar Association, Task Force on Overcriminalization*, American bar Association, http://www.americanbar.org/groups/litigation/initiatives/overcriminalization.html (last visited May 27, 2014). The NACDL has consistently urged Congress to enact sweeping reforms to counteract the adverse effects of overcriminalization. *See*, *e.g.*, *Defining the Problem and Scope of Over-Criminalization and Over-Federalization: Hearing Before the Over-Criminalization Task Force of 2013 of the H. Comm. on the Judiciary*, 113th Cong (2013) (testimony of Steven D. Benjamin, President, National Association of Criminal Defense Lawyers).
5. The Heritage Foundation has created what might be called an "Overcriminalization Hall of Shame," a list of documented cases nationwide in which federal prosecutors have convicted people who inadvertently ran afoul of obscure federal laws. *See* http://www.heritage.org/issues/legal/overcriminalization. A sampling of these stories has been collected and published by members of an Overcriminalization Working Group, comprised of Heritage, the ACLU, and other respected opponents of overcriminalization, in *USA v. YOU: The Flood of Criminal Laws Affecting Your Liberty*.
6. William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 Mich. L. Rev. 505, 511 (2001). This idea, previously known mainly to criminal law "insiders," captured the attention of the public with the publication of Harvey A. Silverglate's widely publicized exposé, Three Felonies a Day: How the Feds Target the Innocent (2009). As his title indicates, Silverglate's thesis is that American criminal laws are so broadly and poorly defined that ordinary, well-meaning citizens unwittingly commit multiple felonies on a daily basis and thus are exposed to indictment and conviction at the whim of federal agents and prosecutors.
7. In 2013 alone, for example, the Congressional Task Force on Overcriminalization held three different hearings addressing concerns about the overly broad nature of federal criminal liability.
8. *See* John S. Baker, Jr., *Revisiting the Explosive Growth of Federal Crimes*, Heritage Foundation Legal Memorandum No. 26, at 5 (June 16, 2008). The ABA's Task Force on Federalization found that fully 40 percent of the thousands of federal criminal laws in force were enacted after 1970. *See* American Bar Association, The Federalization of Criminal Law 7 (1998).
9. Baker, *supra* note 8, at 2.

sive views of congressional power to define crimes,[10] will not nudge Congress even to curb its reliance on overcriminalization, much less to quit cold turkey.

At this point, traditional critiques of overcriminalization hit a brick wall because overcriminalization is understood primarily in quantitative terms: the notion that there are too many criminal laws regulating too many activities. From this view, reform efforts depend entirely on Congress, which needs to narrow and repeal scores of federal criminal laws. Absent such legislative action, federal prosecutors will continue to have free rein to exploit the vagaries of federal law to charge and convict whomever they wish, regardless of how innocuous the accused's behavior is.

Fortunately, there is another path to reform in this area, one that does not depend on congressional action (or heroic self-restraint by federal prosecutors). This path to reform is informed statutory interpretation in federal criminal cases. Legislative overuse and prosecutorial misuse of the criminal sanction need not go unchecked, as many judges seem to think. The courts themselves have an important role in defining crimes, a role that takes on even greater importance as Congress continues to default on its obligation to restrict criminal liability and penalties to sensible bounds.

Courts flesh out—and, more often than not, prescribe in the first instance—the state of mind required for conviction. The state-of-mind, or *mens rea*, requirements are of vital importance in preventing morally undeserved punishment and guaranteeing the fair warning necessary to enable law-abiding citizens to avoid committing crimes. As important as the role of defining the mental element of criminal liability is, however, it is not the judiciary's only role in this area. The courts also help to define criminal liability by interpreting ambiguous statutes, determining the meaning of laws in which Congress failed to make its intention entirely clear.

Once the important role of the federal judiciary in defining criminal liability is understood, there is greater cause for optimism about the prospect of finally reining in overcriminalization. The effort to persuade Congress to reverse course and exercise greater restraint and care in the use of criminal sanction is important and should continue. It is time, however, to broaden the conversation to include the one branch of the federal government—the judiciary—that is most likely to be receptive to long-standing complaints about overcriminalization. As we continue to await legislative reform, it is high time for courts to be part of the solution to overcriminalization instead of part of the problem.

The rest of this paper proceeds as follows. The first section seeks to reframe the typical discussion of overcriminalization in terms of the deeper problems stemming from the expansive body of federal criminal law. These problems, which stem fundamentally from poor crime definition, are ones that the federal courts helped to create and thus can remedy on their own without action by Congress. Although comprehensive legislative reform is ultimately needed, the reform effort can and should take place in federal courtrooms as well as in the chambers of Congress.

The second and third sections discuss the ways in which courts have worsened—and, by changing interpretive strategies, can counter—the adverse effects of overcriminalization through statutory interpretation. It is not "restraint" for courts to expand ambiguous federal criminal statutes and to water down *mens rea* requirements. To the contrary, it is "activism" and an abdication of the judiciary's historic responsibility to promote due process and equal justice for all.

To be faithful to its role as a coequal branch of government, the federal judiciary should not be rubber stamps for the Department of Justice's predictably expansive uses of federal criminal statutes. The judiciary should instead counteract the personal, political, and other considerations that often sway prosecutorial decision making with informed, dispassionate judgment about the proper scope of federal criminal laws in light of statutory text, legislative intent, and enduring principles of criminal law. The sooner federal judges get the message, the

10. *See* Stephen F. Smith, *Proportionality and Federalization*, 91 Va. L. Rev. 879, 881 & n.2 (2005) (hereinafter Smith, *Proportionality and Federalization*) (noting that constitutional law does not limit, and indeed facilitates, the federalization of crime). The main culprit here, of course, is the Commerce Clause, which even after the so-called New Federalism of the Rehnquist Court allows Congress to regulate even the most local of crimes. As Professor Lino Graglia laments, with the "narrow exception" of "clearly noneconomic conduct that is not part of a larger regulatory scheme," recent Commerce Clause cases "indicate[] a return to the Court's practice since 1937 of reviewing purported exercises of the commerce power in name only." Lino A. Graglia, Lopez, Morrison, *and* Raich*: Federalism in the Rehnquist Court*, 31 Harv. J.L. & Pub. Pol'y 761, 784–85 (2008).

sooner overcriminalization's days will be numbered and the court system can resume the business of dispensing justice instead of merely punishment.

Overcriminalization Defined

As the term implies, critiques of overcriminalization posit that too many criminal laws are on the books today and, relatedly, that existing criminal prohibitions are too broad in scope. This standard view of overcriminalization is quantitative in that it bemoans the number of criminal laws on the books and the amount of activity that is deemed criminal.

Arguments that there is too much criminal law typically stress the fact that new criminal laws are continuously added to the books, even when crime rates are low or falling, and that the expansion often involves "regulatory" offenses. Such offenses punish conduct that is *mala prohibita*, or wrongful only because it is illegal, and may allow punishment where "consciousness of wrongdoing be totally wanting."[11] With the continued proliferation of regulatory offenses, conduct that in prior generations might have resulted only in civil fines or tort liability (if that) is now subject to the stigma and punishment of criminal law.[12]

Although the quantitative view tends to dominate discussions of overcriminalization, it is unsatisfying on its own terms. While such frequent use of the criminal sanction, especially during election years and times when crime rates are low or falling, may suggest that Congress is legislating for reasons other than legitimate public-safety needs, new criminal legislation might be used, for example, to signal voters that its proponents are "tough" on crime.[13] Alternatively, steady expansion in the reach of federal crimes might signify that Congress does not see (or simply does not care much about) potential misuse of increasingly broad prosecutorial authority.[14]

Still, a broad, constantly expanding criminal code need not jeopardize individual liberty or mete out morally undeserved punishment. If the prohibitions and penalties are carefully tailored to appropriate offenses and offenders, a large, expanding code can operate as justly as a code that is smaller and more targeted in its reach. For this reason, the quantitative objection to overcriminalization is, without more, incomplete.

The quantitative objection implies a deeper, qualitative objection to overcriminalization in that overcriminalization tends to degrade the quality of the criminal code, producing unjust outcomes. For example, a code that is too large and grows too rapidly will often be poorly organized, structured, and conceived. The crimes may not be readily accessible or comprehensible to those who are subject to their commands. Moreover, a sprawling, rapidly growing criminal code likely contains inadequately defined crimes—crimes, for example, in which the conduct (*actus reus*) and state of mind (*mens rea*) elements are incompletely fleshed out, giving unintended and perhaps unwarranted sweep to those crimes.

The number and reach of criminal laws may be symptomatic of a broken criminal justice system, but the poor quality of the criminal code and the resulting mismatch between moral culpability and criminal liability are the disease.

11. United States v. Dotterweich, 320 U.S. 277, 284 (1943). As *Dotterweich* further explained, regulatory offenses employ criminal penalties as a form of regulation to promote the effectiveness of health, safety, and welfare rules otherwise enforced through noncriminal means. *See id.* at 280–81. Regulatory offenses differ from the types of crimes punishable at common law, which were deemed *mala in se*, or wrong in themselves, and typically involved infringements of personal or property rights of others.

12. The fact that regulatory offenses are punished criminally increases the number of federal criminal offenses immeasurably. Although 4,000 to 5,000 federal statutory provisions carry criminal penalties, the total number of federal criminal offenses is well in excess of 10,000 when regulatory offenses are taken into account. As Professor Baker has explained, counting the many thousands of federal administrative rules and regulations that can be enforced criminally would add "an additional 10,000 or so crimes" to the total. Baker, *supra* note 8.

13. As the late Professor William Stuntz has explained: "Voters demand harsh treatment of criminals; politicians respond with tougher sentences (overlapping crimes are one way to make sentences harsher) and more criminal prohibitions. This dynamic has been particularly powerful the past two decades, as both major parties have participated in a kind of bidding war to see who can appropriate the label 'tough on crime.'" Stuntz, *supra* note 6, at 509. Although he credits tough-on-crime politics as an important factor in overcriminalization, his larger point is that deeper forces of institutional cooperation drive legislators repeatedly to expand criminal liability and penalties because those actions benefit prosecutors, who are legislators' natural allies on issues of criminal justice. *See id.* at 509–11.

14. In other words, Congress might take what Paul Larkin refers to as a "trust us" approach to criminal lawmaking. As he explains: "The 'trust us' argument is that the law should be willing to allow overbreadth in criminal statutes because the courts and the public can rely, as Justices Holmes and Frankfurter once noted, on the 'conscience and circumspection in prosecuting officers.'" Paul Larkin, *The Dangers of a "Trust Us" Approach to Statutory Interpretation*, Heritage Foundation Legal Memorandum No. 93, at 2 (June 12, 2013).

Overcriminalization as a (Partially) Self-Inflicted Judicial Wound

Once overcriminalization's qualitative aspects are understood, it becomes evident that the blame for overcriminalization cannot be laid entirely at Congress's doorstep. Regrettably, the courts have played the overcriminalization game with Congress and the Department of Justice. They have done so by expansively interpreting ambiguous criminal statutes in derogation of the venerable "rule of lenity" and by not insisting on *mens rea* requirements robust enough to rule out morally undeserved punishment. Both of these interpretive failures have made federal criminal law even broader and more punitive.

Expansive Interpretations as Judicial Crime Creation. It is often said that courts do not "create" federal crimes, but that simply is not the case. When courts expand the reach of ambiguous criminal laws (laws which, by definition, can reasonably be read to include or exclude the defendant's conduct), they are essentially creating crimes. They are determining for themselves, within the broad bounds of the terms of an ambiguous statute, whether the defendant's conduct *should* be condemned as criminal, and they are doing so after the fact, without prior warning to the defendant charged with a violation. To allow citizens to be convicted and imprisoned based on such judicial determinations transforms federal criminal law into what one scholar has described as "a species of federal common law"[15]—a result fundamentally at odds with the principle that in a democracy, the criminalization decision is reserved for legislatures.[16]

The root of the problem is that the courts are notoriously inconsistent in adhering to the rule of lenity. The rule of lenity requires a court to construe ambiguous criminal laws narrowly, in favor of the defendant,[17] not to show lenience to lawbreakers, but to protect important societal interests against the many adverse consequences that the judicial expansion of crimes produces. These consequences include judicial usurpation of the legislative crime-definition function, not to mention potential frustration of legislative purpose and unfair surprise to persons convicted under vague statutes. The rule of lenity therefore reflects, as Judge Henry Friendly memorably said, a democratic society's "instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should."[18]

More to the point, faithful adherence to the rule of lenity would require courts to counteract overcriminalization. The rule would require courts to narrow the scope of ambiguous criminal laws, adopting expansive interpretations only if compelled by the statutory text. This would prevent prosecutors from exploiting the ambiguities of poorly defined federal crimes either to criminalize conduct that Congress has not specifically declared to be a crime or to redefine—or ratchet up the penalty for—crimes dealt with more specifically in other statutes. The rule of lenity would thus make poor crime definition an obstacle to—not a license for—more expansive applications of federal criminal law, remitting prosecutors seeking more enforcement authority to the democratic process, not an unelected, unaccountable judiciary.

Regrettably, the federal courts treat the rule of lenity with suspicion and, at times, outright hostility. While sometimes faithfully applying the rule of lenity, the Supreme Court has frequently either ignored lenity or dismissed it as a principle that applies only when legislative history and other interpretive principles cannot give meaning to an ambiguous stat-

15. Dan M. Kahan, *Lenity and Federal Common Law Crimes*, 1994 Sup. Ct. Rev. 345, 347.

16. This notion inheres in the "principle of legality." Although legality is sometimes described as merely a rejection of judicial crime creation *vel non*, the principle reflects the broader notion that only legislatures are "politically competent to define crime." John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 Va. L. Rev. 189, 190 (1985).

17. *See*, *e.g.*, United States v. Bass, 404 US 336, 349 (1971).

18. *Id.* (quoting Henry J. Friendly, *Mr. Justice Frankfurter and the Reading of Statutes*, reprinted in Henry J. Friendly, Benchmarks 196, 209 (Chicago, 1967)). The rule also has an important, albeit underappreciated, role in preventing courts from overriding legislative grading decisions. In a system with many overlapping criminal laws, broad interpretations of statutes can increase the penalties the legislature provided in laws specifically regulating a criminal act, potentially resulting in disproportionately severe punishment. *See generally* Smith, *Proportionality and Federalization*, *supra* note 10, at 934–44.

ute.[19] Indeed, the federal courts disregard the rule of lenity so frequently that it is questionable whether the rule of lenity can still be accurately described as a rule. As I have previously stated:

> [T]he courts' aversion to letting blameworthy conduct slip through the federal cracks has dramatically reversed the lenity presumption. The operative presumption in criminal cases today is that whenever the conduct in question is morally blameworthy, statutes should be *broadly* construed, in favor of the prosecution, unless the defendant's interpretation is compelled by the statute.... The rule of lenity, in short, has been converted from a rule about the proper locus of lawmaking power in the area of crime into what can only be described as a "rule of severity."[20]

The results of the judiciary's haphazard adherence to the rule of lenity are as predictable as they are misguided. Federal judges have repeatedly used ambiguous statutes as a basis for creating new federal crimes.[21] They have also expanded the reach of overlapping federal crimes to drive up the punishment that Congress prescribed for comparatively minor federal crimes.[22] The end result of such assaults on the rule of lenity is necessarily a broader and more punitive federal criminal law—a *worsening* of overcriminalization rather than an improvement.

Inadequate *Mens Rea* Requirements. The courts have done better—but only slightly—in fleshing out the state-of-mind, or *mens rea*, requirements for federal criminal liability. As the Supreme Court explained in *Morissette v. United States,*[23] the concept of punishment based on acts alone without a culpable state of mind is "inconsistent with our philosophy of criminal law." In our system, crime is understood as a "compound concept," requiring both an "evil-doing hand" and an "evil-meaning mind."[24]

19. Muscarello v. United States, 524 U.S. 125 (1998), exemplifies the dismissive treatment lenity usually receives in federal court. Faced with a statutory term that even the majority admitted had literally dozens of different dictionary meanings and no evidence of the meaning that Congress intended, the majority simply chose the one it preferred and in doing so brought the defendant under a strict and otherwise inapplicable mandatory minimum under 18 U.S.C. § 924(c). Where Justice Ruth Bader Ginsburg correctly saw an easy case for the rule of lenity, the majority dismissed the rule as irrelevant. Justice Stephen Breyer wrote: "The rule of lenity applies only if, after seizing everything from which aid can be derived…we can make no more than a guess as to what Congress intended. To invoke the rule, we must conclude that there is a grievous ambiguity or uncertainty in the statute." *Id.* at 138–39 (citations and internal quotation marks omitted). For a discussion of the Supreme Court's schizophrenic case law on lenity, see Kahan, *supra* note 15, at 384–89.

20. Smith, *Proportionality and Federalization*, *supra* note 10, at 926.

21. *See generally* Smith, *Proportionality and Federalization*, *supra* note 10, at 896–908 (discussing examples). One notorious example is mail and wire fraud. Courts have cut the concept of "fraud" loose from its moorings in common-law notions of "fraud" and allowed prosecutors to substitute in its place all sorts of imaginative "intangible rights." Beginning with bribery and kickbacks involving corrupt public officials and corporate self-dealing, the intangible-rights doctrine was steadily extended over decades to allow federal prosecution of a stunning array of misbehavior. This misbehavior involved breaches of contract, conflicts of interest, ethical lapses, and violations of workplace rules that otherwise would not be federal crimes and in some cases may not have been crimes at all. *See generally* John C. Coffee, Jr., *From Tort to Crime: Some Reflections on the Criminalization of Fiduciary Breaches and the Problematic Line Between Law and Ethics*, 19 Am. Crim. L. Rev. 117 (1981). This area was wide open to federal prosecutors until the recent decision in Skilling v. United States, 130 S.Ct. 2896 (2010), in which the Court invalidated the statute codifying the intangible-rights doctrine (18 U.S.C. § 1346) as void for vagueness as applied to wrongdoing other than bribery and kickbacks.

22. An example is extortion under the Hobbs Act, 18 U.S.C. § 1951. In Evans v. United States, 504 U.S. 255 (1992), the Court expanded the concept of "extortion" to include the passive acceptance of bribes and gratuities by public officials. The result was a dramatic increase in the maximum punishment available under other federal statutes regulating bribery and gratuities offenses. The maximum punishment for bribery and gratuities *qua* extortion is 20 years, far in excess of the then-applicable maximum for "honest services" mail fraud (five years, *see* 18 U.S.C. § 1341 (1992)) and the applicable maximums under the federal program bribery statute (10 years, *see* 18 U.S.C. § 666) and the federal bribery statute (15 years for bribery and two years for gratuities, *see* 18 U.S.C. § 201(b)-(c)). *See generally* Smith, *Proportionality and Federalization*, *supra* note 10, at 908–30 (discussing situations in which courts expanded overlapping crimes in ways that increased the penalty available under other statutes).

23. 342 U.S. 246, 250 (1952).

24. *Id.* at 251. Notice that, *Morissette*'s colorful reference to the "evil-doing hand" notwithstanding, the *actus reus* often is innocuous conduct. For example, the *actus reus* of mail fraud is simply using the mails, *see* 18 U.S.C. § 1341, and the *actus reus* under the Travel Act includes interstate or international travel, *see* U.S.C. § 18 U.S.C. § 1952(a). The blameworthiness of such crimes comes entirely from *mens rea*—in the examples just given, the illicit purpose for which the mails or channels of commerce are used. *See* 18 U.S.C. § 1341 (intent to defraud); *id.* § 1952(a) (intent to commit crimes).

The historic role of the *mens rea* requirement is to exempt from punishment those who are not "blameworthy in mind" and thereby to limit punishment to persons who disregarded notice that their conduct was wrong.[25] *Mens rea* also serves to achieve proportionality of punishment for blameworthy acts, ensuring that the punishment the law allows "fits" the crime committed by the accused. *Mens rea*, for example, guarantees that the harsher penalties for intentional homicides will not be applied to accidental homicides.[26]

Despite the critical importance of *mens rea* to the effectiveness and legitimacy of federal criminal law, federal crimes often lack sufficient *mens rea* elements. Many federal crimes, including serious crimes, contain no express *mens rea* requirements.[27] Perhaps more commonly, federal crimes include express *mens rea* requirements for some element of the crime but are silent as to the *mens rea* (if any) required for the other elements.[28] Here it is evident that Congress intended to require *mens rea* but unclear whether Congress intended the express *mens rea* requirement to exclude additional *mens rea* requirements. In still other situations, even when Congress includes *mens rea* terms in the definition of crimes, it uses terms such as "willfully" and "maliciously" that have no intrinsic meaning and whose meaning varies widely in different statutory contexts.[29]

This confusing state of affairs might be acceptable if the courts employed a consistent method of *mens rea* selection. However, the courts have been inconsistent in their approach to *mens rea* questions. On occasion, the Supreme Court stands ready to read *mens rea* requirements into statutes that are silent in whole or in part as to *mens rea* because the Court has an interest in making a morally culpable state of mind a prerequisite to punishment.[30] This, however, is not invariably so.

Sometimes, courts treat legislative silence concerning *mens rea* as a legislative signal to dispense with traditional *mens rea* requirements, especially with respect to regulatory crimes protecting the public health, safety, and welfare. Even *Morissette v. United States*, with its strong emphasis on the usual

25. 342 U.S. at 252.

26. *See* Stephen F. Smith, *Proportional Mens Rea*, 46 Am. Crim. L. Rev. 127, 133–35 (2009) (hereinafter Smith, *Proportional Mens Rea*). As a consequence, the role of *mens rea* "is broader than exempting morally blameless conduct from punishment. It involves limiting guilt and punishment in accordance with the blameworthiness of the defendant's act. The means of doing so differs. In some cases, mens rea serves to carve morally innocent conduct out of the reach of a criminal statute whereas, in others, it ensures that morally blameworthy conduct will not be punished out of proportion with its level of blameworthiness; in still others, it does both. The goal, however, is the same: to ensure that guilt and punishment track the moral blameworthiness of the conduct that gives rise to liability." *Id.* at 136.

27. To give but two examples, the National Firearms Act, 26 U.S.C. § 5861(d), construed in *United States v. Freed*, 401 U.S. 601 (1971), makes it a serious felony to possess unregistered grenades and other "firearms" but contains no express *mens rea* requirements. Similarly, the Hobbs Act, 18 U.S.C. § 1951(a), makes it a crime to commit extortion, defined as obtaining money or property from another, with his consent, through the wrongful use of coercion, *id.* § 1951(b)(2). No *mens rea* requirements appear in the definition of the crime.

28. The false statement statute, for example, requires that the false statement have been made "knowingly and willfully" but provides no *mens rea* requirement for the part of the crime requiring that the false statement have been made in a matter within the jurisdiction of a federal agency. *See* 18 U.S.C. § 1001. Similarly, the federal child-pornography law requires that the defendant "knowingly" transported or received a visual depiction but prescribes no *mens rea* either for the sexually explicit nature of the visual depiction or for the fact that it involved minors. *See* 18 U.S.C. § 2252(a).

29. According to the Brown Commission, known more formally as the National Commission on Reform of Federal Criminal Laws, federal criminal statutes contain a "staggering array" of *mens rea* terms, and "there is no discernible pattern or consistent rationale which explains why one crime is defined or understood to require one mental state and another crime another mental state or indeed no mental state at all." 1 National Commission on Reform of Federal Criminal Laws, Working Papers 119–20 (1970). For example, "willfulness" has a chameleon-like quality in federal criminal law: "The word 'willfully' is sometimes said to be 'a word of many meanings' whose construction is often dependent on the context in which it appears. Most obviously it differentiates between deliberate and unwitting conduct, but in the criminal law…a 'willful' act is one undertaken with a 'bad purpose.'" Bryan v. United States, 524 U.S. 184, 191 (1998) (citations omitted).

30. A good example is Staples v. United States, 511 U.S. 600 (1994). In that case, the defendant was convicted for possession of an unregistered machine gun despite his claimed ignorance of his rifle's ability to fire automatically. To the prosecution, all that mattered was that he knew his rifle was a gun. The Court disagreed. In our gun-friendly culture in which handguns and long guns are lawful possessions in millions of households, mere knowledge that one is in possession of a firearm fails to give notice of a potential criminal violation. In order for the requisite culpable mental state to exist, the Court ruled, the government must prove the defendant knew the specific characteristic of his gun (in *Staples*, its automatic-firing capability) that placed it in the category of "quasi-suspect" weapons as to which citizens can reasonably expect legal regulation.

requirement that a culpable mental state is a prerequisite to punishment, conceded that the requirement may not apply to regulatory or other crimes not derived from the common law.[31] The Court seized on this statement in *United States v. Freed*[32] as justification for treating a felony punishable by 10 years in prison as a regulatory offense requiring no morally culpable mental state.

To be sure, more recent cases cast doubt on *Morissette* and *Freed* in this respect. Among these cases are *Arthur Andersen LLP v. United States,*[33] *Ratzlaf v. United States*,[34] and *Staples v. United States*.[35] In each case, the Supreme Court adopted heightened *mens rea* requirements, and *Arthur Andersen* and *Ratzlaf* went so far as to make ignorance of the law a defense.[36] Each time, the Court ratcheted up *mens rea* requirements for the stated purpose of preventing conviction for morally blameless conduct.

These cases, I believe, are best read as making a culpable mental state a prerequisite for punishment for *all* crimes, even regulatory offenses. As I have explained elsewhere:

> [T]he Supreme Court has dramatically revitalized the mens rea requirement for federal crimes. The "guilty mind" requirement now aspires to exempt all "innocent" (or morally blameless) conduct from punishment and restrict criminal statutes to conduct that is "inevitably nefarious." When a literal interpretation of a federal criminal statute could encompass "innocent" behavior, courts stand ready to impose heightened mens rea requirements designed to exempt all such behavior from punishment. The goal of current federal mens rea doctrine, in other words, is nothing short of protecting moral innocence against the stigma and penalties of criminal punishment.[37]

The fact remains, however, that *Freed* and cases like it have never been overturned. Unless that happens, confusion will persist, as will the possibility that a culpable mental state may not be required for some crimes, especially regulatory offenses involving health and safety concerns.

One thing, however, is certain: As long as courts fail to make proof of a culpable mental state an unyielding prerequisite to punishment, federal prosecutors will continue to water down *mens rea* requirements in ways that allow conviction in excess of blameworthiness. That is exactly what prosecutors did in *Arthur Andersen* during the wave of post-Enron hysteria over corporate fraud. In seeking to convict Enron's accounting firm of the "corrupt persuasion" form of obstruction of justice, prosecutors—flatly disregarding the lesson of cases like *Staples* and *Ratzlaf*—argued for incredibly weak *mens rea* requirements that, as the Court noted, would have criminalized entirely innocuous conduct.[38]

31. *See* Morissette v. United States, 342 U.S. 246 (1952). As unfortunate as *Morissette*'s dictum was in this respect, the Court had previously held that the category of regulatory offenses that *Morissette* later referred to as "public welfare offenses" "*dispenses* with the conventional requirement for criminal conduct—awareness of some wrongdoing." United States v. Dotterweich, 320 U.S. at 281 (emphasis added).
32. 401 U.S. 601, 607 (1971) (noting that common-law crimes belong to a "different category" than the "expanding regulatory area involving activities affecting public health, safety, and welfare" as to which relaxed *mens rea* requirements apply).
33. 544 U.S. 696 (2000).
34. 510 U.S. 135 (1994).
35. 511 U.S. 600 (1994).
36. *Arthur Andersen* held that ordering the destruction of documents to keep them out of the hands of federal investigators cannot be considered "knowing corruption" within the meaning of 18 U.S.C. § 1512(b) unless the person who gave the order knew he was acting illegally. *See Arthur Andersen*, 544 U.S. at 706. *Staples*, as previously explained, ruled that a person does not knowingly possess an unregistered "firearm" unless he knew the precise characteristics of the weapon that classified it as a "firearm" subject to federal registration requirements. *See supra* note 30. *Ratzlaf* held that to be guilty of "willfully" violating a prohibition of evading currency transaction reporting requirements by breaking down a cash transaction in excess of $10,000 into smaller transactions, the prosecution must prove the accused knew that such "structuring" activity is illegal. *See Ratlzaf*, 510 U.S. at 149.
37. Smith, *Proportional Mens Rea*, *supra* note 26, at 127 (footnotes omitted); *see generally* John S. Wiley, Jr., *Not Guilty by Reason of Blamelessness: Culpability in Federal Criminal Interpretation*, 85 Va. L. Rev. 1021 (1999).
38. The government's interpretation would have made it a crime either to withhold documents from federal investigators or to destroy documents pursuant to the sort of document-retention policies that are commonplace in the business world, even if the person responsible for nondisclosure or destruction honestly believed he was acting lawfully and even if the person was reasonably unaware that the documents pertained to a federal investigation. *See Arthur Andersen*, 544 U.S. at 705–08.

Although the Supreme Court unanimously rejected the Justice Department's efforts and overturned Arthur Andersen's conviction, the firm has less cause to celebrate than one might think. After being convicted on a prosecution theory so aggressive that it could not win even a single vote from the Justices, the firm—once a Big Five accounting firm—went out of the consulting business. Even now that it no longer stands convicted of a crime, its reputation has likely been damaged beyond repair. Its own conduct in the Enron matter had a lot to do with that, of course, but so did the overzealousness of federal prosecutors in exploiting the serious imperfections in federal *mens rea* doctrine. The Arthur Andersen episode simultaneously shows the need for substantial *mens rea* reform and the high cost of not having strong *mens rea* requirements.

The Judicial Path to Overcriminalization Reform

Given that overcriminalization has qualitative components—for which courts themselves bear a large share of the blame—courts can be part of the solution instead of part of the problem. Even if Congress and federal prosecutors continue their unrestrained use of the criminal sanction, courts are not powerless to act.

The solution is for courts to interpret statutes in ways that rectify the qualitative defects that overcriminalization produces in a body of criminal law as sprawling and poorly defined as federal criminal law is. New interpretive strategies, tailored to the troubling realities of a criminal justice system characterized by rampant overcriminalization, can help to right this fundamental wrong in federal criminal law.[39]

Statutory construction, of course, has its limits and cannot be used to defeat the operation of statutes that plainly encompass the defendant's conduct. In cases such as these, courts should apply the statutes as written, barring some constitutional infirmity, but even here courts can exercise informed discretion to counteract abusive exercises of prosecutorial discretion.

After *United States v. Booker*,[40] district judges have wide sentencing discretion, and they can and should use that discretion to show suitable lenience toward sympathetic defendants. The President can also use his power to grant pardons or commute sentences—as President Barack Obama recently did to free eight prisoners serving unduly long drug sentences in the wake of the Fair Sentencing Act of 2010[41]—to do justice toward defendants who were unfairly convicted or sentenced.[42] Although these important safeguards for the sound administration of criminal justice should not be overlooked, this paper focuses on how courts can interpret criminal statutes to counteract the effects of overcriminalization.

Restoring the Rule of Lenity to Its Rightful Place. In light of how often courts interpret criminal statutes expansively, it should be clear that they do not simply let the weights in the interpretive scales determine whether statutes are to be read broadly or narrowly, as academic critics of lenity would have them do.[43] Instead, the balance is heavily skewed in favor of the prosecution when the conduct in question is morally blameworthy, even when a broad interpretation allows prosecutors to drive up considerably the punishment that would otherwise apply or to evade limitations that the legislature included in the definition of the crime in more specific statutes.

39. For a more detailed discussion of these and other potential judicial reform measures, *see* Stephen F. Smith, *Overcoming Overcriminalization*, 102 J. Crim. L. & Criminology 537, 578–89 (2012).

40. 543 U.S. 220 (2005).

41. *See* David Jackson, *Obama Commutes 8 Crack Cocaine Sentences*, USA Today (Dec. 19, 2013). The grant of executive clemency, unusual for the Obama Administration, came a year after stunning press reports and calls for investigations concerning misconduct in the Office of the Pardon Attorney resulting in critical evidence supporting clemency being withheld from the White House. *See, e.g.*, Dafna Linzer, *Pardon Attorney Torpedoes Plea for Presidential Mercy*, ProPublica (May 30, 2012). (In the interest of full disclosure, the author signed a joint letter of criminal law and procedure professors calling for an investigation into the Office of the Pardon Attorney.)

42. *See* Paul Rosenzweig, *Reflections on the Atrophying Pardon Power*, 102 J. Crim. L. & Criminology 593 (2012). For a similar argument in the context of capital offenses, see Stephen F. Smith, *The Supreme Court and the Politics of Death*, 94 Va. L. Rev. 283, 319–27 (2008).

43. *See* Kahan, *supra* note 15, at 425; Jeffries, *supra* note 16, at 189.

Whether the law enforcement need for expanded authority is real,[44] minimal,[45] or just silly,[46] the one constant seems to be that courts will go to almost any lengths to keep blameworthy conduct from slipping through the federal cracks. Thus, it is closer to the truth to say that the operative interpretive rule in federal criminal cases is severity: that ambiguous statutes presumptively should be construed broadly to prevent culpable defendants from slipping through the federal cracks.

In practice, then, rejecting the rule of lenity tends to look a lot like endorsing anti-lenity (or a rule of severity). That, in turn, affords a substantial justification for taking lenity seriously, even if, as a theoretical matter, an evenhanded approach to the interpretation of criminal statutes might be preferable to a strict-construction default. After all, even critics of lenity do not contend that criminal laws should always be interpreted broadly, recognizing that sometimes courts should narrow the reach of criminal statutes.[47]

The obvious assumption is that there is a viable interpretive middle ground between the lenity side of the spectrum (in which ambiguous statutes are always construed narrowly) and the anti-lenity or severity side of the spectrum (in which such statutes are always construed broadly). This assumption is quite difficult to reconcile with the courts' rather checkered track record in interpreting federal crimes.[48] Given that courts often miss valid reasons for narrowly construing statutes, a consistently applied rule of lenity under which every ambiguous criminal statute is read narrowly is the right interpretive rule.

The political economy of criminal law confirms that lenity is the right interpretive default. The relevant question is which interpretive rule would give Congress proper incentives to make its intentions clear concerning the scope and meaning of criminal statutes. To the extent that legislatures generally share prosecutors' desire for broad criminal prohibitions,[49] a rigidly enforced rule of lenity would operate as an information-forcing default rule, giving Congress added incentives to make its wishes known *ex ante*.

Additionally, once an ambiguity arises in particular settings, as it often does, the question is whether the Department of Justice or groups favoring criminal justice reform are in the best position to convince Congress to pass new legislation resolving the interpretive question. The Justice Department—the 800-pound gorilla in federal criminal law—is undoubtedly best suited to the task of overcoming legislative inertia. As Professor Einer Elhauge explains, "there

44. *See*, *e.g.*, United States v. Turkette, 452 U.S. 576 (1981) (allowing the federal racketeering statute to be used against corrupt "enterprises" without any effort by racketeers to infiltrate legitimate businesses); *see generally* Smith, *Proportionality and Federalization*, *supra* note 10, at 909–11 (discussing implications of *Turkette* for federal efforts to eradicate organized crime).

45. Smith v. United States, 508 U.S. 223 (1993), is a case in point. There the defendant sought to trade a machine gun for drugs. He was convicted of multiple drug offenses and presumably could have been convicted of any number of serious firearms offenses as well. Suffice it to say that there was no danger that he or others who purchase drugs with guns (much less machine guns) would slip through the federal cracks. The prosecutor, however, argued that exchanging guns for drugs constitutes "use…of a firearm during and in relation to a drug trafficking offense" pursuant to 18 U.S.C. § 924(c)(1). One would think that such barter is not a terribly significant problem: Even if trading guns for drugs is common (which is far from self-evident), it would surely be the rare drug dealer whose access to firearms depends on bartering customers. Nevertheless, the Court rejected the ordinary meaning of "using a gun" (which connotes employment as a weapon) and endorsed the "universal view of the courts of appeals" that the statute encompasses barter with as well as more lethal "uses" of guns. 508 U.S. at 233. That the Court stretched the statute to convict is all the more remarkable given the draconian penal consequences of its interpretation: Having bartered with a machine gun, Smith faced a mandatory *minimum* sentence of *30 years*, to run *consecutively* with his underlying drug convictions. *See id.* at 227.

46. In Carter v. United States, 530 U.S. 255 (2000), the Court watered down the *mens rea* required to convict under the federal bank robbery statute, 18 U.S.C. § 2113, to "permit the statute to reach cases…where an ex-convict robs a bank [without any intent to abscond with the loot] because he wants to be apprehended and returned to prison." *Id.* at 271. The reader will be forgiven for regarding this as a solution in desperate search of a problem.

47. For example, Professor Dan Kahan asserts that "federal criminal statutes should not uniformly be read either narrowly or broadly, but rather appropriately so as to carry out their purposes and to realize the full range of benefits associated with delegated lawmaking." Kahan, *supra* note 15, at 426; *see generally* Jeffries, *supra* note 16, at 220–21 (identifying situations in which criminal laws should be interpreted narrowly).

48. *See generally* Smith, *Proportionality and Federalization*, *supra* note 10, at 896–930 (demonstrating that federal courts often expand the reach of criminal laws in spite of strong grounds for interpreting them narrowly).

49. *See* Stuntz, *supra* note 6, at 534–35 (describing legislatures and prosecutors as "natural allies").

is no effective lobby for narrowing criminal statutes," whereas "an overly narrow interpretation is far more likely to be corrected...because prosecutors and other members of anti-criminal lobbying groups are heavily involved in legislative drafting and can more readily get on the legislative agenda."[50] Strict adherence to the rule of lenity would thus put the burden of overcoming legislative inertia on the shoulders of the party in the best position to persuade Congress to act.

Finally, a reinvigorated rule of lenity would promote the more effective operation of prosecutorial restraint. When courts stand ready to expand ambiguous criminal laws to keep blameworthy offenders from slipping through the cracks in federal criminal law, prosecutors can safely "push the envelope" and stretch vague laws to their outer limit. As long as they target blameworthy offenders—and, disturbingly, even if they do not[51]—prosecutors can be confident that courts will ratify their broad readings of criminal laws.

Lenity would dramatically change the calculus by lowering the prosecution's likelihood of conviction, giving prosecutors greater incentives to decline prosecution in cases of blameless or marginally blameworthy offenders potentially guilty only of hypertechnical, victimless crimes—the kind of offenders who tend to become ensnared in the overcriminalization net. The administration of justice in federal prosecutions, therefore, would vastly improve if federal courts started taking the rule of lenity seriously.

Proportionality-Based Approaches to Statutory Construction. If federal judges remain fickle in their adherence to the rule of lenity despite its obvious advantages, they should at least take into account the potential sentencing consequences before expanding the reach of a criminal statute. This inquiry would require courts to look past the facts of the cases before them, hypothesize the range of potential applications of the statute,[52] and pay close attention to the penal consequences of an expansive interpretation. In cases in which an expansive interpretation would threaten to visit disproportionate punishment on convicted offenders, as determined against the baseline of other criminal laws (state or federal) proscribing the same criminal act, a narrow reading is the appropriate response unless the statute's plain meaning commands a broader interpretation.[53]

Proportionality considerations should also be factored into *mens rea* selection. The Supreme Court should repudiate the notion that avoiding conviction for morally blameless conduct is the only goal of *mens rea* doctrine.[54] A separate, equally vital and proper concern of *mens rea* doctrine is to ensure that

50. Einer Elhauge, *Preference-Eliciting Statutory Default Rules*, 102 Colum. L. Rev. 2162, 2194 (2002). One might wonder what the point of enforcing lenity would be if Congress can be counted upon to repeal decisions narrowing the reach of criminal statutes. The fact, however, is that Congress does not reflexively ride to the rescue of federal prosecutors handed interpretive defeats in court. According to a leading study of congressional overrides of Supreme Court decisions, Congress lets stand the vast majority (80 percent) of narrow interpretations of federal criminal statutes. *See generally* William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 Yale L.J. 331, 351 tbl. 19 (1991). This is cause for optimism about the potential for lenity to make serious inroads on overcriminalization.

51. Even though moral culpability is an essential prerequisite to punishment, judges (many of whom are themselves former prosecutors) may tend to defer excessively to the judgment of prosecutors that an offender is blameworthy and thus deserving of punishment. Such misplaced deference undoubtedly explains why the many sympathetic defendants whose stories have been cataloged by The Heritage Foundation and the Criminal Law Reform Group were found guilty in spite of their blamelessness. *See supra* notes 1–2 & 5.

52. This hypothetical inquiry is exactly how the Supreme Court decides federal *mens rea* issues. See John Shepard Wiley, Jr., *Not Guilty by Reason of Blamelessness: Culpability in Federal Criminal Interpretation*, 85 Va. L. Rev. 1021, 1023 (1999) (explaining that courts deciding such issues start by asking "as a hypothetical matter whether morally blameless people could violate [the statute]").

53. Pleas for proportionality of punishment inevitably encounter the objection that it is impossible to determine when, objectively speaking, punishments are proportional. Although familiar, the objection is misplaced. Proportionality serves as a judicially manageable legal standard in a variety of other contexts, such as determining the excessiveness of terms of imprisonment and of punitive-damages awards, and proportionality is used by legislatures and judges alike in grading offenses and sentencing offenders. *See* Smith, *Proportionality and Federalization*, *supra* note 10, at 891–92 (citing cases). Taking proportionality considerations into account is no more perilous in interpreting federal crimes than in these other contexts, especially if the proportionality inquiry is grounded in a comparison with the penalties other laws provide for a particular crime and is used only as an interpretive principle (as opposed to a standard of constitutionality).

54. In Carter v. United States, 530 U.S. 255 (2000), for example, the Court declared that *mens rea* doctrine "requires a court to read into a statute only that mens rea which is necessary to separate wrongful conduct from 'otherwise innocent conduct.'" *Id*. at 269.

the sanctions available in the event of conviction will be proportional to the blameworthiness of convicted offenders.[55]

Imposing punishment in excess of blameworthiness is just as offensive in principle as convicting blameless conduct: Either way, courts are imposing punishment that is not justified by the culpability of the offender and gambling with the moral credibility of the criminal law. Crimes for which Congress has prescribed severe penalties should require correspondingly high levels of *mens rea* so that offenders will be seriously blameworthy. Only then will convicted offenders be morally deserving of the stiff penalties that federal law affords.

Reinvigorate *Mens Rea* Requirements. Finally, courts should substantially overhaul federal *mens rea* doctrine. Quite simply, the doctrine is in dire need of reform both in its underlying theory and in its operational details. For the stated purpose of preventing punishment for morally blameless (or "innocent") conduct,[56] the Supreme Court has made "innocence protection" the driving force in *mens rea* selection. Heightened *mens rea* requirements can and should be imposed where (and only where) a federal criminal statute would otherwise potentially reach morally blameless conduct.[57]

In addition to making disproportionate punishment a proper concern of *mens rea* doctrine, courts should free the prevailing federal method of selecting *mens rea* from the shackles that prevent it from achieving its important goal of aligning punishment and blameworthiness. Once courts detect a potential innocence-protection problem—understood not just as the potential for punishment of blameless acts, but also as disproportionate punishment for blameworthy acts—the courts should impose whatever heightened *mens rea* requirement is necessary to limit punishment in accordance with blameworthiness. In doing so, courts should not be at all reluctant to require, where necessary to avoid morally undeserved punishment, prosecutors to prove knowledge that the defendant knew his conduct was illegal.

This more robust *mens rea* doctrine could be the single most important contribution the courts could make to avoiding the qualitative problems associated with overcriminalization. Overcriminalization horror stories typically involve prosecutors using obscure regulatory laws as traps for unwary citizens who are understandably unaware either of the existence or the meaning of the law in question.[58] To the extent that judges start demanding proof in these cases, not only of the facts that make the defendants' conduct illegal, but also of the defendants' knowledge that they were breaking the law, prosecutors could no longer count on guilty pleas or guilty verdicts.

The effect would not simply prevent unjust punishment, although that is a worthy goal in its own right. It would also give the federal government much-needed incentives either to give the regulated public notice that such obscure crimes exist, thereby enabling itself to prove knowing illegality, or, as one scholar helpfully suggests,[59] to use administrative or civil enforcement mechanisms in place of criminal

55. For an extensive argument along this line, *see* Smith, *Proportional Mens Rea*, *supra* note 26.

56. *See*, *e.g.*, Carter v. United States, 530 U.S. 255, 269 (2000); *see generally* Smith, *Proportional Mens Rea*, *supra* note 26, at 131 ("The Supreme Court has insisted that federal crimes be defined in terms that guarantee a path to acquittal for morally blameless conduct and has increasingly looked to the mental element of crimes to provide this protection against punishment for 'innocent' conduct.").

57. "Where the nature of the prohibited act, as defined by Congress, is sufficient to guarantee that anyone convicted of the crime will be morally blameworthy, courts treat the legislative definition of the crime as conclusive and do not impose heightened mens rea requirements. If, however, the prohibited act is not 'inevitably nefarious' and thus could potentially reach innocent conduct, courts adopt more stringent mens rea requirements designed to exclude all innocent conduct from the crime's reach." Smith, *Proportional Mens Rea*, *supra* note 26, at 130. *See, e.g.*, Arthur Andersen LLP v. United States, 544 U.S. 696 (2000); Staples v. United States, 511 U.S. 600 (1994); Ratzlaf v. United States, 510 U.S. 135 (1994).

58. For a collection of cases in which this has occurred, *see*, *e.g.*, The Heritage Foundation, *Legal Issues: Overcriminalization*, http://www.overcriminalized.com/CaseStudy.aspx (last visited May 28, 2014). The website does not mince words, describing the case studies as "documented stories of good people whose lives were impacted by overcriminalization: criminal laws that are overbroad or flat-out ridiculous, prosecutors and prosecutions that are over-zealous, and sentences that are harsh, unreasonable, and unjust. The lives of some were shattered when they were arrested, prosecuted, and imprisoned for doing things no one would think are crimes. Others did an act that could be considered wrongful, but did so unintentionally—without 'criminal intent' (what lawyers call mens rea)—and should not have been charged, convicted, or punished." *Id.*

59. *See* Darryl Brown, *Criminal Law's Unfortunate Triumph over Administrative Law*, 7 J.L. Econ. & Pol'y 657, 677–82 (2011).

prosecutions to achieve the government's regulatory goals. In a free society, criminal prosecution—the most coercive and stigmatizing exercise of governmental authority—should be a last resort, reserved for cases in which the government's legitimate regulatory goals cannot otherwise be achieved.

Conclusion

As this brief survey of federal criminal law has shown, overcriminalization is a serious problem in the federal system and more generally for American criminal law. The number and scope of criminal laws, however, is only the tip of the iceberg. Ultimately, overcriminalization is so problematic because it tends to degrade the quality of criminal codes and result in unwarranted punishment, jeopardizing the quality of justice the system generates. While overcriminalization is the order of the day in the federal system, rendering the legislature no longer supreme in matters of crime and punishment, it is ultimately prosecutors who exploit incompletely defined crimes and the redundancy of the criminal code to expand the scope of their enforcement power and ratchet up the punishment that convicted defendants face.

As judges decry this state of affairs and scholars hope against hope for bold legislative or constitutional solutions, they have missed something critical. Given that the federal courts helped to make federal criminal law as broad and punitive as it is, there is a ready solution to overcriminalization's many problems short of legislative self-restraint or judicial activism in the name of the Constitution.

The solution is for federal judges to approach their vital interpretive functions with keen sensitivity to the many adverse effects that overcriminalization and the courts' current, self-defeating interpretive strategies create for federal criminal law. If courts cease giving unwarranted scope to ambiguous criminal laws and redouble their efforts to use *mens rea* requirements to rule out morally undeserved punishment—understood not merely as punishment for blameless acts, but also as disproportionately severe punishment for blameworthy acts—overcriminalization need not be the disaster that so many with good cause believe it to be.

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