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The Pressing Need for *Mens Rea* Reform

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Abstract

One of the greatest safeguards against overcriminalization—the misuse and overuse of criminal laws and penalties to address societal problems—is ensuring that there is an adequate mens rea *requirement in criminal laws. Sentencing reform addresses how long people should serve once convicted, but* mens rea *reform addresses those who never should have been convicted in the first place: morally blameless people who unwittingly commit acts that turn out to be crimes and are prosecuted for those offenses rather than having the harms they caused addressed through the civil justice system. Not only are their lives adversely affected, perhaps irreparably, but the public's respect for the fairness and integrity of our criminal justice system is diminished. That is something that should concern everyone.*

A number of criminal justice reform proposals have been introduced and are being actively discussed and debated on Capitol Hill these days. Most[1] (but not all[2]) of these proposals involve reforming criminal sentencing practices and prison reform. Notably absent, at least so far, have been any proposals to address *mens rea* (Latin for a "guilty mind") reform.

This is both surprising and disappointing given that *mens rea* reform was a consistent theme throughout the year-long set of hearings conducted by the U.S. House of Representatives Committee on the Judiciary's Over-Criminalization Task Force. During the task force's first hearing, when Subcommittee Chairman James Sensenbrenner (R–WI) asked the four witnesses (former Deputy Attorney General George Terwilliger, then-Chairman of the American Bar Association's Criminal Justice Section William Shepherd,

Key Points

- Nearly 5,000 federal criminal statutes are scattered throughout the U.S. Code, and an estimated 300,000 or more criminal regulatory offenses are buried in the Code of Federal Regulations.
- Not even Congress or the Department of Justice knows precisely how many criminal laws and regulations currently exist. Because many of them lack adequate (or even any) *mens rea* standards, innocent mistakes or accidents can become crimes.
- Congress should pass a default *mens rea* provision that would apply to crimes in which no *mens rea* has been provided. If a *mens rea* requirement is missing from a criminal statute or regulation, a default standard should automatically be inserted, unless Congress makes it clear in the statute itself that it intended to create a strict liability offense.

This paper, in its entirety, can be found at **http://report.heritage.org/lm160**

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then-President of the National Association of Criminal Defense Lawyers Steven Benjamin, and the author) to name their top priority to address overcriminalization, each said *mens rea* reform.[3] The task force subsequently devoted an entire hearing to the issue.[4]

One of the greatest safeguards against overcriminalization—the misuse and overuse of criminal laws and penalties to address societal problems—is ensuring that there is an adequate *mens rea* requirement in criminal laws. While sentencing reform addresses how long people should serve once convicted, *mens rea* reform addresses those who never should have been convicted in the first place: people who engaged in conduct without any knowledge of or intent to violate the law and that they could not reasonably have anticipated would violate a criminal law. Any reform legislation should address and improve the problems with current law pertaining to *mens rea* standards as well as sentencing and other areas in need of reform.

Mens Rea Reform Is a Bipartisan Issue

Prominent Republican and Democratic members of the Over-Criminalization Task Force seemed to agree on the need for *mens rea* reform. For instance, Republican Chairman Sensenbrenner stated that "[t]he lack of an adequate intent requirement in the Federal Code is one of the most pressing problems facing this Task Force...."[5] Lending his support to the issue, Ranking Member Robert "Bobby" Scott (D–VA) stated:

> The *mens rea* requirement has long served as an important role in protecting those who did not intend to commit a wrongful act from prosecution or conviction.... Without these protective elements in our criminal laws, honest citizens are at risk of being victimized and criminalized by poorly crafted legislation and overzealous prosecutors.[6]

Similarly, during a hearing about the scope of regulatory crimes, Representative John Conyers (D–MI) stated:

> First, when good people find themselves confronted with accusations of violating regulations that are vague, address seemingly innocent behavior and lack adequate *mens rea*, fundamental Constitutional principles of fairness and due process are undermined.... Second, *mens rea*, the concept of a "guilty mind," is the very foundation of our criminal justice system.[7]

Following completion of the task force's hearing, the Democratic members of the task force and the Subcommittee on Crime, Terrorism, Homeland Security, and Investigations issued a report in which they stated:

> Federal courts have consistently criticized Congress for imprecise drafting of intent requirements for criminal offenses.... It is clear that the House and Senate need to do better. We can do so by legislating more carefully and articulately regarding *mens rea* requirements, in order to protect against unintended and unjust conviction. We can also do by ensuring adequate oversight and default rules when we fail to do so.[8]

What Is *Mens Rea*, and Why Is Reform Needed?

Heritage scholars have written about the need for *mens rea* reform for some time,[9] and that need is no less pressing today. As former Heritage Senior Legal Research Fellow Paul Rosenzweig stated:

> From its inception, the criminal law expressed both a moral and a practical judgment about the societal consequences of certain activity: For an act to be a crime, the law required that an individual must either cause (or attempt to cause) a wrongful injury and do so with some form of malicious intent. In other words, the definition of a crime requires two things: an *actus reus* (a bad act) and *mens rea* (a guilty mind). At its roots, the criminal law did not punish mere bad thoughts (intentions to act without any evil deed) or acts that achieved unwittingly wrongful ends but without the intent to do so. The former were for resolution by ecclesiastical authorities, and the latter were for amelioration in the civil tort system.[10]

There are different *mens rea* standards providing varying degrees of protection to the accused (or, depending on your perspective, challenges for the prosecution). The following recitation of the

different *mens rea* standards is somewhat broad and simplified, and courts often differ in how they define those standards, which can make a huge difference in close cases.[11]

- The standard that provides the highest level of protection to an accused would be "willfully," which essentially requires proof that the accused acted with the knowledge that his or her conduct was unlawful.

- A "purposely" or "intentionally" standard would require proof that the accused engaged in conduct with the conscious objective to cause a certain harmful result.

- A "knowingly" standard provides less protection, with how much less depending to a great extent on how that word is defined. Some courts have defined the term "knowingly" to mean that the prosecution must prove (1) that the accused was aware of what he was doing (meaning he was not sleepwalking or having a psychotic episode or something of that nature) and (2) that he was aware to a practical certainty that his conduct would lead to a harmful result; other courts have defined the term to require only the former.

- Yet another *mens rea* standard would be "recklessly" or "wantonly," which would require proof that the accused was aware of what he was doing; that he was aware of the substantial risk that such conduct could cause harm; and that, despite this knowledge, he acted in a manner that grossly deviated from the standard of conduct that a reasonable, law-abiding person would have employed in those circumstances.

- Another standard that does not offer much protection at all would be "negligently," which requires proof that the accused did not act in accordance with how a reasonable, law-abiding person would have acted in those circumstances. "Negligently" is often utilized in connection with criminal statutes that define *mens rea* based on what a defendant "reasonably should have known." Negligence is a term traditionally used in tort law and is extremely ill-suited to criminal law. Arguably, negligence is not a *mens rea* standard at all, since someone who simply has an accident by being slightly careless can hardly be said to have acted with a "guilty mind."

Today, nearly 5,000 federal criminal statutes are scattered throughout the 51 titles of the U.S. Code,[12] and buried within the Code of Federal Regulations, which is composed of approximately 200 volumes with over 80,000 pages, are an estimated 300,000 or more (in fact, likely many more) criminal regulatory offenses[13] or so-called public welfare offenses. In fact, it is a dirty little secret that nobody, not even Congress or the Department of Justice, knows precisely how many criminal laws and regulations currently exist.[14] Many of these laws lack adequate, or even any, *mens rea* standards—meaning that a prosecutor does not even have to prove that the accused had any intent whatsoever to violate the law or even knew he was violating a law in order to convict him. In other words, innocent mistakes or accidents can become crimes.

There are, of course, certain kinds of crimes such as murder, rape, arson, robbery, and fraud, which are referred to as *malum in se* offenses (Latin for "wrong in itself"), that are clearly morally opprobrious. In dealing with such crimes, it is completely appropriate—indeed necessary—to bring the moral force of the government to bear in the form of a criminal prosecution in order to maintain order and respect for the rule of law.

Some criminal statutes and many regulatory crimes, however, do not fit into this category. Such crimes are known as *malum prohibitum* (Latin for "wrong because prohibited"). This category of offenses would not raise red flags to average citizens (or even to most lawyers and judges) and are "wrongs" only because Congress or regulatory authorities have said they are, not because they are in any way inherently blameworthy.

In the case of regulations, the matter is even more complicated. Unlike *malum in se* offenses, which are always wrong and always prohibited absent a limited set of morally justified and well-recognized exceptions (such as a legitimate claim of self-defense in a murder case), regulations *allow* conduct, but they circumscribe when, where, how, how often, and by whom certain conduct can be done, often in ways that are hard for the non-expert to understand or predict. Such regulatory infractions are enforced and penalized through the same traditional process that is used to investigate, prosecute, and penalize

rapists and murderers, even though many of the people who commit such infractions are unaware that they are exposing themselves to potential criminal liability by engaging in such activities.[15]

In 2001, in *Rogers v. Tennessee*,[16] the Supreme Court of the United States cited "core due process concepts of notice, foreseeability, and, in particular, the right to fair warning as those concepts bear on the constitutionality of attaching criminal penalties to what previously had been innocent conduct." The threat of unknowable, unreasonable, and vague laws—all of which pertain to one's ability to act with a "guilty mind"—troubled our Founding Fathers as well. In *Federalist* No. 62, James Madison warned: "It will be of little avail to the people that 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...[so] that no man who knows what the law is today, can guess what it will be like tomorrow."[17] There is a serious problem when reasonable, intelligent people are branded as criminals for violating laws or regulations that they had no intent to violate, never knew existed, and would not have understood applied to their actions even if they had known about them.

The relationship between criminal law and administrative law dates back to the turn of the 19th century, when Congress established federal administrative agencies to protect the public from potential dangers posed by an increasingly industrialized society and a regulatory framework that included both civil and criminal penalties for failing to abide by the rules those agencies promulgated. Such regulations cover such aspects of our lives as the environment around us, the food we eat, the drugs we take, health, transportation, and housing, among many others. As the administrative state has grown, so too has the number of criminal regulations.

There are, however, important differences between criminal laws and regulations, the most important of which is that they largely serve different purposes.[18] Criminal laws are meant to enforce a commonly accepted moral code that is set forth in language the average person can readily understand[19] and that clearly identifies the prohibited conduct, backed by the full force and authority of the government. Regulations, on the other hand, are meant to establish rules of the road (with penalties attached for violations of those rules) to curb excesses and address consequences in a complex, rapidly evolving, highly industrialized society. This is why they are often drafted using broad, aspirational language designed to provide agencies with the flexibility they need to address health hazards and other societal concerns and to respond to new problems and changing circumstances, including scientific and technological advances.

But while large, heavily regulated businesses may be able to keep abreast of complex regulations as they change over time to adapt to evolving conditions, it is less likely that individuals or small businesses will be able to do so. Such traps for the unwary can have particularly dire consequences if criminal penalties are attached to violations of such regulations.

There is a significant difference between regulations that carry civil or administrative penalties for violations and those that carry criminal penalties. People caught up in the latter may find themselves deprived of their liberty and stripped of their rights to vote, sit on a jury, and possess a firearm, among other penalties that simply do not apply when someone violates a regulation that carries only civil or administrative penalties.

There is also a unique stigma that is associated with being branded a criminal. A person stands to lose not only his liberty and certain civil rights, but also his reputation—an intangible yet invaluable commodity, precious to entities and people alike, that once damaged can be nearly impossible to repair. In addition to standard penalties that are imposed on those who are convicted of crimes, a series of burdensome collateral consequences often imposed by state or federal laws can follow a person for life.[20] For businesses, just being charged with violating a regulatory crime can sometimes result in the "death sentence" of debarment from participation in federal programs.[21]

As is the case with Congress, regulators have seemingly succumbed to the temptation to criminalize any behavior that occasionally leads to a bad outcome.[22] Such individuals, acting out of an understandable desire to protect the public from environmental hazards, adulterated drugs, and the like, believe it is appropriate—indeed, advantageous—to promulgate criminal statutes and regulations with weak *mens rea* standards or with no *mens rea* standards at all (so-called strict liability offenses) in order to prosecute and incarcerate those who engage in conduct, albeit perhaps negligently or totally unwittingly, that causes harm to the public. They

will cite to the fact that, while a number of commentators have criticized strict liability criminal provisions,[23] the Supreme Court of the United States has upheld the constitutionality of such crimes on several occasions.[24] Such individuals believe, or at least fear, that insisting upon robust *mens rea* standards in our criminal laws will give a "pass" to those who engage in conduct that harms our environment—most likely, in their view, wealthy executives working for large, multinational corporations.

This argument is misplaced. This is not to deny that bad outcomes occasionally do occur or to suggest that those who engage in conduct that causes harm should not be held accountable. Rather, the appropriate question is how they should be held accountable.

There are dozens, perhaps over a hundred, sites being operated and controlled by one entity that are contaminated with hazardous substances and are on the Environmental Protection Agency's Superfund List. Should the operators of these sites be prosecuted? Maybe so, but such an outcome is highly unlikely: These sites are operated by the Department of Defense.[25]

In August 2015, employees at a large entity engaged in conduct that caused millions of gallons of contaminated waste water (which stings when you touch it) containing heavy metals, including lead, arsenic, mercury, cadmium, iron, zinc, and copper, to surge into Colorado's Animas River. It is feared that this could eventually affect Mexico, Utah, and the Navajo nation. New Mexico Governor Susana Martinez surveyed the damage caused by this toxic brew and said, "The magnitude of it, you can't even describe it. It's like when I flew over the fires, your mind sees something it's not ready or adjusted to see." Should the miscreants who caused this disaster be slapped in irons and branded felons? Again, such an outcome is not likely: This mishap was caused, no doubt unwittingly, by a trained hazmat team from the EPA.[26]

Why Congress Should Act

It is unavoidable that bad outcomes will occur from time to time, whether through willfulness, negligence, or sheer accident; however, the intent of the actor should make a difference in whether that person is criminally prosecuted or dealt with, perhaps severely, through the civil or administrative justice systems. As Oliver Wendell Holmes, Jr., who was later appointed to the Supreme Court, once observed, "Even a dog distinguishes between being stumbled over and being kicked."[27]

The notion that a crime ought to involve a purposeful culpable intent has a solid historical grounding. In 1952, in *Morissette v. United States*, the Supreme Court stated:

> The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.[28]

Some people or entities intentionally pollute our air and water or intentionally engage in other conduct knowing it will cause harm, in which case criminal prosecution may be entirely appropriate. However, if somebody or some entity unwittingly does something that results in harm, say, to the environment or to another person, there is no reason why it cannot be dealt with (even harshly) through the administrative or civil justice systems. This would help to remedy the problem and compensate victims without saddling morally blameless individuals and entities for life with a criminal conviction.

Just this past term, in *Elonis v. United States*, the Supreme Court emphasized the need for an adequate *mens rea* requirement in criminal cases. In that case, the Court reversed a man's conviction for violating 18 U.S.C. §875(c) by transmitting threatening communications after he posted some deeply disturbing comments about his estranged wife (and others, including former co-workers) on his Facebook page that she quite reasonably regarded as threatening.[29]

The Court noted that while the statute clearly required that a communication be transmitted and contain a threat, it was silent as to whether the defendant must have any mental state with respect to those elements and, if so, what that state of mind must be. The Court stated that "[t]he fact that the statute does not specify any required mental state, however, does not mean that none exists" and, quoting from *Morissette*, observed that the "'mere omission from a criminal enactment of any mention of criminal intent' should not be read 'as dispensing with it.'"[30]

The Court, citing to four other cases in which it had provided a missing *mens rea* element,[31] proceeded to

read into the statute a *mens rea* requirement and reiterated the "basic principle that 'wrongdoing must be conscious to be criminal.'"[32] The Court focused on the actor's intent rather than the recipient's perception: "Having the liability turn on whether a 'reasonable person' regards the communication as a threat—regardless of what the defendant thinks—'reduces the culpability on the all-important element of the crime to negligence.'"[33] While the Court declined to identify exactly what the appropriate *mens rea* standard is under that statute and whether recklessness would suffice, it certainly recognized that a defendant's mental state is critical when he faces criminal liability and that when a federal criminal statute is "silent on the required mental state," a court should read the statute as incorporating "that *mens rea* which is necessary to separate wrongful conduct from 'otherwise innocent conduct.'"[34]

If it were a guarantee that courts would always devise and incorporate an appropriate *mens rea* standard into every criminal statute when one was missing, there might be no need for Congress to do so. As the *Elonis* Court noted, however, there are exceptions to the "'general rule'...that a guilty mind is 'a necessary element in the indictment and proof of every crime.'"[35] Despite the *Elonis* Court's recent warning about the need to interpret *mens rea* requirements to distinguish between those who engage in "wrongful conduct" and those who engage in "otherwise innocent conduct," courts (including the Supreme Court) on occasion have upheld criminal laws lacking a *mens rea* requirement based on a presumption that Congress must have deliberated and made a conscious choice to create a strict liability crime.[36]

Although this is a doubtful proposition to begin with, the moral stakes are too high to leave such matters to guessing by a court as to whether Congress truly intended to create a strict liability offense or, more likely, in the rush to pass legislation simply neglected to consider the issue. And even if a court concludes that Congress did not mean to create a strict liability crime, there is the ever-present risk that a court will pick an inappropriate standard that does not provide adequate protection, given the circumstances, to the accused.

What Congress Should Do

Congress should give greater consideration to *mens rea* requirements when passing criminal legislation, both to make sure that they are appropriate for the type of activity involved and to ensure that the standard separates those who truly deserve the government's highest form of condemnation and punishment—criminal prosecution and incarceration—and not some other form of sanction. Absent extraordinary circumstances, it should not be enough for the government to prove that the accused possessed "an evil-doing hand"; the government should also have to prove that the accused had an "evil-meaning mind."[37]

In addition to beginning the arduous task of undertaking a review of existing criminal statutes and regulations to see whether they contain adequate and appropriate *mens rea* standards, Congress should pass a default *mens rea* provision that would apply to crimes in which no *mens rea* has been provided. In other words, if an element of a criminal statute or regulation is missing a *mens rea* requirement, a default *mens rea* standard—preferably a robust one—should automatically be inserted with respect to that element.[38]

It is important to remember that such a provision would come into play only if Congress passes a criminal statute that does not contain any *mens rea* requirement. Congress can always obviate the need to resort to this provision by including its own preferred *mens rea* element with respect to the statute in question. Moreover, on those (hopefully rare) occasions when Congress wishes to pass a criminal law with no *mens rea* requirement whatsoever, it should make its intentions clear by stating in the statute itself that Members have made a conscious decision to dispense with a *mens rea* requirement for the particular conduct in question. Such an extraordinary act—which can result in branding someone a criminal for engaging in conduct without any intent to violate the law or cause harm—should not be accomplished through sloppy legislative drafting or guesswork by a court trying to divine whether the omission of a *mens rea* requirement in a statute was intentional or not.

This should not be an onerous requirement, and Congress would not have to use a magic formulation of words to make its intent clear. Congress could, for example, choose to make its intent clear by adding a provision to a criminal statute such as: "This section shall not be construed to require the Government to prove a state of mind with respect to any element of the offense defined in this section."

Who Will Benefit from *Mens Rea* Reform?

Will some senior corporate management "fat cats" benefit because stricter *mens rea* requirements make it more difficult to prosecute them successfully? Possibly. After all, most individuals who fall into that category work in heavily regulated industries and are normally given explicit warnings by government officials, usually as a condition of licensure, about what the law, including potential criminal penalties, requires and therefore cannot reasonably or credibly claim that they were not aware that their actions might subject them to criminal liability so long as they acted with the requisite intent. Moreover, as Heritage Foundation Senior Legal Research Fellow Paul Larkin has noted:

> Corporate directors, chief executive officers (CEOs), presidents, and other high-level officers are not involved in the day-to-day operation of plants, warehouses, shipping facilities, and the like. Lower level officers and employees, as well as small business owners, bear that burden. What is more, the latter individuals are in far greater need of the benefits from [*mens rea* reform[39]] precisely because they must make decisions on their own without resorting to the expensive advice of counsel. The CEO for DuPont has a white-shoe law firm on speed dial; the owner of a neighborhood dry cleaner does not. Senior officials may or may not need the aid of the remedies proposed here; lower-level officers and employees certainly do.[40]

Consider two examples. Wade Martin, a native Alaskan fisherman, sold 10 sea otters to a buyer he thought was a Native Alaskan; the authorities informed him that was not the case and that his actions violated the Marine Mammal Protection Act of 1972,[41] which criminalizes the sale of certain species, including sea otters, to non-native Alaskans. Because prosecutors would not have to prove that he knew the buyer was not from Alaska, Martin pleaded guilty to a felony charge and was sentenced to two years' probation and ordered to pay a $1,000 fine.[42]

Lawrence Lewis[43] was born and raised in the projects of Washington, D.C. Seeking to avoid the fate of his three older brothers who got caught up in the criminal justice system and were murdered, and while caring for his elderly mother and raising two daughters, Lewis worked as a janitor for the public school system, took night classes, and eventually rose to the position of chief engineer at Knollwood, a military retirement home. On occasion, some of the elderly patients at Knollwood would stuff their adult diapers in the toilets, causing a blockage and sewage overflow. To prevent harm to the patients, especially those in the hospice ward on the first floor, Lewis and his staff did what they were trained to do on such occasions and diverted the backed-up sewage into a storm drain that they believed was connected to the city's sewage-treatment system.

It turned out, however, that the storm drain emptied into a remote part of Rock Creek, which ultimately connects with the Potomac River. This was unbeknownst to Lewis, as acknowledged by the Department of Justice in a court filing. Nonetheless, federal authorities charged Lewis with felony violations of the Clean Water Act, which required only proof that Lewis committed the physical acts that constitute the violation, regardless of any knowledge of the law or intent to violate the law on his part. To avoid a felony conviction and potential long-term jail sentence, Lewis was persuaded to plead guilty to a misdemeanor and was sentenced to one year of probation.

Were Wade Martin and Lawrence Lewis corporate fat cats? Hardly, yet both carry the stigma of a criminal conviction and all of the attendant collateral consequences that flow from that.

When morally blameless people like Lawrence Lewis and Wade Martin unwittingly commit acts that turn out to be crimes and are prosecuted for those offenses rather than having the harms they caused addressed through the civil justice system, not only are their lives adversely affected, perhaps irreparably, but the public's respect for the fairness and integrity of our criminal justice system is diminished. That is something that should concern everyone.

Conclusion

In 1933, in a classic law review article that coined the term "public welfare offenses," Columbia Law Professor Francis Sayre stated: "To subject defendants entirely free from moral blameworthiness to the possibility of prison sentences is revolting to the community sense of justice; and no law which violates this fundamental instinct can long endure."[44] Sadly, that has not proven to be the case. In fact, quite the opposite is true: Such laws have flourished.

To those who would argue that corporate bigwigs might benefit from *mens rea* reform, Larkin likely would eloquently respond:

> To be sure, [*mens rea* reform would] not, and could not be, limited to the lower echelons of a corporation or to persons earning below a certain income. The indigent can demand the appointment of counsel at the government's expense, but the criminal law has never created a similar divide for defenses to crimes, with some available only for the poor. Just as the sun 'rise[s] on the evil and on the good' and it rains 'on the just and the unjust,' [*mens rea* reform] will aid senior corporate executives as well as entry-level employees. But any remedy for any of the ills caused by overcriminalization will have that effect. We ought not to reject remedies for a serious problem because the neediest are not the only ones who will benefit from them.[45]

An equally apt and pithier response comes from Representative Bobby Scott, who stated during one of the Over-Criminalization Task Force's hearings:

> The real question before us is how to address not only the regulations that carry criminal sanctions, but also numerous provisions throughout the Criminal Code that also have inadequate or no *mens rea* requirement.... Addressing and resolving the issue of inadequate or absent *mens rea* and in all the criminal code would benefit everyone.[46]

The time for *mens rea* reform is now.

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Endnotes

1. *See* Justice Safety Valve Act of 2015 (Senate version, S. 383, introduced by Sens. Rand Paul (R–KY) and Patrick Leahy (D–VT), and House version, H.R. 706, introduced by Rep. Bobby Scott (D–VA)); Smarter Sentencing Act of 2015 (Senate version, S. 502, introduced by Sens. Mike Lee (R–UT) and Richard Durbin (D–IL), and House version, H.R. 920, introduced by Rep. Raul Labrador (R–ID)); Safe, Accountable, Fair, and Effective (SAFE) Justice Act (H.R. 2944, introduced by Reps. James Sensenbrenner (R–WI) and Bobby Scott (D–VA)); Federal Prison Bureau Relief Act of 2015 (H.R. 3354, introduced by Reps. Sheila Jackson Lee (D–TX) and John Conyers (D–MI)); Corrections Oversight, Recidivism Reduction, and Eliminating Costs for Taxpayers in Our National System (CORRECTIONS) Act of 2015 (S. 467, introduced by Sens. John Cornyn (R–TX) and Sheldon Whitehouse (D–RI)); Recidivism Risk Reduction Act (H.R. 759, introduced by Rep. Jason Chaffetz (R–UT)).
2. *See, e.g.*, Fifth Amendment Integrity Restoration (FAIR) Act of 2015 (Senate version, S. 255, which proposes civil asset forfeiture reform, introduced by Sen. Rand Paul (R–KY), and House version, H.R. 540, introduced by Rep. Tim Walberg (R–MI)); Civil Rights Voting Restoration Act of 2015 (S. 457, which proposes restoring the voting rights of convicted felons, introduced by Sens. Rand Paul (R–KY) and Harry Reid (D–NV)).
3. *Defining the Problem and Scope of Over-Criminalization and Over-Federalization: Hearing Before the Over-Criminalization Task Force of the H. Comm. on the Judiciary*, 113th Cong. 65–66 (2013), *available at* http://judiciary.house.gov/_cache/files/e886416b-82d6-43f9-8d5d-68c44fc590cd/113-44-81464.pdf.
4. *See Mens Rea: The Need for a Meaningful Intent Requirement in Federal Criminal Law: Hearing Before the Over-Criminalization Task Force of the H. Comm. on the Judiciary*, 113th Cong. (2013), *available at* http://www.gpo.gov/fdsys/pkg/CHRG-113hhrg81984/pdf/CHRG-113hhrg81984.pdf.
5. *Id.* at 2 (statement of Rep. James Sensenbrenner).
6. *Id.* at 3 (statement of Rep. Robert Scott).
7. *Regulatory Crime: Identifying the Scope of the Problem: Hearing Before the Over-Criminalization Task Force of the H. Comm. on the Judiciary*, 113th Cong. 5 (2013) (statement of Rep. John Conyers), *available at* http://judiciary.house.gov/_cache/files/1b92d362-abf4-45eb-b154-8a14c913c0ff/113-60-85283.pdf.
8. Bobby Scott, Democratic Views on Criminal Justice Reforms Raised Before the Over-Criminalization Task Force & the Subcommittee on Crime, Terrorism, Homeland Security, and Investigations, 120 (Dec. 16, 2014), *available at* https://bobbyscott.house.gov/sites/bobbyscott.house.gov/files/OTF%20FULL%20REPORT%20FINAL.pdf.
9. John G. Malcolm, *Criminal Law and the Administrative State: The Problem with Criminal Regulations*, Heritage Foundation Legal Memorandum No. 130 (Aug. 6, 2014), *available at* http://www.heritage.org/research/reports/2014/08/criminal-law-and-the-administrative-state-the-problem-with-criminal-regulations; Paul Rosenzweig, *Congress Doesn't Know Its Own Mind—And That Makes You a Criminal*, Heritage Foundation Legal Memorandum No. 98 (July 18, 2013), *available at* http://www.heritage.org/research/reports/2013/07/congress-doesnt-know-its-own-mind-and-that-makes-you-a-criminal; Paul J. Larkin, Jr., *Regulation, Prohibition, and Overcriminalization: The Proper and Improper Uses of the Criminal Law*, 42 Hofstra L. Rev. 745 (2014); Brian W. Walsh, *The Criminal Intent Report: Congress Is Eroding the* Mens Rea *Requirement in Federal Criminal Law*, Heritage Foundation WebMemo No. 2900 (May 14, 2010), *available at* http://www.heritage.org/research/reports/2010/05/the-criminal-intent-report-congress-is-eroding-the-mens-rea-requirement-in-federal-criminal-law; Brian W. Walsh and Tiffany Joslyn, *Without Intent: How Congress Is Eroding the Criminal Intent Requirement in Federal Law*, Heritage Foundation Special Report No. 77 (May 5, 2010), *available at* http://www.heritage.org/research/reports/2010/05/without-intent.
10. Rosenzweig, *supra* note 9 (footnote omitted).
11. *See, e.g.*, Model Penal Code § 2.02 (General Requirements of Culpability); United States v. Bailey, 444 U.S. 394, 403–07 (1980) (discussing different standards and noting the difficulty of discerning the proper definition of *mens rea* required for any particular crime); United States v. Pomponio, 429 U.S. 10, 12 (1976) (term "willfulness" requires proof of "an intentional violation of a known legal duty") (citing United States v. Bishop, 412 U.S. 346, 360 (1973)); Bryan v. United States, 524 U.S. 184, 191–92 (1998) ("As a general matter, when used in the criminal context, a 'willful' act is one undertaken with a 'bad purpose.' In other words, in order to establish a 'willful' violation of a statute, 'the Government must prove that the defendant acted with knowledge that his conduct was unlawful.'") (quoting Ratzlaf v. United States, 510 U.S. 135, 137 (1994); footnote omitted); Holloway v. United States, 526 U.S. 1 (discussing the use of "intentional" and not reading it to require proof of knowledge of illegality); United States v. Cooper, 482 F.3d 658, 667–68 (4th Cir. 2007) (discussing "knowing" standard); United States v. Sinskey, 119 F.3d 712, 715–16 (8th Cir. 1997) (discussing "knowing" standard); United States v. Hopkins, 53 F.3d 533, 537–41 (2d Cir. 1995) (discussing "knowing" standard); United States v. Weitzenhoff, 35 F.3d 1275, 1284 (9th Cir. 1993) (en banc) (discussing "knowing" standard); United States v. Baytank (Houston), Inc., 934 F.2d 599, 613 (5th Cir. 1991) (discussing "knowing" standard); United States v. Ortiz, 427 F.3d 1278, 1282–83 (10th Cir. 2005) (discussing "negligence" standard); United States v. Hanousek, 176 F.3d 1116, 1121 (9th Cir. 1999) (discussing "negligence" standard); United States v. Frezzo Bros., Inc., 602 F.2d 1123, 1129 (3d Cir. 1979) (discussing "negligence" standard).

12. *The Crimes on the Books and Committee Jurisdiction: Hearing Before the H. Comm. on the Judiciary*, 113th Cong. (2014) (testimony of John Baker), *available at* http://judiciary.house.gov/_cache/files/44135b93-fe36-43dc-a91b-3412fe15e1f4/baker-testimony.pdf. See also Gerald E. Lynch, *The Role of Criminal Law in Policing Corporate Misconduct*, 60 Law & Contemp. Probs. 23, 37 (1997) ("Legislatures, concerned about the perceived weakness of administrative regimes, have put criminal sanctions behind administrative regulations governing everything from interstate trucking to the distribution of food stamps to the regulation of the environment."). For an interesting discussion about the emergence and expansion of regulatory crimes, see Paul J. Larkin, Jr., *Regulatory Crimes and the Mistake of Law Defense*, Heritage Foundation Legal Memorandum No. 157 at 2-3 (July 9, 2015), *available at* http://www.heritage.org/research/reports/2015/07/regulatory-crimes-and-the-mistake-of-law-defense; Paul J. Larkin, Jr., *Strict Liability Offenses, Incarceration, and the Cruel and Unusual Punishments Clause*, 37 Harv. J. L. & Pub. Pol'y 1065, 1072–77 (2014). *See also* Morissette v. United States, 342 U.S. 246, 253–54 (1952) (stating that the Industrial Revolution "multiplied the number of workmen exposed to injury from increasingly powerful and complex mechanisms" and resulted in "[c]ongestion of cities and crowding of quarters [that] called for health and welfare regulations undreamed of in simpler times.").
13. *See, e.g.,* John Baker, Jr., *Revisiting the Explosive Growth of Federal Crimes*, Heritage Foundation Legal Memorandum No. 26 (June 16, 2008); John C. Coffee, Jr., *Does "Unlawful" Mean "Criminal"? Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. Rev. 193, 216 (1991); Larkin, *Regulatory Crimes and the Mistake of Law Defense*, *supra* note 12 ("the number of regulations affecting the reach of the criminal code has been estimated to exceed 300,000"); *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) (testimony of Former Attorney General Dick Thornburgh) transcript available at http://judiciary.house.gov/_files/hearings/pdf/Thornburgh090722.pdf. The CFR spans 50 titles and approximately 200 volumes and is more than 80,000 pages long. *See* U.S. Government Printing Office, Code of Federal Regulations (CFRs) in Print, http://bookstore.gpo.gov/catalog/laws-regulations/code-federal-regulations-cfrs-print#4.
14. It is worth noting that Congress is currently considering a proposal that would require the U.S. Attorney General and the heads of all federal regulatory agencies to compile a list of all criminal statutory and regulatory offenses, including a list of the *mens rea* requirements and all other elements for such offenses, and to make such indices available and freely accessible on the websites of the Department of Justice and the respective agencies. *See* Smarter Sentencing Act of 2015 §7. (The Senate version of this bill, which was introduced by Sen. Mike Lee (R–UT) and Sen. Richard Durbin (D–IL), is S. 502, and the House version of this bill, which was introduced by Rep. Raul Labrador (R–ID), is H.R. 920.)
15. There are additional problems with respect to regulatory crimes: that is, regulations in which violations are punishable as criminal offenses. In addition to the fact that many regulations are vague and overbroad, many are so abstruse that they may require a technical or doctoral degree in the discipline covered by the regulations to understand them. Further, there are so many regulations located in so many places that lay people and small companies subject to those regulations would be unable to locate them, much less understand them, even if they had the resources to do so. In addition to actual regulations, there are also agency "guidance" documents and "frequently-asked-questions" that agencies sometimes try to pass off as having the same legal effect as regulations.
16. Rodgers v. Tennessee, 532 U.S. 451, 459 (2001).
17. The Federalist No. 62, at 323–24 (James Madison) (George W. Carey & James McClellan eds., 2001).
18. *See* Larkin, *supra* note 9.
19. *See, e.g.*, United States v. Harriss, 347 U.S. 612, 617 (1954) (government cannot enforce a criminal law that cannot be understood by a person of "ordinary intelligence"); Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926) (referring to persons of "common intelligence").
20. An inventory of collateral consequences is maintained by the American Bar Association. *See* American Bar Association, National Inventory of the Collateral Consequences of Conviction, *available at* http://www.abacollateralconsequences.org/. In short, individuals convicted of crimes face consequences extending beyond the end of their actual sentences, potentially lasting their entire lives. Examples include being barred from entering a variety of licensed professional fields and receiving federal student aid. The Internet has spawned numerous websites designed specifically to catalog, permanently retain, and publicize individuals' criminal histories—all but guaranteeing perpetual branding as a criminal. These websites can demand payment from individuals in exchange for removing their mug shots and related personal information. For additional discussion about the detrimental nature of collateral consequences, see *Collateral Damage: America's Failure to Forgive or Forget in the War on Crime*, Nat'l Ass'n of Crim. Defense Lawyers (May 2014), *available at* http://thf_media.s3.amazonaws.com/2014/pdf/Collateral%20Damage%20FINAL%20Report.pdf.
21. *See, e.g.*, Peggy Little, *The Debarment Power—No Do Business With No Due Process*, Executive Branch Review (Apr. 25, 2013), http://executivebranchproject.com/the-debarment-power-no-do-business-with-no-due-process/#sthash.ord4YN0x.dpuf; Steven Gordon & Richard Duvall, *It's Time To Rethink the Suspension and Debarment Process*, Mondaq (July 3, 2013), http://www.mondaq.com/unitedstates/x/248174/Government+Contracts+Procurement+PPP/Its+Time+To+Rethink+The+Suspension+And+Debarment+Process.

22. *See* Lawrence M. Friedman, Crime and Punishment in American History 282–83 (1993) ("There have always been regulatory crimes, from the colonial period onward.... But the vast expansion of the regulatory state in the twentieth century meant a vast expansion of regulatory crimes as well. Each statute on health and safety, on conservation, on finance, on environmental protection, carried with it some form of criminal sanction for violation.... Wholesale extinction may be going on in the animal kingdom, but it does not seem to be much of a problem among regulatory laws. These now exist in staggering numbers, at all levels. They are as grains of sand on the beach.") Indeed, the mere existence of criminal regulations dramatically alters the relationship between the regulatory agency and the regulated power. All an agency has to do is suggest that a regulated person or entity *might* face criminal prosecution and penalties for failure to follow an agency directive, and the regulated person or entity will likely fall quickly into line without questioning the agency's authority. For an excellent article discussing the pressures that companies face when confronted with the possibility of, and the lengths to which they will go to avoid, criminal prosecution, see Richard A. Epstein, *The Dangerous Incentive Structures of Nonprosecution and Deferred Prosecution Agreements*, Heritage Foundation Legal Memorandum No. 129 (June 26, 2014), *available at* http://www.heritage.org/research/reports/2014/06/the-dangerous-incentive-structures-of-nonprosecution-and-deferred-prosecution-agreements. *See also* James R. Copeland, *The Shadow Regulatory State: The Rise of Deferred Prosecution Agreements*, Manhattan Inst. for Policy Research (May 2012), *available at* http://www.manhattan-institute.org/html/cjr_14.htm.
23. *See*, *e.g.*, Lon L. Fuller, The Morality of Law 77 (rev. ed. 1969) ("Strict criminal liability has never achieved respectability in our law."); H. L. A. Hart, *Negligence, Mens Rea, and Criminal Responsibility*, *in* H. L. A. Hart, Punishment and Responsibility: Essays in the Philosophy of Law 136, 152 (1968) ("strict liability is odious"); Francis B. Sayre, *Public Welfare Offenses*, 33 Colum. L. Rev. 55, 72 (1933) ("To subject defendants entirely free from moral blameworthiness to the possibility of prison sentences is revolting to the community sense of justice; and no law which violates this fundamental instinct can long endure."); A. P. Simester, *Is Strict Liability Always Wrong?*, *in* Appraising Strict Liability 21 (A. P. Simester ed., 2003) (Strict liability is wrong because it "leads to conviction of persons who are, morally speaking, innocent."); Herbert Wechsler, *The Challenge of a Model Penal Code*, 65 Harv. L. Rev. 1097, 1109 (1952): ("The most that can be said for such provisions [prescribing liability without regard to any mental factor] is that where the penalty is light, where knowledge normally obtains and where a major burden of litigation is envisioned, there may be some practical basis for a stark limitation of the issues; and large injustice can seldom be done. If these considerations are persuasive, it seems clear, however, that they ought not to persuade where any major sanction is involved."); Richard G. Singer, *The Resurgence of Mens Rea: The Rise and Fall of Strict Criminal Liability*, 30 B.C. L. Rev. 337, 403–04 (1989); Rollin M. Perkins, *Criminal Liability Without Fault: A Disquieting Trend*, 68 Iowa L. Rev. 1067, 1067–70 (1983).
24. *See*, *e.g.*, Shevlin-Carpenter Co. v. Minnesota, 218 U.S. 57 (1910) (holding that a corporation can be convicted for trespass without proof of criminal intent); United States v. Balint, 258 U.S. 250 (1922) (holding that a real person can be convicted of the sale of narcotics without a tax stamp without proof that he knew that the substance was a narcotic); United States v. Behrman, 258 U.S. 280 (1922) (*Balint* companion case) (holding that a physician can be convicted of distributing a controlled substance not "in the course of his professional practice" without proof that he knew this his actions exceeded that limit); United States v. Dotterweich, 320 U.S. 277 (1943) (holding that the president and general manager of a company could be convicted of distributing adulterated or misbranded drugs in interstate commerce without proof that he even was aware of the transaction); United States v. Park, 421 U.S. 658 (1975) (upholding conviction of a company president for unsanitary conditions at a corporate warehouse over which he had managerial control but not hands-on control).
25. *See Military sites on the EPA Superfund List*, http://veteransinfo.org/epa.html (listing military sites on the EPA Superfund List).
26. *See*, *e.g.*, Jon Street, *Fury Directed at EPA Over Massive Toxic Sludge Spill: 'They Are Not Going to Get Away With This'*, The Blaze (Aug. 10, 2015), http://www.theblaze.com/stories/2015/08/10/fury-directed-at-epa-over-massive-toxic-sludge-spill-they-are-not-going-to-get-away-with-this/; *Mine Busters at the EPA*, Wall St. J. (Aug. 11, 2015), http://www.wsj.com/articles/mine-busters-at-the-epa-143933649.
27. Oliver Wendell Holmes, Jr., The Common Law 3 (1881).
28. *Morissette*, 342 U.S. at 250.
29. Elonis v. United States, 135 S.Ct. 2001 (2015).
30. *Id.* at 2009 (quoting Morissette, 342 U.S. at 250).
31. United States v. X-Citement Video, Inc., 513 U.S. 64 (1994); Posters 'N' Things, Ltd. v. United States, 511 U.S. 513 (1994); Liparota v. United States, 471 U.S. 419 (1985); *Morissette*, 342 U.S. 246.
32. Elonis, 135 S.Ct. at 2009 (quoting *Morissette*, 342 U.S. at 252).
33. *Id.* at 2011.
34. *Id.* at 2010 (quoting Carter v. United States, 530 U. S. 255, 269 (2000)).
35. *Id.* at 2009 (quoting Balint, 258 U.S. at 251).

36. *See, e.g.*, Shevlin-Carpenter Co. 218 U.S. 57 (holding that a corporation can be convicted for trespass without proof of criminal intent); Balint, 258 U.S. at 254 (holding that a real person can be convicted of the sale of narcotics without a tax stamp without proof that he knew that the substance was a narcotic;) ("Congress weighed the possible injustice of subjecting an innocent seller to a penalty against the evil of exposing innocent purchasers to danger from the drug, and concluded that the latter was the result preferably to be avoided."); Behrman, 258 U.S. 280 (*Balint* companion case) (holding that a physician can be convicted of distributing a controlled substance not "in the course of his professional practice" without proof that he knew this his actions exceeded that limit); Dotterweich, 320 U.S. at 284-85 (holding that the president and general manager of a company can be convicted of distributing adulterated or misbranded drugs in interstate commerce without proof that he even was aware of the transaction) ("Hardship there doubtless may be under a statute which thus penalizes the transaction though consciousness of wrongdoing be totally wanting. Balancing relative hardships, Congress has preferred to place it upon those who have at least the opportunity of informing themselves of the existence of conditions imposed for the protection of consumers before sharing in illicit commerce, rather than to throw the hazard on the innocent public who are wholly helpless."); United States v. Park, 421 U.S. 658 (1975) (upholding conviction of company president for unsanitary conditions at a corporate warehouse over which he had supervisory authority, but not hands-on control); United States v. Goff, 517 Fed. Appx. 120, 123 (4th Cir. 2013) (holding that the government need not prove that a defendant knew blasting caps qualified as explosives or detonators, and that government need not prove that a defendant knew that he had stored blasting caps in an illegal manner) ("We cannot believe that Congress set out to police a myriad of dangerous explosives regardless of their explosive power but considered the policing of detonators necessary only when they actually possess an ability to detonate."); United States v. Burwell, 690 F.3d 500 (D.C. Cir. 2012) (holding that the government need not prove that a defendant knew the weapon he carried was capable of firing automatically in order to support sentence enhancement for use of a machine gun while committing a violent crime) (Rogers, J. dissenting) ("Thus, neither of the first two interpretative rules—grammatical rules of statutory construction nor the presence of otherwise innocent conduct—counseled in favor of requiring proof of *mens rea*, and the Court thus held that no such proof was required. In so holding, the Court did not, however, classify the provision as a public welfare offense. Nor did it frame the question before it as a choice between offenses that have *mens rea* requirements and public welfare offenses that do not.); United States v. Langley, 62 F.3d 602, 605 (4th Cir. 1995) (holding that the government does not need to prove that a defendant knew of his status as a convicted felon in order to prove knowing possession of a firearm by someone who has been convicted of a felony) (Because "Congress is presumed to enact legislation with... the knowledge of the interpretation that courts have given to an existing statute....[W]e may assume that Congress was aware that: (1) no court prior to FOPA required the government to prove knowledge of felony status and/or interstate nexus in prosecutions under [the statute's] predecessor statutes; (2) the only knowledge the government was required to prove in a prosecution under [the statute's] predecessor statutes was knowledge of the possession, transportation, shipment, or receipt of the firearm; and (3) Congress created the FOPA version of [the statute] consistent with these judicial interpretations."); United States v. Harris, 959 F.2d 246, 258 (D.C. Cir. 1992) (holding that Congress intended to apply strict liability to the machinegun provision of § 924(c)) ("The language of the section is silent as to knowledge regarding the automatic firing capability of the weapon. Other *indicia*, however, namely the structure of section 924(c) and the function of *scienter* in it, suggest to us a congressional intent to apply strict liability to this element of the crime."); United States v. Montejo, 353 F.Supp.2d 643 (E.D. Va 2005) (holding that a defendant need not have knowledge that identification actually belonged to another person to be convicted under the Aggravated Identity Theft Penalty Enhancement Act) (The Court found against the defendant even though it recognized that the defendant "correctly points out that the conduct that Congress appeared most concerned with when it enacted [the statute] was that of individuals who steal the identities of others for pecuniary gain....However, Congress did not make pecuniary gain and victimization elements of the offense. So long as the language and structure of the statute do not countervail the clearly expressed intent of the legislature—to prevent identity theft and for other purposes—the statute cannot be said to be ambiguous.") (United States v. Averi, 715 F.Supp. 1508, 1509 (M.D. Ala 1989) (holding that the government need not prove a defendant knew about record-keeping requirements as an element of a crime of "knowingly" failing to maintain records) ("...Congress may have used the term "knowingly" in [the statute] to mean only that the defendant must have been aware that he was not maintaining reasonably informative records on his usage of controlled substances. ..."[T]his statute falls into "the expanding regulatory area involving activities affecting public health, safety and welfare" in which the traditional rule of guilty purpose or intent has been relaxed.") (quoting United States v. Freed, 401 U.S. 601, 607).
37. *See Morissette*, 342 U.S. at 251–52 ("Crime, as a compound concept, generally constituted only from concurrence of an evil-meaning mind with an evil-doing hand, was congenial to an intense individualism and took deep and early root in American soil.").
38. Of course, such a requirement could be dispensed with if the element involved was purely jurisdictional or related to establishing the proper venue. For more on the erosion of *mens rea* requirements and the establishment of a default *mens rea* requirement, see Walsh and Joslyn, *supra* note 9; Rosenzweig, *supra* note 9.
39. In his article, Larkin discusses "remedies" for the problem of overcriminalization; however, the same argument applies with respect to *mens rea* reform, which Larkin and former U.S. Attorney General Michael Mukasey have endorsed elsewhere. *See* Michael B. Mukasey & Paul J. Larkin, Jr., *The Perils of Overcriminalization*, Heritage Foundation Legal Memorandum No. 146 (Feb. 12, 2015), *available at* http://www.heritage.org/research/reports/2015/02/the-perils-of-overcriminalization.
40. Paul J. Larkin, Jr, *Public Choice Theory and Overcriminalization*, 36 Harv. J. L. & Pub. Pol'y 715, 792 (2013) (footnotes omitted).
41. 16 U.S.C. §§ 1371–1423.
42. *See* Gary Fields & John R. Emshwiller, *As Federal Crime List Grows, Threshold of Guilt Declines*, Wall St. J., Sept. 27, 2011, *available at* http://online.wsj.com/articles/SB10001424053111904060604576570801651620000.

43. *See* Gary Fields & John R. Emshwiller, *A Sewage Blunder Earns Engineer a Criminal Record*, Wall St. J., Dec. 12, 2011, *available at* http://online.wsj.com/articles/SB10001424052970204903804577082770135339442; *Regulatory Crime: Identifying the Scope of the Problem: Hearing Before the Over-Criminalization Task Force of the H. Comm. on the Judiciary*, 113th Cong. (2013) (testimony of Lawrence Lewis), *available at* http://judiciary.house.gov/_files/hearings/113th/10302013/Lawrence%20Lewis%20Testimony.pdf. For a videotaped interview with Lawrence Lewis, see http://dailysignal.com/2013/07/05/diverted-from-the-straight-and-narrow-path-for-diverting-sewage/.
44. Sayre, *supra* note 23 at 72.
45. Larkin, *supra* note 40 at 792 (footnotes omitted).
46. *Regulatory Crimes: Solutions: Hearing Before the Over-Criminalization Task Force of the H. Comm. on the Judiciary*, 113th Cong. (2013) (statement of Rep. Robert Scott), *available at* http://judiciary.house.gov/_cache/files/1f22a094-0f62-49d9-9927-21f85174be11/113-61-85566.pdf, at 2.