

ABA Criminal Justice Section Resolution Addresses Overcriminalization

This summer, at its annual meeting, the American Bar Association's Criminal Justice Section will sponsor a resolution that addresses the issue of overcriminalization. Resolution 113D seeks to mitigate the consequences of overcriminalization by urging "federal, state, local and territorial governments to re-examine strict liability offenses to determine whether the absence of a *mens rea* element results in imposition of unwarranted punishment on defendants who lacked any culpable state of mind in performing acts that were not *malum in se*, to prescribe specific *mens rea* elements for all crimes other than strict liability offenses, and to

assure that no strict liability crimes permit a convicted individual to be incarcerated." The recommendation will be considered by the ABA's House of Delegates, and if adopted, will become official policy of the Association. *ABA Watch* presents some background on previous ABA action concerning overcriminalization and analyzes the Criminal Justice Section's proposal.

Background on Overcriminalization

Overcriminalization is broadly defined as the misuse and overuse of criminal law and penalties. As outlined in the ABA's resolution, there has been a sharp
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Questions for ABA President-Elect, James R. Silkenat

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involved.

In addition to the Legal Access Job Corps, I want to focus on what lawyers can do to inform the debate and help shape our nation's policies on the most urgent, stalemated issues of our time. Among these issues are immigration, gun violence, and problems with elections that impede our citizens from voting and having their votes count. I believe that lawyers can help in the effort to develop solutions to some of the biggest challenges facing our nation.

Q: In your view, what is the role of the ABA in the legal profession, but also, more generally, in our society as a whole?

A: The ABA has four stated goals, which work together to shape the mission of the ABA. The ABA provides outstanding CLE, publications and other programs and resources, including numerous opportunities to connect with lawyers from across the country and throughout the world. We want to enable lawyers to learn their craft more fully and gain greater competence.

Another goal is to improve our profession. We seek to promote the highest quality legal education, to encourage competence, ethical conduct and

professionalism throughout the bar, and to help lawyers contribute to society by performing pro bono and public service work.

A third goal is to eliminate bias and enhance diversity in the ABA, the legal profession and the justice system.

Finally, we aim to advance the rule of law by, among other things, working for just laws, a fair legal process, and meaningful access to justice for all. Our profession is a key aspect of our democracy and free society. We are officers of the court, and our justice system is central to the challenges we face as a society.

Q: Is there a crisis in the legal profession? How would you respond to critics of the ABA's accreditation process? Is more innovation needed in the training of lawyers, particularly in light of escalating costs and increased student debt?

A: American legal education is the best in the world, but it has to evolve to keep up with the rapid changes taking place in the legal profession. I am deeply concerned about our law students, our young lawyers and their futures. Many new lawyers have too much debt to work in public interest positions or to make a living by providing affordable legal services.

Last year the ABA commissioned a 20-member Task Force on the Future of Legal Education to determine how law schools, the ABA and other stakeholders can address issues concerning the economics and delivery of legal education. The Task Force is exploring all avenues of legal education and legal practice: from the number of years needed for a law degree, to stu-

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increase in the number of criminal federal statutes and regulations enacted in recent decades. Currently, about 4,500 federal criminal statutes are on the books, with roughly one-third of these enacted in the past thirty years.

Advocates of a strong federal criminal code contend that modern federal criminal law maintains order, protects consumers, and mitigates fraudulent activity. They claim that the risk of overcriminalization is overstated because the federal government has limited resources and can only focus on major areas such as firearm violations, immigration, drugs, and fraud. Thus, federal prosecutors ignore most breaches. Statistics show that about 95% of most federal criminal cases result in guilty pleas, demonstrating that mostly only strong federal cases are litigated. These advocates also hold that the federal government does have legitimate interests in regulating conduct that could undermine the country's commerce and economic system.

However, critics of the expansive federal code question the recent need to federalize many crimes, contending they should continue to be governed by state law. The burden of federal criminal charges and increased threat of incarceration has caused many to be overwhelmed by the ensuing expense, stress, stigma, and emotional consequences for people who often had no intention of committing a wrongdoing. Reform advocates are concerned about violations that occur despite the lack of an element of intent (*mens rea*) and consequently target people who had no intention or will to cheat the government. Additionally, many scholars argue that overcriminalization undermines individual liberty and threatens prosperity by providing a powerful mechanism for the federal government to regulate the private sector.

The ABA's Previous Work on Overcriminalization Issues

The ABA has long been interested in

overcriminalization. In the late 1990s, the Association launched a Task Force on the Federalization of Criminal Law chaired by former Attorney General Edwin Meese, III. In 1998, the Task Force issued a report that dissected trends in the growth of federal criminal law. The report analyzed the trends and endorsed efforts to curb it by refocusing the national role in fighting crime.

The Task Force concluded that there was a "dramatic increase in the number and variety of federal crimes" and that these laws passed not out of necessity, but because federal crime legislation is "thought to be politically popular." Legislators overwhelmingly support legislation, though some privately conceded it might be "misguided, unnecessary, and even harmful." The Task Force warned that the "Congressional appetite for new crimes regardless of their merit is not only misguided and ineffectual, but has serious adverse consequences, some of which have already occurred and some of which can be confidently predicted."

The Task Force emphasized that state, rather than federal, law enforcement is the preferred method of enforcement, as state governments "are neither incapable nor unwilling to exercise their traditional responsibility to protect the lives and property of citizens, and that Congress ought to reflect long and hard before it enacts legislation which puts federal police in competition with the states for the confidence of its citizenry and limited law enforcement resources."

In recent months, ABA Criminal Justice Section leaders have continued to speak out on the issue at conferences and on Capitol Hill. At the ABA Criminal Justice Section 2012 Fall Conference, General Meese urged the Section to become more involved in addressing overcriminalization. General Meese observed that the United States was making and enforcing too many criminal laws, many of which hamper personal liberty and hinder economic growth. He traced the increase to the heightened power of the modern state and the growing clout of special interest groups which utilize criminal law to take advantage over competitors. Additionally, according to Meese, over-zealous lawmakers have too often adopted new laws in attempts to appease constituents. He noted that these new laws often lack a *mens rea* requirement and unnecessarily include elements of tort law-like strict liability that contribute to the problem. He proposed increased education of the repercussions of overcriminalization as well as legislative reforms. Specifically, he endorsed the creation of a new rule that one cannot delegate the criminalization of

conduct to regulatory agencies. He also urged increased clarity in current criminal laws. Meese stressed that legislators need to understand the importance of *mens rea* as well as eliminate tort concepts in criminal law. One consideration might be a “mistake of law” defense, which New Jersey has explored. Additionally, General Meese recommended that all laws and regulations with criminal penalties be centralized under Title 18. Finally, he urged additional scrutiny of federal criminal laws by both the House and Senate Judiciary Committees.

In June 2013, Criminal Justice Section Chairman Bill Shepherd testified before the U.S. House of Representatives Committee on the Judiciary Task Force on Over-Criminalization. Shepherd called for the Congressional Task Force to comprehensively review federal criminal laws, stating, “At every stage of the criminal justice process today—from the events preceding arrest to the challenges facing those reentering the community after incarceration—serious problems undermine basic tenets of fairness and equity, as well as the public’s expectations for safety. The result is an overburdened, expensive, and often ineffective criminal justice system.” He continued to say, “Furthermore, both over-criminalization and over-federalization lessen the value of existing important legislation by flooding the landscape with duplicative and overlapping statutes, making it impossible for the lay person to understand what is criminal and what is not. Punishment, the centerpiece of American criminal law, can lose its deterrent, educative, rehabilitative, and even retributive qualities, under the barrage of overly broad, superfluous statutes.”

Shepherd’s testimony touched on concerns that overcriminalization violated tenants of federalism and personal liberty. He urged that *mens rea* be properly defined and considered when assessing criminal intent. His remarks also highlighted the high financial costs of incarceration, which leads to an over-burdened criminal justice and corrections system.

Mens Rea

The Criminal Justice Section’s recommendation and accompanying report build on many of the ideas presented by both General Meese and Chairman Shepherd. The report details the Criminal Justice Section’s concerns that many criminal statutes do not define *mens rea* elements of the crime. The Section emphasizes in its report, “It is a fundamental principle of criminal law that, before criminal punishment can be imposed, the government

must prove both a guilty act (*actus reus*) and a guilty mind (*mens rea*). The erosion of the *mens rea* requirement does not protect individuals from punishment for making honest mistakes or engaging in conduct that was not sufficiently wrong to give notice of possible criminal responsibility.”

The Section is therefore concerned that individuals could be punished disproportionately to the extent of their crimes. It suggests that governments should reconsider strict liability offenses to establish whether the absence of *mens rea* could result in an undeserved punishment for acts that were not *malum in se*. The Section also would like to see reforms so that convicted individuals are not incarcerated for strict liability crimes. Only blameworthy conduct, committed with a purpose to break the law, should result in criminal punishment.

Other Implications

While the recommendation highlights the issue of *mens rea*, the accompanying report also highlights other issues stemming from overcriminalization.

For example, the report maintains that laws are at times poorly written, targeting unintended individuals and activities, or are redundant and unnecessary because they often mirror existing state laws. The report also maintains that overcriminalization is inconsistent with the principles of federalism, as the federal government wields too much power over activity that traditionally was left to the states. For example, some claim federal laws that penalize crimes like carjacking are unnecessary because in practice victims of those crimes usually exclusively work with their local authorities.

The report discusses recent moves by the United States Supreme Court toward stronger culpability requirements. The sponsors contend, “It is important to recognize that the ‘new’ strict liability approach toward crimes carries with it the dangerous potential of punishing people that are otherwise morally innocent. It is for this reason, that the ABA is urging the re-examination of strict liability crimes.”

The Criminal Justice Section asserts that the erosion of *mens rea* is a “significant problem” and thus “affects the core principle of the American system of justice.” It risks punishing individuals who are not morally guilty.

Barwatch will update the status of this recommendation after the House of Delegates votes on it August 12 or 13.