

REMARKS ON RESTORING THE *MENS REA* REQUIREMENT

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I begin by admitting that I am not a legal scholar; I am a criminal defense and civil liberties trial and appellate *practitioner*. I am also an occasional journalist and author. So when I was asked to comment on a presentation by a real academic, on the subject of “overcriminalization,” I feared that the professor and I would be inhabiting somewhat different worlds. However, I decided to accept the invitation—for which I thank the organizers of this conference—because the subject focuses on what I consider to be one of the most dangerous and intractable problems in the federal criminal justice system. A problem which has its theoretical side, but which also happens to be an increasingly common and disturbing one for trial and appellate lawyers and their often beleaguered clients. It is a problem that requires the urgent attention of scholars, practitioners, and indeed, folks throughout civil society.

I begin with my view of what is really the central problem. The term overcriminalization might be a bit misleading. You will find it used throughout the magnificent joint report, *Without Intent: How Congress Is Eroding the Criminal Intent Requirement in Federal Law*, co-authored by Heritage and NACDL.¹ But what does the term actually mean?

When I think of overcriminalization, I think of the problem endemic to modern federal criminal legislation, from the 1930s to the present, caused by the fact that too many things are made criminal.² Besides the burgeoning federal criminal code, there is also the monumental Code of Federal Regulations. No human being could possibly know, nor intuit, all of the actions in which he or she engages in the course of a day that might arguably be a federal crime. Lord only knows how many federal felonies each of us in this room committed yesterday. Indeed, I know a former prosecutor who would come close to considering this conference to be a conspiracy to obstruct justice!

However, this problem of unknowingly committing myriad felonies in a typical day is due only in part to what I, at least, deem to be overcriminalization. Sure, it is a big problem that we cannot know or intuit that some-

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¹ See BRIAN W. WALSH AND TIFFANY JOSLYN, *WITHOUT INTENT: HOW CONGRESS IS ERODING THE CRIMINAL INTENT REQUIREMENT IN FEDERAL LAW*, available at <http://www.nacdl.org/withoutintent>.

² By 2007, the U.S. Code contained more than 4,450 criminal offenses, up from 3,000 in 1980. See JOHN S. BAKER JR., *MEASURING THE EXPLOSIVE GROWTH OF FEDERAL CRIME LEGISLATION* (May 2004), available at <http://www.heritage.org/Research/LegalIssues/lm26.cfm>.

thing we are doing happens to violate a statute or regulation simply because there are so many of them. But an equally—if not indeed more—serious problem arises when the statutes and regulations, in addition to being *too numerous* for ordinary human beings to know, are *too vague* for the typical, intelligent citizen or even lawyer to understand. There is simply no way to assure your compliance with a vague statute, even if you are aware of its existence.

I am told, and I believe, that the movement to combat overcriminalization comprehends both statutes that criminalize too many aspects of daily life and commerce, as well as those that are simply incomprehensible. When too many activities are denominated federal crimes—overcriminalization in its most common meaning—we enter into a tyranny that, in theory, might bother primarily libertarians and federalists. But again, in theory, with the right technology, we could keep track of everything deemed criminal by the feds—not that it would be easy. However, when these laws are *incomprehensible* because they employ such vague language that even a machine-like brain cannot figure out what conduct would constitute the criminal transgression, we enter into even more dangerous territory, one that transcends political ideology.

Vagueness has generally been thought to be essentially a “due process” problem. The due process clause of the Fifth Amendment protects citizens from being prosecuted under federal laws that are so vague that they fail to give notice of what conduct is prohibited. Similarly, the due process clause of the Fourteenth Amendment provides this protection from state laws. But my experience is that by and large we can understand the conduct that is criminalized under state law. Maybe this is because our state criminal codes are derived from common law concepts, where the notion of *mens rea* is deeply embedded. Historically, the state could not obtain a conviction unless it could show that the miscreant not only committed the act, but that he or she did so intentionally and with the knowledge that the act violated the law. Furthermore, it is generally easier to intuit when conduct violates a state law, in contrast to a federal law. Murder, for example, is easier to grasp than, say, some esoteric mail or securities fraud.

To be sure, there are *some* state crimes that have a touch of vagueness. During the period of civil rights demonstrations in the Jim Crow South during the 1960s, sheriffs would arrest demonstrators and charge them with “disturbing the peace” under state laws that were unclear as to precisely what divided disturbing the peace from a constitutionally protected protest demonstration. The Supreme Court in 1961 reversed the conviction of Reverend B. Elton Cox for leading a demonstration “in or near” a court-

house, because the statute prohibiting such demonstrations in proximity to a house of justice was too vague.³

But by and large, state laws do not suffer from such vagueness problems, in part because such laws have common law antecedents that inform their meaning in both the courts and in common parlance and understanding. Part of this common law tradition entails the doctrine of *lenity*; if a criminal statute is sufficiently ambiguous so that it is not clear to a reasonable person that his conduct fits within the statute, the defendant is entitled to the benefit of the doubt. But in 1812 the Supreme Court held that federal law is entirely statutory, not common law.⁴ And so the long history, wisdom, and experience of common law jurisprudence have been largely unavailable, or at least not mandatory, in the interpretation and enforcement of federal criminal law. I consider this to be a recipe for prosecutorial mischief.

When federal criminal law began its path of deviation from ancient common law, one of the casualties was the doctrine of *mens rea*. I have to tell you, frankly, that I do not really understand the role of *mens rea* in federal criminal law. Maybe if I listen closely enough today I'll figure it out, but I suspect that I am not the only one. It seems to me that the Congress does not understand it any better than I do. And alas, the federal courts are not too good at it either. Sometimes *mens rea* counts, sometimes it does not. Sometimes it is applied more strictly, sometimes hardly at all. Sometimes *mens rea* requires that the defendant be proven to know what he was doing, or what the law requires. Often such a state of mind or knowledge matters not. It is truly a mess. And the growing list of strict liability laws threaten what little influence the doctrine of *mens rea* has retained in the federal criminal justice system.

Let me give you one example from my recently published book, *Three Felonies a Day: How the Feds Target the Innocent*.⁵ I will here truncate my discussion of the case, but you can read about it more fully in the book's concluding chapter. Bradford C. Councilman worked at a company that provided an online listing service for rare and out-of-print books. It supplied a number of its book-dealer customers with electronic mail addresses and thereby acted as an Internet Service Provider. As part of the service it rendered, it made temporary copies of all emails that went through its system, and then eventually deleted those copies when it was clear that the email had actually arrived at its destination. Councilman's computer, in other words, was a sort of way-station for electronic messages.

The feds indicted Councilman for violation of the wiretap statute. As the litigation unfolded, it became obvious that it was unclear whether the

³ Cox v. Louisiana, 379 U.S. 536 (1965).

⁴ United States v. Hudson & Goodwin, 11 U.S. (7 Cranch) 32 (1812).

⁵ HARVEY A. SILVERGLATE, *THREE FELONIES A DAY: HOW THE FEDS TARGET THE INNOCENT* (2009).

statute covered Councilman's activity, since he did not exactly make a copy of the emails *while* they were in transit, as the statute appeared to define wiretapping. Instead, he copied the emails while they were temporarily standing still in his company's computer, and then sent them on to the recipient. He was not, I thought, a wire-tapper in any reasonable nor even technical sense. He was engaging in "business as usual" for a person in his industry.

The federal district judge at first denied Councilman's motion to dismiss.⁶ The judge then changed his mind when he found a Ninth Circuit opinion⁷ that interpreted the statute in such a way so as to exclude conduct like Councilman's. In that case, incidentally, the Department of Justice advanced a definition much like Councilman's in his Massachusetts litigation, but in the Ninth Circuit case it was in the government's interest to have a *more restrictive* definition of wiretapping in order to protect government agents from liability.

In Councilman's case, the DOJ appealed to the First Circuit, where a three-judge panel upheld the dismissal, concluding that the statute covered copying an email only while it was in transit.⁸ But the government persisted, and the First Circuit en banc reversed the panel in August of 2005.⁹ The en banc court said that its opinion pivoted on a question central in the criminal law: "whether Councilman had fair warning that the Act would be construed to cover his alleged conduct in a criminal case, and whether the rule of lenity or other principles require us to construe the Act in his favor."¹⁰ The five-judge majority claimed to "find no basis to apply any of the fair warning doctrines."¹¹ Nor did they see fit to apply the "rule of lenity," which holds, essentially, that if doubt over the interpretation of a criminal statute exists, the defendant has to be given the benefit of that doubt.

The en banc court's analysis was remarkable for the degree to which it dismissed all of the doubts previously expressed about the meaning and reach of the Wiretap Act. In response to Councilman's argument that the "plain text" of the statute did not cover his actions, the majority said: "As often happens under close scrutiny, the plain text is not so plain."¹² But this lack of clarity, rather than working *for* Councilman, somehow worked *against* him. The majority claimed to resolve "this continuing ambiguity" in the statute's language by looking to the legislative history, a notoriously difficult task.¹³ Congress intended to give "broad" protection to electronic

⁶ United States v. Councilman, 245 F.Supp.2d 319 (D. Mass. 2003).

⁷ Konop v. Hawaiian Airlines, Inc., 302 F.3d 868 (9th Cir. 2002).

⁸ United States v. Councilman, 373 F.3d 197 (1st Cir. 2004).

⁹ United States v. Councilman, 418 F.3d 67, 67 (1st Cir. 2005) (en banc).

¹⁰ *Id.* at 72.

¹¹ *Id.*

¹² *Id.* at 73.

¹³ *Id.* at 76.

communications, they concluded, and so the panel's *Councilman* decision was deemed flawed.

The majority of First Circuit judges must have been a bit self-conscious about reinstating an indictment that was so controversial and that had perplexed so many fine judicial minds. The court could not entirely deny that there was *some* degree of ambiguity. But the rule of lenity, the majority intoned, applies only in cases of "grievous ambiguity in a penal statute."¹⁴ In this case, the majority remarked, in one of its more bizarre formulations, there was only "garden-variety, textual ambiguity."¹⁵

It was this last part of the majority's opinion reinstating the indictment that drew the seeming ire of Circuit Judge Juan Torruella, who issued a stinging dissent, with which only one fellow judge agreed. Judge Torruella argued that surely the rule of lenity must be applied in this case: "Councilman is being held to a level of knowledge which would not be expected of any of the judges who have dealt with this problem, to say nothing of 'men [and women] of common intelligence.'"¹⁶ "If the issue presented be 'garden-variety,' this is a garden in need of a weed killer."¹⁷

The overcriminalization approach must not be pursued without due attention paid to the related but analytically distinct problem of vagueness. In the *Councilman* case, after all, few would think that it is overcriminalization for Congress to outlaw wiretapping. And given the clear interstate nature of electronic communications, even federalists would likely concede legitimate federal jurisdiction and interest. The problem here is not reasonably classified, in my view, as *overcriminalization*, but rather, as statutory *vagueness*. In other words, if a law criminalizes being "bad," then requiring knowledge of this law before punishing a citizen is putting the cart before the horse.

¹⁴ *Id.* at 83.

¹⁵ *Councilman*, 418 F.3d at 84. (quoting *Sabetti v. Dipaolo*, 16 F.3d 16, 18 (1st Cir. 1994) (Breyer, C.J.).

¹⁶ *United States v. Councilman*, 418 F.3d 67, 90 (1st Cir. 2005) (en banc) (Torruella, J., dissenting) (addition in original).

¹⁷ *Id.* (internal citations omitted).

