

Overcriminalization

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Legal philosophers (like me) have thought long and hard about the limits of the substantive criminal law and the principles that should be employed to constrain it. The attempt to formulate and apply these principles is a small but important part of an effort to retard the phenomenon of overcriminalization. Regardless of their political ideology, most commentators agree that the tendency to criminalize too much and to punish too many are problems from which the United States currently suffers. Despite this near consensus, concrete proposals to implement a theory of criminalization tend to be embraced or resisted depending upon the socioeconomic class of defendant they would be expected to benefit. Conservatives have accepted but liberals have rejected principled suggestions to expand the defense of ignorance of law. This result is unfortunate. In my view, the case for or against the expansion of this defense should derive solely from an assessment of the normative arguments in its favor.

I. ASPIRATIONS OF NEUTRALITY

Alarm about the size and scope of the criminal justice system led me to write *Overcriminalization* in 2008.¹ There I identified, defended, and applied a number of constraints that particular offenses should be required to satisfy before they should be regarded as justifiable. Some of these constraints are derived from moral philosophy. I contended that a proposed statute must prohibit conduct that is wrongful, prevent harm, and impose liability only on those who are deserving. Other constraints are derived from political theory. I contended that a proposed statute must be designed to further a substantial state interest, must actually succeed in advancing that interest, and be no broader than necessary to achieve its objective.²

In trying to combat the phenomenon of overcriminalization, I formulated a theory that is almost wholly non-ideological or politically partisan. That is, I did not suppose that my list of constraints that need to be satisfied for a

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1. See DOUGLAS HUSAK, *OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW* (2008).

2. For a discussion of overcriminalization in the federal system, see Stephen F. Smith, “Overfederalization,” in the present Volume.

proposed statute to be a legitimate imposition of the penal sanction would prove more congenial to political conservatives, liberals, or to anyone else with a mainstream ideology. Although my confidence has been shaken, I continue to believe my original assumption is basically correct. It is unfortunate if those who aspire to retard overcriminalization invoke their political ideology to argue for or against a particular theory.

Of course, my claim about the absence of a non-ideological tilt was bound to strike cynics as naïve at the outset. Their conviction to the contrary may as well have been *a priori* (i.e., based on theoretical deduction rather than experience or observation). That is, many thinkers are certain that all theories simply must contain a political bias, even without the need to examine a given theory to determine whether their certainty is warranted. On a high enough level of abstraction, I am certain they are correct. Any theory that seeks to contrast justified from unjustified impositions of the criminal sanction will be rejected by commentators who are persuaded that no law, or at least no criminal law, is ever justified. Thus my endeavor is rejected as misguided by anarchists and the small but growing number of criminal law abolitionists. The same is true of those on the opposite end of the political spectrum. Someone who thinks that any law is justified, or that any law enacted in accordance with specified procedures in a constitutional democracy is justified, will not appreciate the need for an independent set of normative principles that purport to contrast the justified from the unjustified. All of the work is done by procedure; there is no need for a substantive theory to evaluate criminal laws. Obviously, I reject each of these extreme positions. Some actual and possible penal statutes are justified and others are not, and it is an important project for legal philosophers to defend a set of principles to draw the line between them. The question is whether those who join me in rejecting these extreme positions should employ whatever political ideology they hold as a basis for accepting or (more likely) for rejecting my (or any) theory of criminalization.

To be sure, the particular theory I produced in 2008 has certainly attracted its share of critics.³ Any philosopher should anticipate this response. In fact, he should *hope* for this response; the alternative is neglect, which is far worse. In any event, some legal philosophers have contended that a viable theory of criminalization should not consist in a set of constraints.⁴ Others have contested the acceptability of some of my constraints. In particular, they have pointed out that the harm constraint is not so easy to formulate, let alone to defend.⁵ For present purposes, however, the important point is not whether I was correct or incorrect to employ constraints to construct a theory of criminalization or to include a harm requirement among those constraints that penal statutes must satisfy. Instead, the important point is that there is no obvious connection between those who accept or reject my theory and those who adopt a particular political ideology. That is, one should make no inferences about whether someone is a conservative or a liberal (or a pragmatist or whatever) because she accepts or rejects any of my constraints. Admittedly, we may well differ about what harm is,⁶ for example, and we are even more likely to differ about whether a given statute proscribes it.⁷ But the constraint itself, in the absence of further embellishment, comes pretty close to qualifying as politically neutral.

3. See John Gardner, *Book Review*, NOTRE DAME PHIL. REVS. (Aug. 3, 2008), <http://ndpr.nd.edu/news/overcriminalization-the-limits-of-the-criminal-law/>; Danny Scoccia, *Book Review*, 119 ETHICS 189 (2008); Peter Ramsay, *Overcriminalization as Vulnerable Citizenship*, 13 MOD. L. REV. 262 (2010); Michael S. Moore, *A Tale of Two Theories*, 28 CRIM. JUST. ETHICS 27 (2009); Heidi M. Hurd, *Paternalism on Pain of Punishment*, 28 CRIM. JUST. ETHICS 49 (2009); Victor Tadros, *The Architecture of Criminalization*, 28 CRIM. JUST. ETHICS 74 (2009); A.P. Simester & Andrew von Hirsch, *Remote Harms and Non-constitutive Crimes*, 28 CRIM. JUST. ETHICS 89 (2009); Robert Young, *Douglas Husak on Dispensing with the Malum Prohibitum Offense of Money Laundering*, 28 CRIM. JUST. ETHICS 108 (2009); Darryl K. Brown, *Can Criminal Law Be Controlled?*, 108 MICH. L. REV. 971 (2010); Stuart P. Green, *Is There Too Much Criminal Law?*, 6 OHIO ST. J. CRIM. L. 737 (2009); Vanessa E. Munro, *Book Review*, 12 NEW CRIM. L. REV. 323 (2009); Alfonso Donoso, *Critical Review: Douglas Husak—Overcriminalization: The Limits of the Criminal Law*, 4 CRIM. L. & PHIL. 99 (2010); Jeremy Horder, *Book Review*, 35 SOC. THEORY & PRAC. 483 (2009); Re'em Segev, *Is the Criminal Law (so) Special? Comments on Douglas Husak's Theory of Criminalization*, 1 JERUSALEM REV. LEGAL STUD. 3 (2010); Miriam Gur-Ayre, *Comments on Douglas Husak's Overcriminalization*, 1 JERUSALEM REV. LEGAL STUD. 21 (2010); Gideon Yaffe, *Harmfulness, Wrongfulness, Lesser Evils and Risk-Creation: A Comment on Douglas Husak's Overcriminalization*, 1 JERUSALEM REV. LEGAL STUD. 35 (2010).

4. See VICTOR TADROS, *WRONGS AND CRIMES* (2016).

5. See James Edwards, *Harm Principles*, 20 LEGAL THEORY 253 (2014).

6. See Matthew Hanser, *The Metaphysics of Harm*, 77 PHIL. & PHENOMENOLOGICAL RES. 421, 432 (2008).

7. See Bernard E. Harcourt, *The Collapse of the Harm Principle*, 90 J. CRIM. L. & CRIMINOLOGY 109 (1999).

And I believe the same is true of the additional constraints that I included in my theory of criminalization. As I indicated, I argued that no one should be subjected to penal liability in the absence of her desert.⁸ Again, what constitutes desert is extraordinarily contentious. To my knowledge, however, virtually no one (except perhaps those who reject the existence of desert altogether) openly argues that criminal liability is justifiably imposed on persons in the absence of their desert, that is, on persons who do not deserve it. This latter position, it seems to me, would be extraordinary. Only in the most catastrophic circumstances should we entertain the possibility that criminal liability should be imposed on those who do not deserve it.

Desert is a significant constraint independent of the others because penal liability requires not only that a person commits an offense, but also that she does so while lacking a defense. If a theory of criminalization allowed penal liability to be imposed on those who do not deserve it because they ought to have a substantive defense that justifies or excuses their conduct, the theory would be deficient in failing to serve its most important (but not its only) function. What is this “most important” function? Why should those of us who care about the real world (in addition to philosophical argumentation) be anxious to identify the correct theory of criminalization? The single best answer, I continue to believe, is that an incorrect theory will inevitably produce overcriminalization and undercriminalization. That is, some conduct that should not incur penal liability will be subject to it, and some conduct that should incur penal liability will not be subject to it. Undercriminalization may well be a larger problem than I appreciated at the time I wrote my book.⁹ But even if the problem of undercriminalization is real, surely the problem of overcriminalization is far more worrisome. Imposing criminal liability on those who do not satisfy the constraints in our best theory of criminalization is a worse evil than not imposing criminal liability on those who do. Again, I do not take myself to be saying anything here that is unorthodox. Those who accept the presumption of innocence have always contended that false positives are more worrisome than false negatives in criminal justice.¹⁰

8. For a discussion of the concept of desert, see Jeffrie G. Murphy, “Retribution,” in Volume 4 of the present Report.

9. See Andrew Ashworth & Lucia Zedner, *Preventive Orders: A Problem of Undercriminalization?*, in *THE BOUNDARIES OF THE CRIMINAL LAW* 59 (R.A. Duff et al. eds., 2010).

10. For a discussion of the complexities in the presumption of innocence, see the special issue of 8 *CRIM. L. & PHIL.* 283-525 (2014).

And why should we worry about overcriminalization? Once again, there are several different reasons. One of these stands out. We should worry about overcriminalization mostly because it is bound to produce overpunishment. Here is why. When a new criminal statute is enacted, legal officials gain powers they previously lacked. Police have the power to arrest, prosecutors have the power to press charges, and judges have the power to sentence. Of course, there is no logical necessity that these powers will ever be exercised. But it is nearly inevitable that these newly created powers will be exercised on some occasions. After all, outlawing conduct does not prevent it. Some persons will persist in the banned behavior, whatever the law may say. It is almost certain that at least some of the people who break a specific law will be arrested, prosecuted, and sentenced. If the statute for which they are punished is an illegitimate use of the penal sanction because it violates the constraints that are included in our best theory of criminalization, these punishments will be unjust. Thus overcriminalization inevitably produces injustice: punishments that cannot be justified. If the state cannot justifiably punish any of the persons who breach a given penal statute, that statute should not have been enacted in the first place.

Overcriminalization produces overpunishment, and that is its principal vice. More and more commentators from all political ideologies have come to appreciate what knowledgeable students of criminal justice have realized for some time: We in the United States punish too many people with too much severity.¹¹ Today, this phenomenon is increasingly characterized as an epidemic of mass incarceration.¹² One of many possible ways to retard mass incarceration is to reduce overpunishment, and one way to reduce overpunishment is to reduce overcriminalization. Of course, there are many other ways to combat this epidemic; some may be more fruitful than developing a theory of criminalization and each should be evaluated on its own merits. But identifying and implementing the correct theory of criminalization would represent major progress toward reaching this objective—an objective that many contemporary commentators agree to be of crucial significance.

Given the foregoing, I admit to having been surprised and disappointed about the extent to which commentators accept or reject given constraints because of their political leanings. Several examples of this phenomenon could be cited. In combination, they have helped to erode my confidence about the depth of the social consensus to reduce mass incarceration. In many respects, the movement to do so is reminiscent of pleas to reduce the federal

11. See, e.g., Erik Luna, “Mandatory Minimums,” in Volume 4 of the present Report.

12. See, e.g., Todd R. Clear & James Austin, “Mass Incarceration,” in Volume 4 of the present Report.

deficit. In the abstract, citizens increasingly believe that sentences throughout the United States are excessive or that government spending is too high. But opinions change quickly when respondents are asked about punishments for specific kinds of crime or about what exact government programs they would cut. With hindsight, I gather I was naïve to suppose that I had reached a level of philosophical abstraction on which criminal law and its reform is not thoroughly politicized.

In particular, quite a few respondents believe that punishments are often too lenient for sexual offenders.¹³ For example, a 2016 sexual-assault case at Stanford University ignited public outrage after the defendant was sentenced to a “mere” six months in jail. A petition calling for the recall of the sentencing judge quickly attracted over 240,000 supporters,¹⁴ and editorials called the sentence a “slap on the wrist” and a “setback for the movement to take campus rape seriously.”¹⁵ Given the supposed prevalence of sexual offenses, increases in the severity of punishments would almost certainly cause levels of incarceration to rise rather than to fall. Those who believe sexual misconduct is a paradigm instance of undercriminalization are unlikely to succeed in retarding the phenomenon of mass incarceration.¹⁶

I admit that no one has a good theory of what might be called cardinal proportionality: how severely given kinds of conduct should be punished. Even when theorists agree that, all other things being equal, the severity of the sentence should be a function of the seriousness of the crime, and the seriousness of the crime is a function of its wrongfulness, harmfulness, and the culpability of the perpetrator, such abstract considerations provide almost no guidance for particular questions about the sentences to impose. How these factors should be balanced in specific cases, or what considerations must be held constant to satisfy the *ceteris paribus* clause, are hotly contested. No one ever said that just sentences would be easy to identify.

13. See generally Robert Weisberg, “Sexual Offenses,” in the present Volume; Wayne A. Logan, “Sex Offender Registration and Notification,” in Volume 4 of the present Report.

14. Liam Stack, *Light Sentence for Brock Turner in Stanford Rape Case Draws Outrage*, N.Y. TIMES (June 6, 2016), <http://www.nytimes.com/2016/06/07/us/outrage-in-stanford-rape-case-over-dueling-statements-of-victim-and-attackers-father.html>.

15. Editorial, *Stanford sexual assault sentence was too light*, MERCURY NEWS (June 2, 2016), <http://www.mercurynews.com/2016/06/02/mercury-news-editorial-stanford-sexual-assault-sentence-was-too-light/>.

16. For other possible examples of undercriminalization, especially in foreign jurisdictions, see Dmitriy Kamensky, *American Peanuts v. Ukranian Cigarettes: Dangers of White-Collar Overcriminalization and Undercriminalization*, 35 MISS. C. L. REV. 148 (2016).

What kind of topic is ripe for scrutiny from the perspective of a theory of criminalization? Although my own work mostly examines the justifiability of drug crimes, statutes prohibiting the electronic possession of child pornography are also good candidates.¹⁷ Perhaps these laws can survive this scrutiny and perhaps they cannot. But I hope we will not fudge the results of this analysis because we hold political views that give us a stake in the outcome. If we have confidence in our principles, we should be willing to allow the arguments to take us where they may.

In what follows, however, I will move away from the substantive content of penal statutes and focus instead on an example of politicization that involves resistance to a principled proposal to expand the scope of a defense we currently recognize under very limited circumstances. My shift from offenses to defenses should not be resisted. After all, a reduction in the scale of punishment can be accomplished just as effectively by enlarging defenses as by contracting offenses. The particular defense on which I will focus is that of ignorance (or mistake) of law. In my judgment, the unwillingness to enlarge this defense produces overcriminalization because it imposes penal liability on those who do not deserve it. I select this particular example from a number of possibilities for a simple reason. Except perhaps for a radical reform of our punitive drug policies, an expansion in the availability of the defense of ignorance of law has the potential to make a non-trivial dent in overpunishment—the phenomenon that makes us concerned about overcriminalization in the first place. In this case, as elsewhere, I think we should accept the constraints in my theory and be willing to accept whatever political implications they turn out to have.

II. IGNORANCE OF LAW

I have long believed that the reluctance to recognize a greatly expanded (complete or partial) defense of ignorance of law throughout the Anglo-American world is normatively indefensible.¹⁸ I will not describe existing doctrine in much detail; I assume most everyone is familiar with the general adage that ignorance of law is no defense as well as with the handful of important exceptions to this adage that most jurisdictions recognize.

Let me simply state my general position in theoretical terms I believe are roughly accurate, neglecting nuance and qualification. Most commentators are critical of strict liability in the criminal law, insisting that some level of culpability or mens rea should attach to every material element in penal statutes. I regard

17. See Asaf Harduf, *Criminalization Downloads Evil: Re-examining the Approach to Electronic Possession when Child Pornography Goes International*, 34 B.U. INT'L L. J. 279 (2016)..

18. See DOUGLAS HUSAK, *IGNORANCE OF LAW* (2016).

culpability or *mens rea* as a requirement designed to ensure that defendants are blameworthy for their criminal acts; punishment in the absence of blame is almost always unjust. The culpability or *mens rea* provisions in penal codes guard against imposing criminal liability on persons who are mistaken about what they have done. As a default, a defendant is not guilty unless he is at least reckless, consciously disregarding a substantial and unjustifiable risk his conduct is criminal. But existing *mens rea* provisions almost solely protect persons who make mistakes of fact. As a result, a defendant who makes a mistake of law can have all of the culpability needed for conviction. A defendant can be reckless, for example, even though he is not aware of the substantial and unjustifiable risk that his conduct violates a law. Thus our existing doctrines that deny a defense of ignorance of law impose a kind of strict liability.¹⁹

The outstanding question, I believe, is why the *mens rea*, blameworthiness, or desert generally needed in order to impose criminal liability and punishment, does not extend to defendants who make mistakes of law as much as to defendants who make mistakes of fact. I believe that it should. Unfortunately, I cannot mount much of an argument for this belief. Let me simply offer one piece of evidence that most of us—especially those of us whose so-called intuitions have not been corrupted by a lifetime of immersion in legal practice—regard ignorance of law as a more robust excuse than current black-letter doctrine allows. At some time or another in our lives, each of us has violated a legal rule of which we were unaware. How did we react on these occasions, and how did we anticipate that others should react to us?

Consider the following example. After returning from abroad, I recently observed a stranger talking on a mobile phone in an area in which such conversations are expressly prohibited by Homeland Security—and where four prominently displayed signs warn travelers of the regulation. It is easy to predict how the offender reacted when an authority confronted him. He did not reply, “I have nothing to say on my own behalf; ignorance of law is no defense.” Instead, he responded apologetically, “I am sorry; I did not know I was not allowed to use my phone here.” I make two observations if I am correct to assume that this latter reply is nearly universal and the former is unusual or non-existent. First, the offender must have believed he was entitled to leniency if his plea were accepted as true. He would not have responded, for example, “my father has a lot of money” or “rules are made to be broken.” These latter retorts, I am sure he would realize, would get him nowhere. Second and just as importantly, the plea of ignorance is often accepted as a wholly or partially

19. See the discussion in GEORGE FLETCHER, *RETHINKING CRIMINAL LAW* (1978).

valid defense by the authority who confronts him. One would be astonished to learn that this person did not actually receive some degree of leniency relative to an offender who knew mobile phones were prohibited and hoped he would not be detected. If the intuition that ignorance of law is no excuse were as entrenched as many commentators allege, we would be puzzled by the fact that ordinary persons plead it so frequently and authorities accept it so readily. But these familiar facts are not puzzling. A perspective on the culpability or blameworthiness of legally ignorant defendants must explain rather than neglect these truisms.

My claim that ignorance of a rule reduces or eliminates blameworthiness is indifferent to whether the rule in question is legal or moral. I hold there to be a strong presumption that our theory of penal liability should mirror our theory of moral responsibility. In morality, I believe most of us allow ignorance that one is acting wrongfully to at least mitigate our blame. This claim is comparative; the relevant kind of case in which to test this judgment compares two people who breach the same moral or legal rule and differ only in that the former but not the latter is aware her conduct is wrongful. The question to be answered, then, is whether each is equally deserving of blame for her immoral or illegal act. In my judgment, the answer is almost always that their blameworthiness differs substantially. If the extent of punishment should generally reflect blameworthiness, as I also believe to be the case, then those who are ignorant that their conduct breaches the rule in question should be punished less severely than those who understand perfectly that their act is immoral and/or criminal.

One kind of case that has attracted considerable attention from moral and legal philosophers is that of ancient slave owners. For example, Hittites who lived 30 centuries ago apparently had no moral qualms about enslaving captives caught in battle.²⁰ Let me stipulate what I also believe to be obvious: Slavery is an unjust institution and owning slaves is wrongful. How should we assess the moral blameworthiness of persons who own slaves today, knowing the institution to be unjust, relative to that of ancient Hittites, whose conduct is otherwise relevantly similar?²¹ Reasonable minds can and do disagree, but I hold the blameworthiness of slave owners who know better to be greater than that of ancient slave owners who were morally ignorant. To support this judgment, we would need to move beyond simple intuitions, which may well conflict or be unclear, and invoke a general theory of the conditions that render persons blameworthy for their

20. For recent commentary, see Alexander A. Guerrero, *Deliberation, Responsibility, and Excusing Mistakes of Law*, 6 JURIS. 81 (2015).

21. See *id.*

wrongful conduct. Although I happen to have such a general theory, further defense of my thesis that ignorance of a moral or legal rule should partly or wholly excuse would take us too far afield. I hope only to have suggested that the case for excuse is powerful and hardly outside the philosophical mainstream. The plausibility of this thesis is far greater than that of the extreme polar positions about justified criminalization with which I began.

My thesis about the excusing significance of ignorance of law should be assessed on its own merits. It should not be rejected because the critic invokes a political ideology to find its real-world implications to be distasteful. But this is exactly the reception to which pleas to expand the excusing significance of ignorance of law have tended to receive in our climate of polarization and paralysis. My own thoughts on this matter are not much evidence for or against such a reception. For better or worse, legal philosophers rarely influence the real world; we mostly engage one another. But concrete ideas to enlarge the excusing significance of ignorance of law have stalled in bills pending before Congress. For example, the Criminal Code Improvement Act of 2015 provides, among other things, that “if the offense consists of conduct that a reasonable person in the same or similar circumstances would not know, or would not have reason to believe, was unlawful, the Government must prove that the defendant knew, or had reason to believe, the conduct was unlawful.”²² To oversimplify a bit, this statute would disallow criminal liability to be imposed on persons who make mistakes of law unless a reasonable person in their circumstances would not have made that mistake.

This Act seems destined to languish before a polarized Congress. Somewhat surprisingly, opposing commentary has come from politicians with whom liberal legal philosophers typically agree. Sen. Elizabeth Warren, for example, called the bill “shameful” because it would make it harder to convict persons who commit corporate crimes.²³ “All of a sudden, some Republicans are threatening to block a reform unless Congress includes a so-called mens rea amendment to make it much harder for the government to prosecute hundreds of corporate crimes,” she declared from the Senate floor.²⁴ “That is shameful because we’re already way too easy on corporate law breakers.”²⁵

22. H.R. 4002, 114th Cong. § 11(2) (2015).

23. Jordain Carney, *Warren: GOP push to block criminal justice reform ‘shameful’*, THE HILL (Feb. 3, 2016), <http://thehill.com/blogs/floor-action/senate/268056-warren-gop-push-to-block-criminal-justice-reform-shameful>.

24. *Id.*

25. *Id.*

Perhaps Warren is correct that we tend to be too lenient with corporate offenders. Each year, however, corporations pay billions of dollars to plaintiffs in civil penalties as well as to governments pursuant to deferred prosecution agreements.²⁶ We cannot expect to make a dent in retarding the problem of mass incarceration if we continue to believe that nothing less than prison represents a real punishment for wrongdoers that stigmatizes them sufficiently.²⁷ Even more importantly, however, is that Warren's retort does not begin to address the Bill on its merits. I trust Warren would not purport to solve the problem of under-punitiveness by endorsing a proposal to imprison corporate criminals who do not deserve it. She owes us a principled argument as to why anyone whose mistake of law is not even negligent deserves criminal liability and punishment.

Conversely, commentary in support of the Act has come from politicians with whom legal philosophers rarely agree. Some even agree that the defense should be conceptualized as a denial of *mens rea*. According to Orrin Hatch, member and former chairman of the Senate Judiciary Committee, "without adequate *mens rea* protections—that is, without the requirement that a person know his conduct was wrong, or unlawful—everyday citizens can be held criminally liable for conduct that no reasonable person would know was wrong. This is not only unfair; it is immoral."²⁸ Hatch's suggestion is potentially radical. It departs from textbook orthodoxy in construing the scope of *mens rea* to encompass not only knowledge of the relevant facts but also knowledge of the applicable law. To be sure, Hatch may be right or he may be wrong. But at least he offers a sketch of an argument of principle that should be confronted on its own merits. If Hatch is mistaken and it is fair to convict a person when no reasonable person would know her conduct to be wrong, we must be able to say why. I, for one, am unable to do so. In fact, I would go further and regard ignorance of law to be wholly or partly excusing even when the mistake *is* negligent. Penal liability for negligence is and ought to be unusual, if it is justifiable at all. In any event, it seems to me that whoever turns out to benefit from the foregoing Act should be excused for the simple reason that they do not deserve criminal liability and punishment.

Public commentary about this proposal tended not to address the argument of principle Hatch sketched. A subsequent editorial in *The New York Times*

26. See BRANDON L. GARRETT, *TOO BIG TO JAIL* (2014).

27. Dan Kahan calls this the problem of "punishment incommensurability." See Dan Kahan, *Punishment Incommensurability*, 1 *BUFF. CRIM. L. REV.* 691 (1998).

28. Press Release, Orrin Hatch, Hatch: It's Time for Criminal Justice, Mens Rea Reform (Sept. 15, 2015), <http://www.hatch.senate.gov/public/index.cfm/2015/9/hatch-it-s-time-for-criminal-justice-mens-rea-reform>.

criticized pending legislation it said “would require prosecutors to prove that a defendant ‘knew, or had reason to believe, the conduct was unlawful.’”²⁹ This proposal was alleged to be objectionable on the ground that it would “indiscriminately” require the “government to prove ‘mens rea’ or intent on the part of the defendant.”³⁰ It concluded: “Ignorance of the law is generally not an excuse for breaking it, and it certainly should not be turned into an excuse when the action inflicts serious harm to large numbers of people or to the environment.”³¹ The editorial did not address the issue of whether or why it would be fair to excuse defendants who are ignorant of law when they do *not* inflict serious harm to large numbers of people or to the environment. As far as I can see, an argument about whether and to what extent legally ignorant defendants are blameworthy is not sensitive to the severity or the type of harm a defendant causes.³²

My point is that we should not favor or oppose proposals to allow ignorance of law as an excuse by speculating about what class of penal wrongdoers would be most likely to benefit from the reform. In my judgment, white-collar environmental polluters who know they are violating the law are more blameworthy than white-collar environmental polluters who do not know they are violating the law. Similarly, disadvantaged minority drug offenders who do not know they are violating the law are less culpable than disadvantaged minority drug dealers who do know they are violating the law. The latter, of course, are far more likely to be the kind of defendants who attract sympathy. Nonetheless, I hold ignorance to be partly or wholly excusing, regardless of the content of the law about which the mistake is made—and regardless of the socioeconomic class of the person who makes it.

Would a relaxation of the general rule that ignorance of law is no excuse make a significant dent in the problem of over-punishment? It is hard to say in the absence of better empirical data about the extent to which the law is known by persons who commit criminal acts. But my own suspicion is that the change would be neither momentous nor trivial. As I have indicated, however, apart from a radical alteration in our punitive drug policy—which I happen to have publicly championed for decades—it is hard to think of a single principled reform of the substantive criminal law that is likely to have a greater impact.³³

29. Editorial, *Don't Change the Legal Rule on Intent*, N.Y. TIMES (Dec. 6, 2015), <https://www.nytimes.com/2015/12/06/opinion/sunday/dont-change-the-legal-rule-on-intent.html>.

30. *Id.*

31. *Id.*

32. Some philosophers disagree. See my discussion of so-called *quality of will* theories of blameworthiness in HUSAK, *IGNORANCE OF LAW*, *supra* note 18.

33. See DOUGLAS HUSAK: *DRUGS AND RIGHTS* (1992).

Still, we sometimes must be willing to settle for changes that turn out to be incremental. If we really hope to make a dent in mass incarceration by reserving criminal liability for those who deserve it, the foregoing proposal is a sensible part of a solution.

Moreover, consider the long-term effects my proposal would be expected to cause. How would we predict legislators would respond to an expansion of a defense of ignorance of law? To answer this question, we must ask why sane adult defendants make mistakes of law. Under what material conditions is ignorance of illegality likely to be prevalent? I agree with Hatch that a main source of the problem is overcriminalization. He writes, “for too long, Congress has criminalized too much conduct and enacted overbroad statutes that sweep far beyond the evils they’re designed to avoid.”³⁴ Prohibiting conduct that not even reasonable people would know to be criminal is a terrible idea. These crimes should probably be repealed, and new statutes with the same flaw should not be enacted—regardless of whether they are likely to be used against white-collar or blue-collar offenders. I am now resigned to the reality that proposed reforms of the criminal law will continue to be politicized in the foreseeable future. Nonetheless, I encourage policymakers to resist politicization and to evaluate reforms on grounds of principle. If we truly aspire to resist overcriminalization and overpunishment, we should care more about what defendants deserve and less about what class of offenders is most likely to benefit from the changes proposed.

RECOMMENDATIONS

1. **Specifically, I recommend that the defense of ignorance of law should be expanded along the lines proposed in either the House or Senate bills on mens rea reform.**³⁵ The penal sanction should be reserved for persons who deserve to be punished, and those who violate criminal laws of which they are unaware deserve complete exculpation or at least mitigation in the severity of their sentence.
2. **More generally, the extreme partisanship that divides our country ideologically should not be brought to bear when assessing principled proposals to further the urgent goal of reducing the size and scale of the substantive criminal law.** Obviously, legal philosophers might well be mistaken in their efforts to identify the principles that should be

34. Press Release, *supra* note 28.

35. See Criminal Code Improvement Act of 2015, H.R. 4002, 114th Cong. § 11(2) (2015); Mens Rea Reform Act of 2015, S. 2298, 114th Cong. § 2 (2015).

applied to limit the criminal sanction. But if a given defendant does not deserve to be punished, he should not bear the hardship and stigma of a criminal conviction regardless of whether he wears a white or a blue collar. Arguments to reduce the penal sanction should be assessed on their own merits.

3. **Even more generally, further efforts should be undertaken to identify principled bases to check the tendency to punish too much and to punish too many.** These efforts might consist in either a repeal of penal statutes or an enlargement of defenses for violations of the statutes that should be retained.