



Engulfed by Environmental Crimes: Overcriminalization on the Gulf Coast

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Recommendations

- Review environmental laws to determine whether criminal sanctions are appropriate.
- Identify environmental criminal laws containing weak or nonexistent mens rea protections and either eliminate them, or amend them so that an appropriate culpable mental state is included.
- Codify and apply the Rule of Lenity to environmental criminal prosecutions.
- Eliminate provisions that delegate the power to agencies to create environmental criminal offenses through rulemaking.
- Establish a “Safe Harbor Provision” whereby if an environmental criminal offense is unintentional and no harm has been done to human health, the offender is given the opportunity to mitigate the harm and to come into compliance.

Introduction

Advocates across the political spectrum are increasingly criticizing overcriminalization, the tendency of government to use criminal law to regulate behavior not traditionally considered criminal, including, quite often, ordinary business activity.* Former U.S. Attorney General Dick Thornburgh has observed that “[t]he problem of overcriminalization is truly one of those issues upon which a wide variety of constituencies can agree.”² Precise definitions of overcriminalization vary, but the general sense that overcriminalization is a problem is widespread. Notre Dame School of Law Professor Stephen F. Smith explained this well in his 2010 testimony before Congress.

It is, of course, difficult to make such claims [of overcriminalization] without a normative baseline—an idea of what constitutes the ‘right’ number of criminal laws—and such a baseline is elusive. Still, history and crime rates provide relevant benchmarks, and they strongly suggest that the criminal sanction is being seriously overused. ... According to a 1998 report issued by an American Bar Association task force, an incredible 40 percent of the thousands of crimes on the federal books were enacted after 1970. ... On average, Congress created 56 new crimes every year since 2000, roughly the same rate of criminalization from the two prior decades.³

Federal Judge Alex Kozinski has memorably observed that “[t]his is not the way criminal law is supposed to work. Civil law often covers conduct that falls in a gray area of arguable legality. But criminal law should clearly separate conduct that is criminal from conduct that is legal...because criminal law represents the community’s sense of the type of behavior that merits the moral condemnation of society.”⁴

It is true that much of the dramatic rise in overcriminalization can be attributed to the federal government.⁵ For example, Timothy Lynch of the Cato Institute observed that prior to 1982, only 25 environmental crimes were prosecuted by federal authorities, but in the ensuing fourteen years, they prosecuted thousands of environmental crimes—and earned over 1,000 convictions.⁶ A prominent example of federal environmental overcriminalization was even mentioned by former Massachusetts governor Mitt Romney in a presidential debate on October 16, 2012.⁷ Overcriminalization, however, is not an exclusively federal problem. State overcriminalization has been equally problematic.⁸

“Ground zero” for state-level overcriminalization may well be the United States Gulf Coast. Five U.S. states border the Gulf of Mexico—Texas, Louisiana, Mississippi, Alabama, and Florida—and between them, they have passed nearly 1,000 laws criminalizing activity along the coast. Criminal sanctions are of course appropriately applied to an individual who inten-

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* In addition to the Texas Public Policy Foundation, organizations that have criticized overcriminalization include the [Heritage Foundation](#), the [Cato Institute](#), the [Manhattan Institute](#), the [American Legislative Exchange Council](#), the [National Association of Criminal Defense Lawyers](#), and the [American Civil Liberties Union](#).

tionally contaminates another person’s property. Too often, however, the activity that is governed by these myriad laws is non-blameworthy, ordinary business activity. This report provides an overview of these “crimes,” explains why the overcriminalization along the coast is detrimental to economic liberty and growth, and finally, proposes solutions for reining in the overcriminalization problem.

Methodology: How to Define an “Environmental Crime”

In this paper, environmental crimes are defined as those which relate to air, water, waste, land use, or other commercial activity involving natural resources, including:

- criminal regulations on wildlife-related activity such as hunting or fishing;
- offenses created by rulemaking pursuant to blanket statutes that permit agencies to effectively create crimes;⁹ and
- agricultural offenses involving pesticides, but not agricultural offenses related to the licensing of growers.

Furthermore:

- Each discrete section of a statute that carries a criminal penalty is treated as a separate offense; and
- Single provisions that list multiple activities or items are treated as a single offense. (Consequently, one offense may in fact cover a wide variety of conduct.)

Finally, this paper deals exclusively with the improper application of criminal law to environmental regulation. Environmental offenses which are punishable only by civil sanction are not within the scope of this paper.

Under this methodology, there are 935 environmental criminal offenses in the five Gulf Coast states. Louisiana

and Texas, with more than 250 offenses apiece, have by far the most offenses.

Environmental Crimes Along the Gulf Coast

Many statutes in the five Gulf states do not specify the mental state necessary to be culpable of a crime. Alabama has a general provision specifying that criminal negligence shall be presumed if the offense does not include a culpable mental state,¹⁰ and Texas requires culpability higher than criminal negligence if mens rea is not specified. Because Florida and Mississippi lack such provisions, however, they effectively have 52 and 32 strict liability crimes, respectively, along the Gulf Coast.¹¹

Louisiana has a general statute on criminal intent but it does not appear to presume criminal negligence where no mental state is prescribed.¹² Louisiana does require that willful, knowing, and/or intentional states of mind be proven for 166 of its first 173 offenses. In the Wildlife and Fisheries portion of Louisiana’s statutes, however, only 6 out of 113 offenses require that a defendant willfully, knowingly, and/or intentionally committed the crime in question. Criminal negligence is quite a low threshold, below intentional, knowing, and reckless conduct, and few judges or juries are likely to acquit a defendant on the basis that this level of intent was not established.

In Louisiana alone, over one hundred offenses that relate to hunting, fishing and wildlife could result in imprisonment—and virtually none of these offenses carry a mens rea requirement. Such offenses include:

- **Wildlife and Fisheries RS 56: 332 G:** A shrimper who catches an unserviceable crab trap shall keep it on board his vessel and properly dispose of it at a designated disposal site if one is available. Thus, the failure to pick up another person’s litter can result in up to 60 days of incarceration—and a mandatory minimum stay in prison for repeat offenses.

Number of Environmental Criminal Offenses				
Texas	Louisiana	Mississippi	Alabama	Florida
263	286	94	185	107

- **Wildlife and Fisheries RS 56: 435.1 D:** Oysters, once harvested and placed upon any vessel, cannot be transferred, except to a shoreside facility. Thus, giving an oyster to someone in a passing boat could result in imprisonment of up to 120 days.

The vast majority of environmental offenses in the surveyed states do not require an actual injury to any person—or even animal or plant—as an element of the offense. Among the five Gulf states, Louisiana’s approach is probably best. In Louisiana, many offenses are classified as either misdemeanors or felonies, depending on whether the facts in the particular case demonstrate human endangerment.¹³ Louisiana’s approach is still open to abuse (in part because some of the infractions carry the possibility of incarceration even though there is no risk of endangerment), but it is certainly preferable to an approach in which conduct is punishable as a felony regardless of whether any risk was posed to humans.

In Florida, it is a first-degree misdemeanor to “transport by vessel over water both wild and aquaculture products of the same species at the same time,” but it is not clear why it is necessary to ban this practice in all circumstances.¹⁴ The Texas Agriculture Code includes a Class A misdemeanor for “disposing of, discarding, or storing a pesticide or pesticide container in a manner that may cause or result in injury to humans, vegetation, crops, livestock, wildlife, pollinating insects, or pollution of any water supply or waterway.”¹⁵ Like many of the other statutes surveyed, this provision suffers from vagueness and overbreadth, as it is unclear what methods of disposal are prohibited.

In Mississippi, a person can be sent to prison for up to six months for “wounding, drowning, shooting, capturing, taking or otherwise killing any deer from a boat.”¹⁶ In Alabama, disposing of scrap tires in an “unauthorized” manner is a felony, punishable by up to ten years in prison, even if no one is harmed.¹⁷ Under the Texas Water Code, “transporting or causing or allowing to be transported for storage, processing, or disposal, any hazardous waste to any location that does not have all required permits” is punishable by up to ten years in prison, even if the waste is not actually stored at the location that does not have all required permits and there is no actual human harm or danger.¹⁸ Notably, Florida—unlike Texas—is governed by sentencing guidelines which prescribe mandatory sentencing ranges. Consequently, a court’s assessment of individual facts is disregarded, and a sanction like probation may not be an option. The differences between Texas and Florida are striking. (*See table below*).

In general, state criminal law continues to expand. There were 1,121 references to “felony” in the 2008 Florida statutes, compared to 886 in 1997. Criminal laws are rarely repealed, but each legislative session creates another opportunity to impose a new offense for the latest perceived environmental problem.

Chapter 376 of the Florida’s statutes is entitled “Pollutant Discharge Prevention and Removal,” and it creates a criminal offense for any discharge that “violates any departmental ‘standard’” and failure “to comply with any statute, rule, order, permit, registration, or certification adopted or issued by the department pursuant to its lawful authority.”¹⁹ This is an extraordinarily broad delegation of power to the agen-

Texas	Prison/Jail Maximum	Florida	Prison/Jail Maximum
Capital felony	Life without parole or death	Capital felony	Life without parole
1st degree felony	99 years	Life felony	Life
2nd degree felony	20 years	1st degree felony	30 years
3rd degree felony	10 years	2nd degree felony	15 years
State jail felony	2 years	3rd degree felony	5 years
Class A misdemeanor	365 days	1st degree misdemeanor	1 year
Class B misdemeanor	180 days	2nd degree misdemeanor	60 days
Class C misdemeanor	None		

cy, which is comprised entirely of unelected (and therefore unaccountable) administrators. Similarly, in Texas, section 7.176 of the Water Code creates a felony punishable by up to five years in prison for “knowingly transporting, treating, storing, disposing of, recycling, causing to be transported, or otherwise handling any used oil within the state in violation of standards or rules for the management of used oil.”²⁰ As new rules are set on a frequent basis, the offense can take on a virtually unlimited number of meanings.

Enforcement Along the Gulf Coast

We have gathered the following information concerning who is responsible for prosecuting environmental crimes in each state:

- **Louisiana.** Environmental offenses are referred by state agencies to local district attorneys.²¹ The Attorney General has the authority to intervene in civil environmental suits and the current Attorney General, is seeking to expand the office’s jurisdiction to cover environmental protection.²²
- **Mississippi.** Environmental offenses may be referred by state agencies to local district attorneys and the Attorney General.²³
- **Alabama.** Both the Attorney General and local prosecutors have authority to initiate environmental crime prosecutions.²⁴
- **Florida.** Environmental crimes are generally prosecuted by the Department of Environmental Protection.²⁵
- **Texas.** Environmental offenses are referred by state agencies to local district attorneys, although the Attorney General provides assistance upon request of a D.A.²⁶

Key Findings about the Scope and Nature of the Environmental Offenses

As detailed above, overcriminalization along the Gulf Coast has become a scourge. Many hunting and fishing violations can land a defendant in prison; few offenses require actual harm as an element (this erosion of *mens rea* is especially problematic in Florida and Mississippi; many offenses are unnecessary or overly broad); statutes often impose disproportionate penalties; and the number of environmental offenses is growing. Statutes often confer virtually unlimited

authority on environmental agencies effectively to create new criminal offenses through their rulemaking without legislative approval.

Overcriminalization along the Gulf Coast is inevitably a significant burden to businesses. Ordinary business activity that is vital for the health of a state—fishing, drilling, hunting, building, etc.—is curtailed. Businesses do not have clear rules under which to operate, and when they do, the rules can be unduly harsh. Ultimately, it is the business’s consumers who suffer. Policymakers in the five Gulf states should consider the following paths to reducing overcriminalization along their coastlines.

Policy Recommendations

Review environmental laws to determine whether criminal sanctions are appropriate

First and foremost, even before they begin the process of tweaking certain laws at the margin, policymakers should review whether certain offenses are properly characterized as “crimes” in the first place. If not, criminal penalties for these offenses should be removed. The remaining offenses, if they are attached to criminal penalties, ought to appear in the state’s penal code.

Strengthen mens rea elements in environmental statutes

Civil and criminal law have always been distinguished by the requirement that a criminal must have a guilty state of mind—*mens rea*—but as explained above, an increasing number of regulatory offenses disregard the *mens rea* requirement because it is inconvenient for a speedy prosecution. Similarly, some statutes require mere criminal negligence rather than intentional, knowing, or reckless conduct for culpability.²⁷ In effect, this is often the same thing as eviscerating the *mens rea* requirement altogether. The American Legislative Exchange Council (ALEC) has enacted model legislation that would apply a strong *mens rea* element to all criminal laws that are silent on this issue.²⁸

This is most needed in Alabama, Florida, Louisiana, and Mississippi, as they are among the 18 states without a default provision found in the Model Penal Code that at least applies the lowest culpable mental state of criminal negligence to offenses which are silent on *mens rea*. Alone among the states dealt with this report, Texas has a default provision in

chapter 6.02 of its penal code that requires a culpable mental state of at least recklessness (one rung above criminal negligence, though less exacting than knowingly or intentionally) when an offense is silent.²⁹ While not as strong as the ALEC model legislation that requires that the defendant act with a conscious objective to engage in the conduct and be fully aware of the circumstances specified in the offense, it nevertheless provides some protection from being convicted for conduct that was entirely accidental. In the other Gulf Coast states, the adoption of a default provision or the addition of a mens rea element to the environmental offenses cataloged herein is vital to provide this type of protection.

Restore the “Rule of Lenity” to environmental offenses

The rule of lenity is a technique of statutory interpretation.³⁰ The rule instructs a court to resolve ambiguities about whether conduct is criminally prohibited in favor of the defendant.³¹ Many, including the U.S. Supreme Court, have explained the rule using a sports analogy: “the tie goes to the defendant.”

Under a long line of our decisions, the tie must go to the defendant. The rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them. This venerable rule not only vindicates the fundamental principle that no citizen should be held accountable for a violation of a statute whose commands are uncertain, or subjected to punishment that is not clearly prescribed. It also places the weight of inertia upon the party that can best induce Congress to speak more clearly and keeps courts from making criminal law in Congress’s stead.³²

This approach to statutory interpretation is almost universally unquestioned in criminal prosecutions—except when it comes to regulatory offenses. “Not only has the rule of lenity been ignored in the context of regulatory offenses, it has also been turned on its head. When an ordinary criminal statute is ambiguous, the courts give the benefit of the doubt to the accused, but when a regulatory provision is ambiguous, the benefit of the doubt is given to the prosecutor.”³³

The rule of lenity is a canon of construction that dates back to English common law. Generally speaking, canons of construction are among the techniques that are taught to law students and which become part of the norms of the prac-

tice of law. They need not be codified in a state code. In the case of the Rule of Lenity, however, a revered principle is eroding, and codification would likely have a salutary effect because it would require that the rule be applied in all prosecutions. Among the five Gulf Coast states, only Florida has a strong, codified rule of lenity, providing that “when the language [of a statute] is susceptible of differing constructions, it shall be construed most favorably to the accused.”³⁴ The rule is not as strongly codified in Alabama, Louisiana, or Texas. In Mississippi, the rule is not codified at all.³⁵

The rule of lenity is consistent with the presumption of innocence and the need for laws to provide warning so that individuals and businesses are put on notice about what conduct is criminal. Perhaps most importantly, enshrining the rule of lenity will also discourage careless and vague drafting by legislators. Just as ALEC has approved model legislation codifying a strong mens rea protection, it has also approved the Rule of Lenity as model legislation.

Conservative legal experts and judges are well known for advocating the need to strictly interpret the law when dealing with constitutional provisions and civil statutes, so as to avoid legislating from the bench by expanding the meaning of a provision beyond what was intended and specified. The rule of lenity is compatible with this notion, as the conviction of a person for conduct that is not clearly prohibited may not only undermine the legitimacy of the law by going beyond the plain meaning and intent of the statute, but it also can result in an individual’s permanent loss of liberty. Conversely, if someone is acquitted because the statute was unclear as to whether the conduct was prohibited and the legislative body did in fact intend to include that conduct, it can revise the statute at its next opportunity.

Eliminate provisions that delegate to agencies the power to create criminal offenses through rulemaking

Many provisions in state and federal statutes authorize regulatory agencies to designate any violation of their rules as a criminal offense. Such provisions transfer the power to take away an individual’s liberty from duly elected officials to unelected administrators. Moreover, as each day brings new agency rules and revisions of existing rules, these broad delegation provisions make it virtually impossible for businesses and individuals to keep track of what constitutes criminal conduct, undermining the fair warning principle.³⁶

Implement “Safe Harbor” Provisions

A “safe harbor” provision is an element in a statute or regulation “that affords protection from liability or penalty” if certain conditions are met.³⁷ Often these conditions require that no harm have occurred as a result of the violation and that the offender take prompt steps to come into compliance with the statute or regulation that has been violated. In the byzantine world of environmental regulation—in which “[it] is impossible to be in 100 percent compliance with all the environmental laws all the time, and a candid EPA manager will admit as much”—safe harbor provisions are particularly sensible.³⁸

Texas law provides for a unique safe harbor statute that allows the Texas Commission on Environmental Quality (TCEQ) to veto certain environmental prosecutions being pursued by a local district attorney if the offender comes into compliance.³⁹ This provision ensures that regulated businesses which rectify the problem, pay administrative fees, and satisfy the state agency, do not then face duplicative local prosecutions. The safe harbor provision was enacted in 2005 after the TCEQ found that excessive prosecutions launched by the Harris County (Houston) district attorney were undermining its regulatory framework and constructive efforts to bring individuals and businesses into compliance.

No other Gulf State appears to have a safe harbor provision similar to Texas’s—but each of the states would surely benefit from one, which can be appropriately limited to unintentional conduct that has not harmed human health. In these situations, little if anything is lost by giving the opportunity for the person or business to come into compliance. Even if one views deterrence as a legitimate function of criminal law, deterrence has little impact in such situations when the conduct was unintentional to begin with.

Conclusion

A prominent attorney has suggested that due to relentless overcriminalization, the average American may commit approximately three felonies a day.⁴⁰ For a business owner along the Gulf Coast of Texas, Louisiana, Mississippi, Alabama, and Florida, that figure is likely two or three times as high. Dozens—and in some cases, hundreds—of activities that one could not possibly know to be criminal put business owners at significant risk. The risk is not just of monetary loss, but of actual prison time.

The five Gulf Coast states mentioned in this report can seize a significant opportunity for leadership. By reforming their laws to conform better to traditional legal norms, they will set an example that can be followed by states along the East and West Coast suffering from similar deficiencies. Perhaps most importantly, they may set an example that can be followed by the federal government, which has made notorious overcriminalization headlines—such as imprisoning a lobster fisherman for six years for harvesting lobster tails improperly.

Although this report has focused primarily on the economic ramifications of overcriminalization, the most important reason for reform is simply that overcriminalization is a dereliction of the government’s responsibility to secure liberty. Rather than allowing business owners along the Gulf Coast to maximize their liberty and opportunity up to the point that they do not harm others, our laws far too often create confusion and threats by reaching far beyond the goal of punishing those who engage in blameworthy conduct that causes real harm. A few modest reforms—proper *mens rea* protections, the rule of lenity, keeping power in the hands of elected representatives instead of bureaucrats, and a safe harbor provision—would do a great deal to solve that problem. ★

Appendix A: A Small, but Notorious, Sampling of Recent Prosecutions

We are continuing to identify actual prosecutions, which is challenging because, if a case is not appealed, the only official records of such prosecutions may be those maintained in the offices of the local district attorney or court. The most common type of prosecution in all states appears to involve the release of waste without proper permits or in excess of statutory or regulatory limits. The following are summaries of some noteworthy cases that we have identified.

Alabama

The Alabama Department of Environmental Management reports none of its own environmental prosecutions, but states that it has made greater progress in remedying pollution of all kinds through education and civil enforcement efforts, which resulted in the collection of \$1.75 million in fines in 2007. This may provide an example of effective enforcement without reliance on criminal prosecution.

Louisiana

1. Burt Rico⁴¹

Louisiana Department of Wildlife and Fisheries Enforcement Division agents discovered Burt Rico of Moreauville hunting with the aid of a deer feeder equipped with lights on Dec. 15, 2005. Agents cited him for hunting without a basic and big game hunting license, failure to wear hunter orange, and hunting deer with illegal methods and during illegal hours with an artificial light. Rico pleaded no contest to hunting deer illegally at night with a .22 caliber rifle, and in addition to a fine of \$1,051, he was sentenced to sixty days in the Avoyelles Parish Jail.

2. Marios Papadopoulos⁴²

In April 2008, Papadopoulos was arrested in Ouachita Parish and charged with exceeding water discharge permit limits, submitting false documents pertaining to the permits and negligent violation by exceeding permitted discharge limits. Papadopoulos owns American Water and Wastewater Management, which operates numerous wastewater treatment plants in northern Louisiana. On May 26, 2009, Papadopoulos entered a no contest plea to two misdemeanor violations, and the company pleaded guilty to one felony count of violating its Clean Water Act permit and one felony count of submitting a false statement concerning its sewer plant. Although no actual harm is alleged, American Water and Waste Water Management, Inc., was sentenced to pay a criminal fine of \$55,000, plus court costs and an additional

\$20,000 in costs of investigation and environmental projects. The company was placed on probation for five years by the court. Papadopoulos was also sentenced to twenty-four months of probation after pleading no contest on charges of violating the Louisiana Clean Water Act. The case was handled by the Louisiana Department of Environmental Quality Criminal Investigation Division.

3. Terry Pierre LeBlanc⁴³

In 2004, LeBlanc was sentenced to 21 months in federal prison for operating a waste disposal facility on a wetland in violation of environmental laws. The case was jointly pursued by the Louisiana Department of Environmental Quality and the U.S. Environmental Protection Agency (EPA).

4. John Charles Mazoch⁴⁴

In August 2008, Mazoch, the owner of a Beaumont, Texas welding supply company, and two of his employees were convicted of conspiracy to violate the Resource Conservation and Recovery Act in a case jointly pursued by the Louisiana Department of Environmental Quality and the EPA. Mazoch, the owner of Coastal Welding Supply, was sentenced to 8 months in federal prison, \$1.2 million in fines and restitution, 8 months of home confinement, and 3 years of supervised release. His two employees were sentenced to six months of home confinement, probation, fines and 200 hours of community service. The joint state and federal investigation found 555 gas cylinders containing hazardous industrial gases were improperly disposed of.

5. Kevin L. Paille⁴⁵

A Livingston Parish man was sentenced on Jan. 17, 2012 in Livingston Parish Court for hunting deer during illegal hours, contributing to the delinquency of a juvenile, and resisting an officer. Kevin L. Paille, 43, of Springfield, was ordered to pay \$1,388 in fees and fines, complete two years of supervised probation and refrain from owning or possessing a firearm for two years. Paille pleaded guilty to all three charges. Louisiana Department of Wildlife and Fisheries Enforcement Division agents cited Paille in January of 2011 after receiving a complaint about two people on foot hunting deer at night in Livingston Parish. Agents went to the area and located the subjects, one of which was a juvenile. Paille was issued citations for the three offenses and booked into the Livingston Parish Jail.

Mississippi

The Mississippi Department of Environmental Quality and Attorney General do not report any cases of environmental prosecutions, but the Attorney General has filed numerous civil actions regarding various alleged violations relating to wildlife, marine habitat, and agricultural activities.

Florida

1. *Jimmie Lee Levenson*⁴⁶

In 2000, Florida Department of Environmental Protection (DEP) Division of Law Enforcement special agents arrested Jimmie Lee Levenson of Avon Park for illegally dumping used waste oil. Levenson, an auto repair technician who worked out of his home, was booked into the Highlands County jail and charged with two felony violations and one misdemeanor. The charges included: (1) littering for commercial purpose; which is a 3rd degree felony punishable by up to five years in prison and/or up to a \$5,000 fine; (2) willful pollution, which is a 3rd degree felony punishable by up to five years in prison and/or up to a \$50,000 fine; and (3) pollutant discharge, a 1st degree misdemeanor punishable by up to one year in prison and/or up to a \$25,000 fine.

2. *Luis Reyes*⁴⁷

In 2007, Florida DEP law enforcement agents charged dry cleaning business owner Luis Reyes of Tampa for allegedly releasing excessive concentrations of chemicals while not maintaining proper records. Reyes was charged with improper storage of hazardous waste, a third-degree felony punishable by up to five years in prison and a \$50,000 fine, and improper disposal of hazardous waste, a third-degree felony punishable by up to five years in prison and a \$50,000 fine.

3. *Harlan Pierce*⁴⁸

After pleading no contest to a felony littering charge, Harlan Pierce of Tequesta was sentenced on February 9, 2009 to serve two days in the Martin County Jail, two years probation, 100 hours of community service and to pay more than \$6,000 to cover the cost of the investigation that led to his arrest in June of 2008. Florida DEP law enforcement agents arrested Pierce on charges of violating the Florida Litter Law by illegally dumping a motorized boat in a pond located at the Boy Scouts of America Camp Tahah Keetah in Tequesta, where Pierce worked as a full-time assistant ranger.

4. *Harper's Seafood, Inc.*⁴⁹

On December 20, 2011, Junior Wayne Harper, the owner and chief executive of Harpers Seafood Inc., a wholesale seafood business located in Thomasville, Georgia, and Byron James Puckett, the company's vice president, pleaded guilty to a conspiracy to purchase in interstate commerce fish which they knew were taken and sold in violation of Florida laws and regulations and the federal Lacey Act. Harper's Seafood had illegally purchased approximately \$100,000 of fish from 48 fishermen who did not have commercial fishing licenses as required under Florida law. After it became known in the fishing industry that another seafood dealer was being investigated for similar violations, Harper purchased more fish for approximately \$40,000 from the unlicensed fisherman through his personal account. Each felony count to which the defendants pleaded guilty carried a maximum possible fine of \$250,000 or five years imprisonment, or both, a period of supervised release of up to three years, and a \$100 mandatory assessment. Harper was sentenced to three years of probation and a \$50,000 fine.

5. *Cypress Gulf Development, Inc.*⁵⁰

In October 2006, the Florida DEP's Bureau of Emergency Response was called to investigate a possible environmental crime that had taken place in Tampa's Ybor City area. Investigators found that an excessive amount of diesel fuel had been poured into a storm drain. A city worker had photographed a man letting fuel drain from a tank into the storm drain. The suspect was identified as an employee of Cypress Gulf Development, Inc. After talking to the suspect and his supervisor, DEP, USCG and the EPA agreed that federal charges should be filed, and the case became a collective effort. Federal charges were sought by the U.S. Attorney's Office against Cypress Gulf Development and employees Willie Styers and Joey Driggers.

Final sentencing was held in Federal Court in March 2008. Cypress Gulf Development pleaded guilty to a misdemeanor violation of the Clean Water Act. The company was fined \$5,000. In addition, the company paid more than \$21,000 to clean up the diesel fuel in McKay Bay Preserve, a \$10,301 fine to the Florida Department of Environmental Protection and a \$3,000 fine to the USCG. Driggers pleaded guilty to a felony violation of Unlawful Discharge of Pollutant in a Navigable Waterway of the United States under the Clean Water Act. Driggers was sentenced to 15 months imprisonment.

Styers pleaded guilty to a misdemeanor charge of Negligent Discharge, and he was sentenced to one year of probation, a \$2,500 fine and 200 hours of community service.

Texas

1. *North American Waste Assistance*⁵¹

On February 16, 2007, Dennis Rodriguez of El Paso County was found guilty of one count of making a false statement or representation on a manifest and two counts of the illegal transportation of hazardous waste, a petroleum-based concrete curing compound. Rodriguez was ordered to serve five months in prison, five months home confinement, two years of probation after his release, and to pay a \$10,000 fine.

2. *Jarrod Shane Harrison*⁵²

On March 16, 2007, Harrison pleaded guilty to one count of illegal dumping in violation of section 365.012 of the Texas Health & Safety Code. Harrison was ordered to serve 12 months in jail. The charges involved improper disposal of demolition debris in Parker County.

3. *William Scott Stevens*⁵³

On September 22, 2005, William Scott Stevens of Travis County pleaded guilty to violating conditions of the probation he received for the illegal disposal of a hazardous waste in violation of section 7.162 of the Texas Water Code. Stevens was sentenced to two years in prison.

4. *Triologic, Inc.*⁵⁴

Michelle Nauman, president, and William Scott Stevens, vice-president, of Triologic, Inc., an environmental consulting company, pleaded guilty to two counts of illegal disposal of hazardous waste and knowing endangerment, one count of the illegal transportation of hazardous waste, and one count of securing execution of a document by deception. For these December 2002 convictions, Stevens received a sentence of 120 days in jail, 10 years probation, \$40,000 in restitution and 400 hours of community service. Nauman was sentenced to 90 days in jail, 10 years probation, \$40,000 in restitution and 400 hours of community service.

5. *Simply Aquatics Inc.*⁵⁵

On August 8 and 12, 2008 Lyle and Kevin Hester, owners of Simply Aquatics, Inc., pleaded guilty to the illegal disposal of hazardous waste. On May 27, 2009 Kevin Wayne Hester, 34, was sentenced to twenty months in federal prison. His

father, Lyle Hester, 62, was sentenced to fourteen months in federal prison. The Hesters were ordered by the federal district court to jointly pay restitution in the amount of \$391,442.57.

The Hesters buried numerous chlorine gas cylinders on the owners' property. The buried gas cylinders were located and excavated and removed from the site by an EPA contractor. A total of 113 gas cylinders were removed from the site. Thirty-three of the cylinders were determined to be under high pressure and contained a combined total of 952 pounds of chlorine. The case was investigated by the EPA Criminal Investigation Division and the TCEQ Environmental Crimes Unit.

6. *Reginald Dane Parker*⁵⁶

In November 2005, Parker pleaded guilty to one count of illegal disposal of a hazardous waste in violation of section 7.162 of the Texas Water Code. He was ordered to serve six years in prison, one of the longest sentences for an environmental crime. It appears that this may be because the waste was generated by burning the insulation off of copper wire, which was stolen.

7. *Best Rate Septic*⁵⁷

In December 2005, Robert Henshaw pleaded guilty to one count of the unauthorized discharge of a pollutant in violation of section 7.145 of the Texas Water Code. The case involved the discharge of fluids from a tanker truck in Tarrant County, which includes Fort Worth. Citing his prior convictions, the court sentenced Henshaw to five years in prison. His co-defendant William Leach was given two years probation and a \$500 fine.

8. *Israel Martinez, J&K*

In June 2006, Martinez of the company J&K was found guilty of one count an unauthorized discharge of a pollutant in violation of section 7.145 of the Texas Water Code, which consisted of the release of oil and grease into a storm drain in Dallas. Martinez was ordered to serve 25 days confinement in the Dallas County Jail and to pay a \$1,000 fine.

9. *OSU Charles Ray Smith*⁵⁸

On August 10, 2011, Charles Ray Smith pleaded guilty to one count of Unauthorized Discharge, in violation of section 7.145 of the Texas Water Code. Smith was sentenced to 4 years probation, deferred adjudication and ordered to pay

a fine of \$10,000, with \$9,000 of the fine deferred. An investigation conducted by the TCEQ Environmental Crimes Unit and Texas Parks and Wildlife determined that Smith discharged salt water from a drilling operation into water in the state.

10. *R&K Fabricating, Inc.*⁵⁹

Ricardo Gonzales, the president of R&K Fabricating, Inc., pleaded guilty to two charges of intentionally and knowingly violating the Texas Clean Air Act. Gonzalez was sentenced to one year of probation, and was ordered to pay a \$25,000 fine and cease operations until his facility came into compliance with TCEQ rules. In the second charge, Gonzales received an additional \$50,000 fine. R&K Fabricating also pleaded guilty and was ordered to pay a \$175,000 fine.

11. *Ricky Pruitt*⁶⁰

On January 25, 2011 Ricky Pruitt was found to be in violation of conditions of his probation, and his probation was revoked. Pruitt was ordered to serve two years in prison. Pruitt was originally placed on probation on July 9, 1999 as a result of his conviction related to providing falsified insurance documentation to the TCEQ that was required under TCEQ hazardous waste rules.

12. *A & F Industrial Services*⁶¹

On April 13, 2011, Jacob Tom Ojeda pleaded guilty to one count of Conspiracy, 18 USC 371, and to one count of Knowing Discharge of a Pollutant and Falsification of Records, 18 USC 1519. Ojeda was sentenced in the Western District of Texas to thirteen months imprisonment, three years supervised release, a \$100 special assessment, and \$11,300 in restitution as applied to Count 1 of the indictment. He was also sentenced to thirteen months of imprisonment, two years of supervised release, and a \$100 special assessment as applied to Count 4 of the Indictment. Count 1 and Count 4 are to run concurrently. The guilty pleas resulted from Ojeda's unpermitted discharge into the sewers of San Antonio, which was also unpermitted disposal

of waste to the waters of the state of Texas and the waters of the U.S. The investigation was conducted jointly by the EPA-CID and the TCEQ ECU.

13. *Capitol City Disposal, Inc.*⁶²

On January 26, 2011, Capitol City Disposal, Inc. pleaded guilty to 26 counts of felony illegal dumping in violation of section 365.012 of the Texas Health & Safety Code. On April 14, 2011, Juan Deanda pleaded guilty to another 26 counts of felony illegal dumping in violation of section 365.012. Capitol City Disposal was ordered to pay a \$200,000 fine. Juan Deanda was sentenced to three years probation, ordered to pay a \$100,000 fine, and ordered to restore the property where the illegal dumping occurred to its original condition within 60 days.

14. *Daniel Sloan/ Emissions Reductions Specialists*⁶³

On November 19, 2010, Daniel J. Sloan, owner and President of Emissions Reduction Specialists, pleaded guilty to two counts of Securing Execution of Document by Deception, a 2nd Degree Felony. In addition, Emission Reduction Specialists, pleaded guilty to four 1st Degree Felony counts of Securing Execution of Document by Deception. Sloan was sentenced to 10 years of probation, was ordered to pay \$90,000 in restitution and received a \$10,000 fine.

15. *Intracoastal Environmental Services*⁶⁴

An Orange County business owner was sentenced to two years probation and received a \$60,000 fine after pleading guilty to five counts of attempted tampering with or fabricating physical evidence, and one count of tampering with a government record. Mohammad Sultan, the owner and operator of O.J.'s Mobil Mart, admitted to submitting falsified documents to the TCEQ in response to a compliance inspection conducted by the agency's Beaumont regional office. Sultan submitted the falsified documents in an attempt to show that O.J.'s Mobil Mart was in compliance with the TCEQ, when in fact the gas station was in violation of TCEQ petroleum storage tank rules.

[For a complete list of environmental crimes in Texas, see Appendix B.](#)

[For a complete list of environmental crimes in Louisiana, see Appendix C.](#)

[For a complete list of environmental crimes in Mississippi, see Appendix D.](#)

[For a complete list of environmental crimes in Alabama, see Appendix E.](#)

[For a complete list of environmental crimes in Florida, see Appendix F.](#)

- ¹ The authors would like to thank Erin Blauvelt, Cody Smith, and especially Timothy Cook for valuable research assistance.
- ² Adam Liptak, "Right and Left Join Forces on Criminal Justice," *New York Times* (23 Nov. 2009).
- ³ Testimony of Stephen F. Smith, Hearing on Reining In Overcriminalization: Assessing the Problems, Proposing Solutions before the Subcomm. on Crime, Terrorism, and Homeland Security of the House Comm. on the Judiciary, 112th Cong. 1 (28 Sept. 2010).
- ⁴ *United States v. Goyal*, 629 F.3d 912, 28-29 (9th Cir. 2010).
- ⁵ Justice Antonin Scalia addressed this issue eloquently in a 2011 opinion: "It should be no surprise that as the volume [of criminal laws] increases, so do the number of imprecise laws. And no surprise that our indulgence of imprecisions that violate the Constitution encourages imprecisions that violate the Constitution. Fuzzy, leave-the-details-to-be-sorted-out-by-the-courts legislation is attractive to the Congressman who wants credit for addressing a national problem but does not have the time (or perhaps the votes) to grapple with the nittygritty. In the field of criminal law, at least, it is time to call a halt." *Sykes v. United States*, 131 S. Ct. 2267, 2288 (2011) (Scalia, J., dissenting).
- ⁶ Timothy Lynch, "Polluting Our Principles" 45-47 in *Go Directly to Jail: The Criminalization of Almost Everything*, ed. Gene Healy, Cato Institute (Dec. 2004).
- ⁷ During the debate, Governor Romney said the following:
 "[T]he president cut in half the number of licenses and permits for drilling on federal lands and in federal waters. So where'd the increase [in drilling] come from? Well, a lot of it came from the Bakken Range in North Dakota. What was his participation there? The administration brought a criminal action against the people drilling up there for oil, this massive new resource we have. And what was the cost? Twenty or 25 birds were killed, and they brought out a migratory bird act to go after them on a criminal basis."
 Full Transcript of the Second Presidential Debate, *New York Times*, Oct. 16, 2012 (emphasis added). This was a reference to *U.S. v. Brigham Oil & Gas*. No. 4-11-po-05 (D.N.D. Jan. 17, 2012). In granting the defendant's motion to dismiss in *Brigham*, the court's language suggested serious concerns about environmental overcriminalization:
 "If the Migratory Bird Treaty Act...were read to prohibit any conduct that proximately results in the death of a migratory bird, then many everyday activities become unlawful—and subject to criminal sanctions—when they cause the death of pigeons, starlings and other common birds. For example, ordinary land uses which may cause bird deaths include cutting brush and trees, and planting and harvesting crops. In addition, many ordinary activities such as driving a vehicle, owning a building with windows, or owning a cat, inevitably cause migratory bird deaths."
- ⁸ See e.g., *Overcriminalizing the Empire State*; Marc A. Levin, *Not Just for Criminals: Overcriminalization in the Lone Star State*, Texas Public Policy Foundation (Apr. 2005).
- ⁹ This does not necessarily include every regulation that these agencies may have put in place, however, because these regulations, which change frequently, would not appear in state statutory codes, and they would be virtually impossible to count.
- ¹⁰ TEX. PENAL CODE ANN. § 6-02(b)-(c) (Vernon 2012); ALA. CODE §13A-2-1 to -3 (2012).
- ¹¹ It could be argued that these states do in fact have mens rea requirement because under federal law, due process requires an intent element to be implied, particularly if incarceration is possible. See, e.g., Amicus Brief of the Texas Public Policy Foundation in *Shelton v. Sec'y, Dep't of Corrs.*, No. 11-13515-GG (11th Cir. 2011).
- ¹² LA. REV. STAT. ANN. § 14-10 to -12 (2012).
- ¹³ LA. REV. STAT. ANN. § 56:18, 109, 110, 111, 316, 431.
- ¹⁴ FLA. STAT. § 597.0041 (2012).
- ¹⁵ TEX. ADMIN. CODE ANN. § 7.34 (Vernon 2012).
- ¹⁶ MISS. CODE ANN. § 49-7-45 (2012).
- ¹⁷ "Any person who intentionally, knowingly, recklessly, or with criminal negligence: (4) Engages in unauthorized disposal of scrap tires in violation of this chapter, upon conviction, shall be subject to a term of imprisonment of not more than 10 years nor less than one year and one day and in addition, may be fined not more than ten thousand dollars (\$10,000) for each violation." CODE OF ALA. § 22-40A-19 (2012).
- ¹⁸ TEX. WATER CODE ANN. § 7.187 (Vernon 2012).
- ¹⁹ FLA. STAT. § 376.302(1)(b) (2012).
- ²⁰ TEX. WATER CODE ANN. § 7.176 (Vernon 2012).
- ²¹ Louisiana.gov, Environmental Crimes Investigation (last visited Sept. 6, 2012).
- ²² John S. Baker, Jr., "Mens Rea and State Crimes," Federalist Society for Law & Public Policy Studies (July 2012).
- ²³ Florida House of Representatives, Prosecution of Environmental Crimes by State (last visited Oct. 1, 2012).
- ²⁴ *Ibid.*
- ²⁵ *Ibid.*; see also Florida Department of Environmental Protection, Compliance and Enforcement (last visited Oct. 1, 2012).
- ²⁶ Texas Commission on Environmental Quality, *The Enforcement Process: From Violations to Actions* (last visited Sept. 6, 2012); see also The Attorney General of Texas, *What the Attorney General Can Do For You* (last visited Sept. 6, 2012) (stating the Attorney General's Office "can assist local prosecutors in criminal matters, but only at their request").
- ²⁷ "[T]o ensure that only persons who are truly culpable can be convicted and punished, the definitions of malum prohibitum offenses must include protective mens rea requirements. Unfortunately, many of the thousands of malum prohibitum offenses in federal law do not...Over 57 percent of the offenses considered by the 109th Congress contained inadequate mens rea requirements, putting the innocent at risk of criminal punishment." Brian Walsh and Tiffany Joslyn, *Without Intent: How Congress Is Eroding the Criminal Intent Requirement in Federal Law* (Heritage Foundation and National Association of Criminal Defense Lawyers, May 2010), 3-4. The arguments made by Walsh and Joslyn focus on federal overcriminalization, but may reasonably extend to state overcriminalization too. Criminalizing ordinary business conduct is not sound public policy merely because the law is enacted by a state legislature or state agency rather than by Congress or a federal agency.
- ²⁸ *Ibid.* 29-30.
- ²⁹ TEX. PEN. CODE ANN. § 6.02 (Vernon 2012).
- ³⁰ Antonin Scalia & Brian Garner, *Reading Law: The Interpretation of Legal Texts* § 49 (2012).
- ³¹ Dan Levin and Nathaniel Stewart, *Whither the Rule of Lenity?*

- ³² *United States v. Santos*, 128 S. Ct. 2020, 2025 (2008) (citations omitted).
- ³³ Timothy Lynch, "Polluting Our Principles" *Go Directly to Jail: The Criminalization of Almost Everything*, ed. Gene Healy (Cato Institute December 2004) (citing *Boycott Motor Lines v. United States*, 342 U.S. 337, 340 (1952) ("[It is] not unfair to require that one who deliberately goes perilously close to an area of proscribed conduct shall take the risk that he may cross the line.")).
- ³⁴ FLA. STAT. § 775.021(1).
- ³⁵ See Roger J. Marzulla, "Lenity: An Essential Rule for Interpreting Environmental Crimes Statutes" 13 *Engage* 3 (Oct. 2012) (providing the status of the rule of lenity throughout the United States in the chart "The Rule of Lenity by Jurisdiction").
- ³⁶ See Erik Luna, *The Overcriminalization Phenomenon*, 54 AM U. L. REV. 703, 708 (2005) ("The impact of [overcriminalization] has been exacerbated by the rise of the modern administrative state, erecting a vast legal labyrinth buttressed by criminal penalties in areas ranging from environmental protection and securities regulation to product and workplace safety. Many public welfare offenses, such as submitting an incorrect report or serving in a managerial role when an employee violates agency regulations, expose otherwise law-abiding people to criminal sanctions.") (citations omitted).
- ³⁷ *Black's Law Dictionary* at 1336 (7th ed. 2000).
- ³⁸ Lynch, "Polluting Our Principles" 66, n. 12 (citing Kenneth A. Grady and Craig H. Zimmerman, "Preparing for the Onslaught: Search Warrants and Inspections in Environmental Criminal Cases," *Natural Resources & Environment* 8 (1994): 7). According to Lynch, "[a]n environmental law treatise published in 1994 acknowledges that 'it is virtually impossible for a major company (or government facility) to be in complete compliance with all regulatory requirements. [And yet] virtually every instance of noncompliance can be readily translated into a criminal violation. Environmental criminal prosecutions are increasingly the result of bad luck, not of blameworthy choice.'" *Ibid.* at 47 (citing Christopher Harris, Raymond C. Marshall, and Patrick O. Cavanaugh, *Environmental Crimes* (Colorado Springs: Shepard's/McGraw-Hill, 1994), p. INT-8).
- ³⁹ See TEX. WATER CODE ANN. § 7.203 (Vernon 2012).
- ⁴⁰ Harvey Silverglate, *Three Felonies A Day: How the Feds Target the Innocent* (Encounter Books, 2011).
- ⁴¹ Louisiana Wildlife Agents Association, "Illegal Night Hunter Sentenced to Jail" (Jan. 2007).
- ⁴² Press Release, State of Louisiana Department of Environment Quality, "Ouachita Wastewater Company and Owner Sentenced for Environmental Crimes" (23 June 2009).
- ⁴³ Press Release, State of Louisiana Department of Environmental Quality, "Judge Sentences Violator to 21 Months in Prison" (May 2004).
- ⁴⁴ Press Release, State of Louisiana Department of Environment Quality, "Beaumont welding supply executive, others, sentenced for illegal disposal of hazardous waste" (29 Aug. 2008).
- ⁴⁵ Press Release, State of Louisiana Department of Wildlife and Fisheries, "Livingston Parish Man Sentenced for Hunting Violations" (23 Jan. 2012).
- ⁴⁶ Press Release, Florida Department of Environmental Protection, "Avon Park Man Arrested For Felony Commercial Dumping Of Waste Oil" (2 Nov. 2000).
- ⁴⁷ Ian P. Murphy, "Florida Cleaner Charged with Hazwaste Violations," *American Dry Cleaner* (6 June 2007).
- ⁴⁸ Paul Ivce, "Boy Scouts employee gets 2 days in Martin County Jail," *Florida's Treasure Coast and Palm Beaches* (9 Feb. 2009).
- ⁴⁹ Press Release, National Oceanic and Atmospheric Administration Office of Law Enforcement, "Seafood Dealers and Fishermen Sentenced" (31 May 2012).
- ⁵⁰ Press Release, Department of Justice United States Attorney Robert E. O'Neill, Middle District of Florida, "Tampa Company and Two Employees Sentenced for Dumping Diesel Fuel Into Storm Drain" (18 Mar. 2008).
- ⁵¹ TEX. COMM'N ON ENVTL. QUALITY, Annual Enforcement Report: Fiscal Year 2011, at Appendix 23 (Nov. 2011).
- ⁵² *Ibid.*
- ⁵³ *Ibid.* at 24.
- ⁵⁴ TEX. ENVTL ENFORCEMENT TASK FORCE, REPORT TO THE TASK FORCE MEMBER AGENCIES, FISCAL YEARS 1991-2001 (Dec. 2001).
- ⁵⁵ TEX. COMM'N ON ENVTL. QUALITY, ANNUAL ENFORCEMENT REPORT: FISCAL YEAR 2011, at Appendix 22 (Nov. 2011).
- ⁵⁶ *Ibid.* at Appendix 24.
- ⁵⁷ *Ibid.*
- ⁵⁸ *Ibid.* at Appendix 19.
- ⁵⁹ *Ibid.*
- ⁶⁰ *Ibid.*
- ⁶¹ *Ibid.*
- ⁶² *Ibid.*
- ⁶³ *Ibid.*
- ⁶⁴ Jessica Lipscomb, "Probation and \$60,000 Fine for Orange County Gas Station Owner," *Beaumont Enterprise* (18 Aug. 2011).

