

Analyze Before You Criminalize: A Checklist for Legislators

Should It Be Against State Law?

- Should the conduct be prohibited at all or will the free market provide a sufficient disincentive?
- Should the conduct be regulated by state government, or might it be better addressed by local government entities that can tailor policies to their own communities?
- Is the conduct, to the extent it is harmful, already prohibited by existing laws, such as laws against fraud and disorderly conduct?

Should It Be a Crime?

- Is there an individual victim? Does the conduct present a threat to public safety? If not, civil penalties may be more appropriate.
- Is the conduct inherently wrong and therefore properly prohibited regardless of its benefits in some circumstances? If not, criminal penalties may be too rigid of an enforcement mechanism.
- Should enforcement be dependent entirely on the discretion of local prosecutors? Would civil penalties, forfeiture of state licenses and permits, a private cause of action, or other remedies be equally or more effective in providing redress to the victim and discouraging the conduct?
- If the conduct is part of a business activity, does criminalization unfairly place the burden of personal criminal liability on employees for acts committed within the scope of employment?
- How much will it cost state and local taxpayers to enforce the law, including the costs of prosecution, operating courts, incarceration, and indigent legal defense if jail time is possible?

If It's a Crime, Should There Be a State of Mind Requirement?

- Should a culpable state of mind be an element of the offense? Unless the conduct at issue involves an inherently dangerous item such as a grenade or toxic chemical, the U.S. Supreme Court has suggested that imposing strict criminal liability may violate due process.
- Is criminal negligence sufficient, or is a higher culpable mental state, such as knowingly and willfully, warranted? Consider factors such as whether the penalty would be fairly applied to a mistake made as the result of negligence and the severity of the punishment.

If It's a Crime, What Should the Punishment Be?

- Does the individual pose a danger to society? If not, incarceration is likely an unnecessary expense. Probation, fines, restitution, and community service may provide a sufficient deterrent.
- Should the offense be classified as a misdemeanor or a felony? Felony convictions are more likely to permanently interfere with the offender's ability to obtain employment, occupational licenses, and housing, undermining efforts to promote community reintegration.
- Should there be a mechanism for alternative dispute resolution, such as victim-offender mediation or, if a regulatory offense with no victim, a requirement that the state first send a cease and desist notice and provide a safe harbor in which to come into compliance before prosecution?

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