

## CENTER FOR EFFECTIVE JUSTICE

### 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?

#### Should It Be A Crime?

- 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?

#### 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 or 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 may be an unnecessary expense for the state. Probation, fines, and restitution may provide a sufficient deterrent to prevent recidivism.
- 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 and housing, undermining efforts to promote community reintegration.