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The Extent of America's Overcriminalization Problem

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Abstract

The Heritage Foundation and others have criticized the modern-day phenomenon known as “overcriminalization,” the neologism given to the overuse and misuse of the criminal law. While some claim that the critics of overcriminalization are making a mountain out of a molehill, numerous respected individuals and organizations believe that overcriminalization is sufficiently widespread that it merits Congress’s attention and remediation. Indeed, overcriminalization undeniably is a serious problem in every case in which it occurs because, as the Rev. Martin Luther King, Jr., wrote in his famous letter from the Birmingham jail, “Injustice anywhere is a threat to justice everywhere.” Congress should adopt reasonable remedies to prevent injustices from reoccurring.

The Heritage Foundation and others have criticized the modern-day phenomenon known as “overcriminalization,”¹ the neologism given to the overuse and misuse of the criminal law.² Those criticisms have taken several forms: Legislatures pass too many statutes creating crimes (especially federal offenses); legislatures too frequently empower administrative agencies to define crimes or otherwise “fill in the blanks” in laws that can be enforced through the criminal process; legislatures too often define offenses with inadequate *mens rea* or scienter (“guilty mind”) requirements; and legislatures too often increase penalties for existing crimes simply to make it look as though they have done something to reduce crime.³

Some claim that the critics of overcriminalization are making a mountain out of a molehill.⁴ The criminal justice system has expand-

KEY POINTS

- “Overcriminalization” is the neologism given to the overuse and misuse of the criminal law.
- Numerous respected individuals and organizations believe that overcriminalization is sufficiently widespread that it merits Congress’s attention and remediation.
- It is also clear that overcriminalization has occurred in particular cases because of flaws in criminal statutes.
- Today, the criminal law often is used not as a necessary substitute for the tort system or as a means of enforcing traditional notions of blameworthy conduct, but as a means of protecting some favored interests over others.
- Overcriminalization undeniably is a serious problem in every case in which it occurs because, as the Rev. Martin Luther King, Jr. wrote in his famous letter from the Birmingham jail, “Injustice anywhere is a threat to justice everywhere.”
- Congress should get to the bottom of this problem and adopt reasonable remedies to prevent injustices from reoccurring.

This paper, in its entirety, can be found at <http://report.heritage.org/lm121>

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ed its reach over time as new social and economic concerns justify new forms of regulation and new justifications emerge for using the criminal process to enforce different regulatory regimes. That expansion creates the possibility that certain individual prosecutions may be unjustified. If the number of instances of overuse or abuse of the criminal process is small, however, the problem may not be as large a concern as critics of overcriminalization claim.

At first blush, statistics seem to support the argument that critics of overcriminalization are overstating the extent of the problem. More than 90 percent of recent federal prosecutions were for crimes not subject to any overcriminalization criticism. The U.S. Sentencing Commission noted that in 2012, 32.2 percent of all federal criminal prosecutions were for immigration law violations, 30.2 percent were for controlled substance crimes, 10.5 percent were for fraud, 9.8 percent were for firearms violations, 3.5 percent were for non-fraud white-collar crimes, 2.4 percent were for child pornography offenses, and 1.7 percent were for larceny cases.⁵ The “Other” category is just 9.7 percent and includes traditional crimes such as assaults on federal officials. The result, the argument concludes, is that there is little room left for an overreaching federal criminal justice system.

That argument, while facially reasonable, is unpersuasive.

The Only Party That Could Know the Full Extent of Overcriminalization—the U.S. Justice Department—Cannot Be Expected to Collect Examples of Its Own Unjust Prosecutions

The extent of the problem is difficult to determine and may be worse and more insidious than some might think. No agency in the legislative, executive, or judicial branches collects statistics about overcriminalization. Neither the U.S. Sentencing Commission nor the Federal Judicial Conference has the charter to identify all cases of unjust prosecutions, and the individual members of the federal bench lack the ability to collect such data on a nationwide basis.

The U.S. Department of Justice, of course, has no interest in identifying instances in which it or one of the U.S. Attorney’s Offices should not have brought criminal charges against someone. This is true for two simple reasons: (1) Many overzealous prosecutors might not acknowledge or even recog-

nize instances of overcriminalization, and (2) even if they did, they might not highlight them because doing so would embarrass the Attorney General and individual U.S. Attorneys who had the authority to prevent any such prosecutions.⁶

Notable Examples of Injustices

There are several prominent examples of the misuse of the criminal justice system.

- Abner Schoenwetter, for example, spent six years in a federal prison for importing Honduran lobsters that were packed in plastic—as opposed to cardboard—boxes and for supposedly violating a Honduran regulation (later declared invalid by the Honduran Attorney General) that made his lobsters marginally too small.
- The federal government pursued a criminal investigation of the Gibson Guitar Company for importing wood for guitar frets that allegedly was exported illegally from India and Madagascar in violation of those nations’ laws—which, in the case of Madagascar, were not even written in English. In other words, the federal government claimed that Gibson Guitar was guilty of a *federal* crime in *this* country because it did not know the law of a *foreign nation*.
- Lawrence Lewis, a building engineer, wound up charged with a felony and pleaded guilty to a misdemeanor for following the procedure he had been instructed to use to clean up toilet overflows at a military retirement home that, totally unbeknownst to him, wound up shunting the refuse into the Potomac River.⁷

Prosecutions such as these deprive the criminal law of the respect it needs to secure public support. That is particularly true if, as social science suggests, people generally follow the law if they respect it, not because they fear it.⁸

Each Injustice Matters

The argument that the concern with overcriminalization is overstated essentially reduces to claiming that because more than 90 percent of federal prosecutions are for classic federal crimes, overcriminalization is not a problem. These isolated instances of injustice, the argument goes, do not jus-

tify the commitment of time and effort necessary to fundamentally re-examine the criminal law:

There may be one or two extreme cases here and there where a prosecutor has exercised poor judgment and has charged someone who may have technically violated a regulatory law, but truly is morally blameless, utterly contrite, and completely harmless. A few mistakes here and there, however, do not justify tarring the entire criminal process or treating every police officer as a modern-day Inspector Javert.⁹

That defense of the status quo, however, is inconsistent with the long-standing axiom, drawn from the Bible,¹⁰ that “It is better that ten guilty men go free than that one innocent man be convicted.”¹¹ As the Rev. Martin Luther King, Jr., wrote in his famous letter from the Birmingham jail, “Injustice anywhere is a threat to justice everywhere.” Society should not ignore known injustices just because they may be few in number. Rather, society should correct such errors, especially when their number is small, because we can no longer, and should not have to, rely on the clemency process to rectify them.¹²

Numerous Respected Individuals and Organizations Are Troubled by the Injustices of Overcriminalization

A large and growing number of highly respected figures believe that overcriminalization in fact is a serious problem. Former senior Justice Department officials have been vocal critics of overcriminalization.¹³ An American Bar Association task force created to examine the issue released a report denouncing this phenomenon.¹⁴ Numerous members of the academy have written about the problem.¹⁵ Several law schools have held symposia to highlight the issue.¹⁶ The media have expressed interest in the problem.¹⁷ The House Judiciary Committee not only has held hearings on overcriminalization,¹⁸ but also has chartered a task force to examine this matter.¹⁹ Organizations from across the political spectrum—The Heritage Foundation and the ACLU, the Manhattan Institute and National Association of Criminal Defense Lawyers, the Texas Public Policy Foundation and Families Against Mandatory Minimums—that ordinarily do not hold the same public policy views all oppose overcriminalization.²⁰

This widespread concern, voiced by important figures in the policymaking process representing very different viewpoints, justifies the belief that the problem is a systemic flaw in the criminal justice system and is not limited to isolated instances of legislative or prosecutorial overreaching.

Congress Should Act Now—Before the Federal Criminal Code Grows Even Further

The increasing use of criminal laws as regulatory penalties amplifies the risk that people, especially those who own or manage small businesses, may be deterred from pursuing legitimate activities due to the fear that they could commit a crime by unwittingly crossing one of the many obscure lines drawn by statutes, regulations, and ordinances. As Professor Douglas Husak has noted, among the harms caused by a large, prolix criminal code are “the freedom-limiting, anxiety-producing, and guilt-inducing effects the criminal law may have on those who take its demands seriously, even apart from the threat of punishment.”²¹

The criminal law serves a reasonable purpose when it deters individuals from approaching the line between lawful and illegal conduct—if the activity being regulated is inherently dangerous and the tort system cannot serve its traditional compensatory and deterrent functions.²² Yet the criminal law often is used not as a necessary substitute for the tort system or as a means of enforcing traditional notions of blameworthy conduct, but as a means of protecting some favored interests over others.²³

The public is ill-served when the criminal law is used to reduce competition rather than to promote it.²⁴ Cases where parties are deterred from socially beneficial activities will not show up in reported decisions discussing overcriminalization because, by definition, the affected parties will have avoided taking the risk of criminal prosecution. But it is precisely because the criminal law can have an overbroad deterrent effect that Congress should not wait until this problem worsens before remedying it.²⁵

Conclusion

The only party with the ability to produce statistics on the prevalence of overcriminalization is the Justice Department, and, realistically speaking, it cannot be expected to collect accurate or complete statistics illustrating how often it has unjustifiably

filed criminal charges. But the absence of proof is not proof of the absence of this problem. Numerous respected individuals and organizations, including several former high-level Justice Department officials, believe that overcriminalization is sufficiently widespread that it merits Congress's attention and remediation. It also is clear that overcriminalization has occurred in particular cases because of flaws in criminal statutes.

Overcriminalization undeniably is a serious problem in every case in which it occurs. Congress should get to the bottom of this problem and adopt reasonable remedies to prevent injustices from reoccurring.

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Endnotes:

1. See, e.g., John Baker, Jr., *Revisiting the Explosive Growth of Federal Crimes*, The Heritage Foundation, LEGAL MEMORANDUM No. 26 (June 16, 2008), available at <http://www.heritage.org/research/reports/2008/06/revisiting-the-explosive-growth-of-federal-crimes>; Gerard V. Bradley, *Retribution and Overcriminalization*, The Heritage Foundation, LEGAL MEMORANDUM No. 77 (March 1, 2012), available at <http://www.heritage.org/research/reports/2012/03/retribution-and-overcriminalization>; Paul J. Larkin, Jr., *Fighting Back Against Overcriminalization: The Elements of a Mistake of Law Defense*, The Heritage Foundation, LEGAL MEMORANDUM No. 92 (June 12, 2013), available at http://thf_media.s3.amazonaws.com/2013/pdf/1m92.pdf; Edwin Meese III & Paul J. Larkin, Jr., *Reconsidering the Mistake of Law Defense*, 102 J. OF CRIM. L. & CRIMINOLOGY 725 (2012); PAUL ROSENZWEIG, ONE NATION, UNDER ARREST: HOW CRAZY LAWS, ROGUE PROSECUTORS, AND ACTIVIST JUDGES THREATEN YOUR LIBERTY (Rev. ed. 2013); Paul Rosenzweig, *Epilogue: Overcriminalization—An Agenda for Change*, 54 AM. U. L. REV. 809 (2005); BRIAN WALSH & TIFFANY M. JOSSLYN, HERITAGE FOUND. & NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, WITHOUT INTENT: HOW CONGRESS IS ERODING THE CRIMINAL INTENT REQUIREMENT IN FEDERAL LAW (2010); *Defining the Problem and Scope of Over-Criminalization and Over-Federalization: Hearing Before the H. Comm. on the Judiciary*, 113th Cong. (2013) (testimony of John G. Malcolm), available at <http://www.heritage.org/research/testimony/2013/06/defining-the-problem-and-scope-of-overcriminalization-and-overfederalization>.
2. "Overcriminalization is the term that captures the normative claim that governments create too many crimes and criminalize things that properly should not be crimes." Darryl K. Brown, *Criminal Law's Unfortunate Triumph Over Administrative Law*, 7 J.L. ECON. & POL'Y 657, 657 (2011).
3. See, e.g., Paul J. Larkin, Jr., *Public Choice Theory and Overcriminalization*, 36 HARV. J.L. & PUB. POL'Y 715, 719 & n.13 (2013).
4. See, e.g., Susan R. Klein & Ingrid B. Grobey, *Debunking Claims of the Over-Federalization of Criminal Law*, 62 EMORY L.J. 1 (2012).
5. See U.S. SENTENCING COMM'N, 2012 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS Figure A (2012).
6. See 28 U.S.C. § 503, 506, 506-19 (2006) (the Attorney General has the authority to direct the conduct of federal litigation); Fed. R. Crim. P. 7(c)(1) (an indictment must be signed by "an attorney for the government").
7. Additional examples of the victims of overcriminalization can be found at "USA vs YOU," The Heritage Found. (June 2013).
8. See TOM R. TYLER, WHY PEOPLE OBEY THE LAW (2006); PETER C. YEAGER, THE LIMITS OF LAW: THE PUBLIC REGULATION OF PRIVATE POLLUTION 9 (1991) ("As criminologists have long known, where laws lack legitimacy, violation rates are likely to be relatively high, other factors held constant.").
9. Larkin, *supra* note 3, at 754.
10. See Genesis 18:23-32 (Abraham persuades God to spare Sodom if ten righteous men can be found in the city).
11. See Coffin v. United States, 156 U.S. 432, 456 (1895) ("[I]t is better that ten guilty persons escape than one innocent suffer."); 4 WILLIAM BLACKSTONE, COMMENTARIES *352.
12. See, e.g., Paul J. Larkin, Jr., *Clemency, Parole, Good-Time Credits, and Crowded Prisons: Reconsidering Early Release*, 11 GEO. J.L. & PUB. POL'Y 1, 7, 34-36 (2013).
13. See, e.g., Edwin Meese III, *Big Brother on the Beat: The Expanding Federalization of Crime*, 1 TEX. REV. L. & POL. 1 (1997); Edwin Meese III, *Overcriminalization in Practice: Trends and Recent Controversies*, 8 SETON HALL CIRCUIT REV. 505 (2012); George Terwilliger, *Under-Breaded Shrimp and Other High Crimes—Addressing the Over-Criminalization of Commercial Regulation*, 44 AM. CRIM. L. REV. 1417 (2007); Richard Thornburgh, *The Dangers of Over-Criminalization and the Need for Real Reform—The Dilemma of Artificial Entities and Artificial Crimes*, 44 AM. CRIM. L. REV. 1281 (2007); Larry D. Thompson, *The Reality of Overcriminalization*, 7 J.L. ECON. & POL'Y 577 (2011).
14. See ABA TASK FORCE ON THE FEDERALIZATION OF CRIMINAL LAW, THE FEDERALIZATION OF CRIMINAL LAW (1998).
15. See, e.g., Andrew Ashworth, *Conceptions of Overcriminalization*, 5 OHIO ST. J. OF CRIM. L. 407 (2008); Sara Sun Beale, *The Many Faces of Overcriminalization: From Morals and Mattress Tags to Overfederalization*, 54 AM. U. L. REV. 747 (2005); Darryl K. Brown, *Can Criminal Law Be Controlled?*, 108 MICH. L. REV. 971 (2010); John C. Coffey, Jr., *Does "Unlawful" Mean "Criminal"?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U.L. REV. 193 (1993); Stuart P. Green, *Why It's a Crime to Tear the Tag Off a Mattress: Overcriminalization and the Moral Content of Regulatory Offenses*, 46 EMORY L.J. 1533 (1997); John Hasnas, *Ethics and the Problem of White Collar Crime*, 54 AM. U. L. REV. 579 (2005); Peter J. Henning, *Targeting Legal Advice*, 54 AM. U. L. REV. 669 (2005); DOUGLAS HUSAK, OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW (2007); Sanford H. Kadish, *The Crisis of Overcriminalization*, 374 ANNALS AMER. ACAD. POL. & SOC. SCI. 157 (1967); Sanford H. Kadish, *Some Observations on the Use of Criminal Sanctions to Enforce Economic Regulations*, 30 U. CHI. L. REV. 423 (1963); Erik Luna, *Overextending the Criminal Law*, in GO DIRECTLY TO JAIL: THE CRIMINALIZATION OF ALMOST EVERYTHING (Gene Healy ed., 2004); Geraldine Szott Moohr, *Defining Overcriminalization Through Cost-Benefit Analysis: The Example of Criminal Copyright Laws*, 54 AM. U. L. REV. 783 (2005); Ellen S. Podgor, *Overcriminalization: The Politics of Crime*, 54 AM. U. L. REV. 541 (2005); Paul H. Robinson & Michael T. Cahill, *The Accelerating Degradation of American Criminal Codes*, 56 HASTINGS L.J. 633 (2005); Stephen F. Smith, *Overcoming Overcriminalization*, 102 J. OF CRIM. L. & CRIMINOLOGY 537 (2012); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505 (2011); John F. Stinneford, *Punishment Without Culpability*, 102 J. OF CRIM. L. & CRIMINOLOGY 653 (2012). Distinct but closely related is the concern regarding the overfederalization of the criminal law. See, e.g., John S. Baker, Jr., *Jurisdictional and Separation of Powers Strategies to Limit the Expansion of Federal Crimes*, 54 AM. U. L. REV. 545 (2005); Rachel E. Barkow, *Federalism and the Politics of Sentencing*, 105 COLUM. L. REV. 1276 (2005); Sara Sun Beale, *Federalizing Crime: Assessing the Impact on the Federal Courts*, 543 ANNALS AMER. ACAD. POL. & SOC. SCI. 39 (1996); Kathleen F. Brickey, *Criminal Mischief: The Federalization of American Criminal Law*, 46 HASTINGS L.J. 1135 (1995); Stephen J. Clymer, *Unequal Justice: The Federalization of Criminal Law*, 70 S. CAL. L. REV. 643 (1997); J. Richard Broughton, *Congressional Inquiry and the Federal Criminal Law*, 46 U. RICH. L. REV. 457 (2012); Rory K. Little, *Myths and Principles of Federalization*, 46 HASTINGS L.J. 1029 (1995).

16. See *Symposium: Overcriminalization in Practice*, Seton Hall Law School (Mar. 13, 2012); *Symposium: Overcriminalization*, Northwestern Law School (Jan. 27, 2012); *Symposium: Overcriminalization and Excessive Punishment*, Yale Law School (Dec. 9–10, 2011); *Symposium, Overcriminalization 2.0: Developing Consensus Solutions*, 7 J.L. ECON. & POL'Y 565 (2011); *Symposium, Overcriminalization: The Politics of Crime*, 54 AM. U. L. REV. 541 (2005).
17. See, e.g., John Jessup, "Overcriminalization" *Making Us a Nation of Felons*, CBN.COM (Mar. 29, 2012), <http://www.cbn.com/cbnnews/us/2012/March/Overcriminalization-Making-Us-a-Nation-of-Felons/>; Gary Fields & John R. Emshwiller, *Criminal Code Tough to Crack: Struggle to Revamp Illinois Law Offers Glimpse of What Congress Faces in Its Effort*, WALL ST. J. (Dec. 29, 2011), http://online.wsj.com/article_email/SB10001424052970203686204577116503258144414-1MyQjAxMTAxMDIwOTEyNDkyWj.html?mod=wsj_share_email; Gary Fields & John R. Emshwiller, *A Sewage Blunder Earns Engineer a Criminal Record*, WALL ST. J., A1, A16 (Dec. 12, 2011), http://online.wsj.com/article_email/SB10001424052970204903804577082770135339442-1MyQjAxMTAxMDEwMjExNDIyWj.html; Gary Fields & John R. Emshwiller, *As Federal Crime List Grows, Threshold of Guilt Declines*, WALL ST. J. (Sept. 27, 2011), http://online.wsj.com/article_email/SB10001424053111904060604576570801651620000-1MyQjAxMTAxMDIwNzEyNDcyWj.html?mod=wsj_share_email; Gary Fields & John R. Emshwiller, *The Animal Enterprise Terrorism Act Sets an Unusual Standard for Crime*, WALL ST. J. (Sept. 27, 2011), <http://online.wsj.com/article/SB10001424053111903791504576586790205241376.html#printMode>; Gary Fields & John R. Emshwiller, *As Criminal Laws Proliferate, More Are Ensnared*, WALL ST. J. (July 23, 2011), <http://online.wsj.com/article/SB10001424052748703749504576172714184601654.html>; *Rough Justice: America Locks Up Too Many People, Some for Acts That Should Not Even Be Criminal*, THE ECONOMIST (July 22, 2010), available at <http://www.economist.com/node/16640389>.
18. See, e.g., *Reining in Overcriminalization: Assessing the Problem, Proposing Solutions: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Sec. of the H. Comm. on the Judiciary*, 111th Cong. (2010); *Over-Criminalization of Conduct/Over-Federalization of Criminal Law: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Sec. of the H. Comm. on the Judiciary*, 111th Cong. (2009); see also, e.g., *Principles for Revising the Criminal Code: Hearing Before the Subcomm. on Crime, Terrorism and Homeland Security of the H. Comm. on the Judiciary*, 112th Cong. (2011) (testimony of Edwin Meese III), available at <http://www.heritage.org/research/testimony/2011/12/principles-for-revising-the-criminal-code>; *On H.R. 1823, the Criminal Code Modernization and Simplification Act of 2011: Hearing Before the Subcomm. on Crime, Terrorism and Homeland Security of the H. Comm. on the Judiciary*, 111th Cong. (2011) (testimony of the Hon. Dick Thornburgh), available at <http://judiciary.house.gov/hearings/pdf/Thornburgh%2012132011.pdf>; *Reining in Overcriminalization: Assessing the Problems, Proposing Solutions: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary* (2010) (testimony of Brian Walsh), available at <http://www.heritage.org/research/testimony/reining-in-overcriminalization-assessing-the-problems-proposing-solutions>.
19. Press Release, House Judiciary Comm., House Judiciary Committee Creates Bipartisan Task Force on Over-Criminalization (May 5, 2013), <http://judiciary.house.gov/news/2013/05082013.html>. The House Judiciary Committee previously had demonstrated interest in this subject. See *supra* note 18. Creation of the task force suggests that the committee may address the issue through legislation.
20. See, e.g., Zach Dillon, *Symposium on Overcriminalization: Foreword*, 102 J. CRIM. L. & CRIMINOLOGY 525, 525 (2013) ("The Heritage Foundation and the American Civil Liberties Union joined forces to cosponsor our live Symposium and send the unified message that whether you are liberal, moderate, or conservative, overcriminalization is an issue that can no longer be ignored.").
21. DOUGLAS HUSAK, OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW 14 (2009).
22. See *Hudson v. United States*, 522 U.S. 93, 102 (1997) ("all civil penalties have some deterrent effect").
23. See Larkin, *supra* note 3, at 743–45.
24. See, e.g., *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 224 (1993) ("[I]t is axiomatic that the antitrust laws were passed for 'the protection of competition, not competitors.'" (citation omitted)).
25. The First Amendment overbreadth doctrine is instructive here. The doctrine allows parties to raise the free speech claims of others because of the fear that such third parties will avoid engaging in First Amendment-protected activity due to the risk of criminal prosecution. See, e.g., *Broadrick v. Oklahoma*, 413 U.S. 601, 611–13 (1973). A similar concern is applicable here. Overuse of the criminal law can deter parties from engaging in legitimate economic or social activity due to the same fear.