

Overcriminalization

THE ISSUE:

Federal criminal law has exploded in size and scope—and deteriorated in quality. Honest, hard-working Americans doing their best to be respectable, law-abiding citizens can no longer be assured that they are safe from federal prosecutors. Federal criminal law used to focus on inherently wrongful conduct: treason, murder, counterfeiting, and the like. Today, an unimaginably broad range of socially and economically beneficial conduct is criminalized. More and more Americans who are otherwise law-abiding are being trapped and unjustly punished. Congress must halt its overcriminalization rampage and begin to eliminate vague, overbroad criminal offenses that punish good people who violate one of the tens of thousands of federal criminal offenses without criminal intent.

THE FACTS:

- **Explosion of Federal Criminal Law.** The number of criminal offenses in the U.S. Code increased from 3,000 in the early 1980s to 4,000 by 2000 to over 4,450 by 2008. Moreover, there is no letup in sight; rather, the pace appears to be constant or even accelerating.
- **Criminalization by Bureaucrat.** Scores of federal departments and agencies have created so many criminal offenses that the Congressional Research Service itself admitted that it was unable even to count all of the offenses. The Service's best estimate? "Tens of thousands." In short, not even Congress's own experts have a clear understanding of the size or scope of federal criminalization.
- **Deeply Flawed Criminal Offenses.** The Heritage Foundation and the National Association of Criminal Defense Lawyers reported in May the results of a [joint study](#) finding that three out of every five new nonviolent offenses

lack a criminal-intent requirement that is adequate to protect from unjust criminal punishment Americans who engaged in conduct that they did not know was illegal or otherwise wrongful.

- **Breakneck Pace Continues.** Despite this rampant overcriminalization, Congress continues to criminalize at an average rate of one new crime for every week of every year (including when its Members are not in session). All inherently wrongful conduct has been criminalized several times over, yet from 2000 through 2007, Congress enacted 452 new criminal offenses.

THE SOLUTIONS:

- **Congress Must Justify All New Criminalization.** Because federal law has already criminalized all inherently wrongful conduct many times over, Congress should be required to provide written analysis and justification of every new or modified criminal offense or penalty. The report should include a description of the problem each offense or penalty is intended to redress, any specific cases or concerns motivating the legislation, and a review of any overlaps it will have with existing federal and state law.
- **Congress's Carelessness Should Not Endanger You.** Federal law should codify the Rule of Lenity, thereby ensuring that the benefit of the doubt under vague, overbroad laws goes to the person being prosecuted, not to the government.
- **Honest Mistakes Should Not Result in Prison Time.** Every criminal conviction must require proof beyond a reasonable doubt that the person acted with criminal intent. Federal criminal laws should require such proof. The time when a person can be arrested and incarcerated

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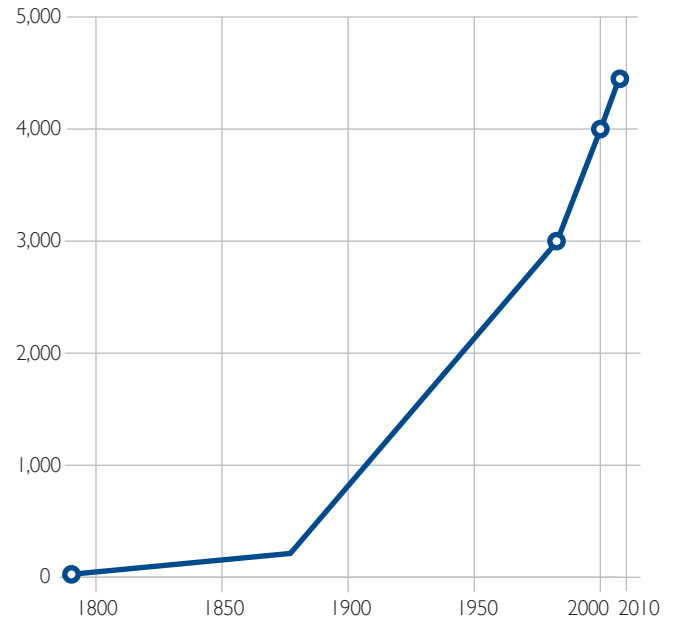
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ated for failing, for example, to affix a federally mandated sticker to an otherwise lawful UPS package must come to an end.

- **Bureaucrats Should Not Be Making New Crimes.** Congress should not “delegate” its power to criminalize to unelected officials in the scores of federal departments and agencies that it has created. Both common sense and constitutional principles hold that the decision as to whether something is important enough to send a person to federal prison should be made by the American people’s elected representatives.
- **Repeal Unjust Laws.** Congress seems to have forgotten that it can repeal bad laws. It can and should. The worst, most unjust criminal offenses should be thrown into the legislative dumpster. Congress should start with offenses that allow Americans to be punished as criminals even if they did not know that they were doing something unlawful or otherwise wrongful and offenses that are vague, overbroad, or cannot be understood even by lawyers.

Explosive Growth of Federal Criminal Law

NUMBER OF FEDERAL CRIMES (SELECT YEARS)



Sources: Crimes Act of 1790, 1 Stat. 112; American Bar Association, “The Federalization of Criminal Law,” 1998; John S. Baker, Jr., “Revisiting the Explosive Growth of Federal Crimes,” Heritage Foundation *Legal Memorandum*, No. 26, June 16, 2008.

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