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Overcriminalization: The Legislative Side of the Problem

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Abstract: *The past 75 years in America have witnessed an avalanche of new criminal laws, the result of which is a problem known as "overcriminalization." This phenomenon is likely to lead to a variety of problems for a public trying to comply with the law in good faith. While many of these issues have already been discussed, one problem created by the overcriminalization of American life has not been given the same prominence as others: the fact that overcriminalization is a cause for (and a symptom of) some of the collective action problems that beset Congress today. Indeed, Congress, for a variety of reasons discussed in this paper, is unlikely to serve as a brake on new, unwarranted criminal laws, let alone to jettison broad readings of those laws by the courts. Therefore, the key to curbing overcriminalization is the American public: It is the people who, if made aware of the legislative issues that enable overcriminalization, could begin to head off such laws before the momentum for their passage becomes overwhelming.*

The past 75 years in America have witnessed an avalanche of new criminal laws, the result of which is a problem known as "overcriminalization"—that is, the promiscuous use of the criminal law to remedy numerous perceived social ills by relegating them to the principal government actors in the criminal justice system (police, prosecutors, defense counsel, judges, and jailers) in order to regulate through criminalization. Four of the hallmarks of overcriminalization are:

Talking Points

- No one knows how many federal crimes exist. Many criminal laws regulate conduct that is not inherently blameworthy in the commercial and environmental fields, for example.
- Often, those laws do not require proof that a person intended to break the law or knew that his conduct was inherently blameworthy or harmful. As a result, people risk committing crimes without having the "guilty mind" required by the common law.
- The practicalities of the legislative process contribute to this dilemma. There generally is little or no constituency for reducing the number or severity of criminal laws, and prosecutors are a powerful political bloc and seek to expand the reach and severity of the penal code.
- Legislators may enact unduly broad laws in the hope that prosecutors will exercise good judgment, which is not always the case. Public awareness is therefore essential if this problem is to be addressed.

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1. The use of strict liability crimes (i.e., offenses that dispense with the requirement that a person act with a "guilty mind," however defined) to outlaw conduct, particularly in commercial and regulatory fields;
2. The passage of several laws applicable to the same conduct, which enables prosecutors to multiply charges and thereby threaten a person with a severe term of imprisonment if he does not accept a plea bargain;
3. The delegation to administrative agencies of the responsibility for filling in the details of a substantive criminal law, which thereby vests in the agency responsible for enforcing the law the power also to define its terms; and
4. Enforcing through the criminal law conduct that, if it is to be enforced by the government at all, should be enforced through administrative or civil mechanisms.

This phenomenon is likely to lead to a variety of problems for a public that is trying to comply with the law in good faith. At bottom, the flaws in overcriminalization are much the same ones that the Supreme Court long has identified in unduly vague criminal laws: They render it impossible for an individual to understand where the line of criminality lies (indeed, the average person's ability to understand and comply with a legal code varies inversely with its prolixity and reticulation); they empower prosecutors to make arbitrary charging decisions and coerce parties into pleading guilty by threatening them with potentially massive sentences should they stand trial; and, in cases that go to trial, they leave to the courts the job of deciding after the fact whether someone broke the law, a job that is tantamount to deciding whether to shoot the survivors.

Most of these problems have been discussed extensively in other publications, such as "Without Intent: How Congress Is Eroding the Criminal Intent Requirement in Federal Law," a report prepared by The Heritage Foundation and the National Association of Criminal Defense Lawyers.[1] But one problem created by overcriminalization of American life has not been given the same prominence as the ones noted above: Overcriminalization is a cause for (and a symptom of) some of the collective action problems that beset Congress today. Those difficulties are discussed here.

Legislative Limitations

Legislators have few options in addressing criminal justice problems. To start, they cannot get involved in the decisions in a specific case. The Due Process Clause of the Constitution quite rightly keeps legislators from meddling with specific defendants in particular cases, and any attempt to do so can (at least potentially) compromise the government's ability to prosecute that party.

Passing legislation, approving law enforcement agencies' budgets, and conducting public oversight hearings are the principal tools that legislators can employ to affect the crime rate, but those options have their limitations. The last two options work only indirectly by, for example, increasing the number of investigative and support personnel or spurring the existing ones to do a better job. Only through legislation creating new crimes, upping the sentences for offenses already on the books, or reducing the procedural or evidentiary burdens on the police and prosecutors can a legislator have a direct effect on crime.

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Even then, however, there are additional limits. The Ex Post Facto and Bill of Attainder Clauses (Art. I, §9, Cl. 3 and § 10, Cl. 1) keep legislators from pursuing the most direct ways to deal with crime: passing a new criminal statute making past conduct an offense, retroactively enhancing the penalties

1. Brian Walsh & Tiffany Joslyn, *Without Intent: How Congress Is Eroding the Criminal Intent Requirement in Federal Law*, HERITAGE FOUNDATION SPECIAL REPORT NO. 77, May 5, 2010, *available at* http://www.heritage.org/research/reports/2010/05/without-intent.

already on the books, or making an outlaw out of a specific individual in a statute itself.

Each of these limitations serves legitimate, important purposes. Ironically, though, they sometimes can wind up channeling legislators into waters that create problems at least as serious as the ones that the U.S. Constitution seeks to avoid.

A New Set of Problems

Since the 1960s, the Supreme Court of the United States has regulated the investigative and trial processes. Using the Fourth, Fifth, and Sixth Amendments as the vehicles, the Court has fenced in nearly every investigative and trial technique—e.g., searches, seizures, arrests, interrogation, lineups, discovery, questioning or immunizing defendants and witnesses, and so forth—with a variety of different rules. The Court also has made clear that Congress cannot tamper with the rules it has created, such as the now-(in)famous *Miranda* warnings.[2]

But the Court has left unregulated the legislature's prerogative to define crimes and affix punishments, as well as a prosecutor's ability to exercise discretion in charging and plea bargaining. As the late Harvard Law School Professor William Stuntz has noted, the result is that, in today's criminal justice system, those two players have become closer allies than ever.[3]

Here is how such an alliance develops: Some legislators, acting on the presumption that prosecutors will exercise judgment in deciding how far to push the edge of the envelope, will write broadly worded statutes in order to maximize the prosecutor's discretion. Other legislators, assuming (and perhaps hoping) that expanding criminal liability will affect only those near the periphery of the laws in existence, also will support expanded criminal liability and lengthier sentences because they, too, do not expect prosecutors to go hog wild with their enhanced weapons.

The result is that even legislators acting solely with the public interest in mind will wind up enacting new criminal laws that no one expects to receive the broad construction that their text permits. Of course, other, perhaps less noble-minded legislators will see the process as a no-lose situation: They create the appearance of having remedied a social ill without any risk of a backlash from a politically powerful constituency and without the burden of deciding how to apply the law on a case-by-case basis.[4]

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By contrast, there is little constituency for cutting back on the reach of the criminal law. Loosening criminal procedures can be justified on the grounds of de-handcuffing the police or bolstering the efficiency of the trial process. Tightening those same procedures can be supported by the need to protect the innocent or everyone's civil rights. Broadening the reach of the criminal law can be sold as an effort to reach miscreants that the courts mistakenly (or involuntarily) let walk or as an attempt to adapt old laws to new criminal schemes. That much is fairly straightforward.

2. *See* Miranda v. Arizona, 384 U.S. 436 (1966). In Dickerson v. United States, 530 U.S. 428 (2000), the Supreme Court rebuffed the argument that Congress had effectively repealed *Miranda* in the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, Title II, § 701(a), 82 Stat. 210 (codified at 18 U.S.C. § 3501).
3. *See*, e.g., WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE (2011); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505 (2001). The discussion that follows relies on Professor Stuntz's cogent description of defects in today's marriage of criminal law and politics.
4. Professor John Baker argues persuasively that both parties are to blame for the problem of overcriminalization: "[Law professor John S.] Baker blamed Republicans as well as Democrats for the trend, saying that both parties fuel it. One-third of about 4,200 federal crimes on the books have been passed since 1970 and Republican President Richard Nixon's 'war on crime,' he said." Kevin McKenzie, *Law Professor Slams Expansion of Federal Crimes*, THE COMMERCIAL APPEAL, Oct. 25, 2011, *available at* http://www.commercialappeal.com/news/2011/oct/25/law-professor-slams-expansion-federal-crimes/.