

# LEGAL MEMORANDUM

No. 131 | AUGUST 12, 2014

## Is Congress Addressing Our Overcriminalization Problem? Reviewing the Progress of the Overcriminalization Task Force

*Evan Bernick, Paul J. Larkin, Jr., and Jordan Richardson*

### Abstract

*In May 2013, the bipartisan Overcriminalization Task Force, authorized by the House Committee on the Judiciary and led by Representatives James Sensenbrenner (R-WI) and Bobby Scott (D-VA), emerged from the widespread national agreement that the overuse and misuse of substantive criminal law (known as “overcriminalization”) needs to be corrected. Although the Overcriminalization Task Force is still a work in progress, the pace of enactment of new criminal legislation has slowed markedly during the time that the task force has been in existence, and some members of both the House and the Senate have introduced legislation that would address overcriminalization problems. Accordingly, there is reason to be hopeful that Congress is paying attention to this problem and may decide to change the status quo.*

There is widespread agreement across the political spectrum that the criminal justice system needs to be reformed in several respects. One of the areas in need of correction is the overuse and misuse of substantive criminal law, a problem known by the neologism “overcriminalization.”<sup>1</sup> In May 2013, the bipartisan Overcriminalization Task Force, authorized by the House Committee on the Judiciary and led by Representatives James Sensenbrenner (R-WI) and Bobby Scott (D-VA), emerged from that consensus.

Although the Overcriminalization Task Force is still a work in progress, it is noteworthy that the pace of the enactment of new criminal legislation has slowed markedly during the time that the task force has been up and running. Moreover, some representatives in both chambers have introduced legislation that would

### KEY POINTS

- Overcriminalization deprives citizens of constitutionally guaranteed fair notice of what the penal code outlaws. Criminal statutes and regulatory crimes can be so complex that even judges and lawyers, let alone average members of the public, have difficulty discerning what conduct is illegal.
- In the not-too-distant past, Congress created new federal crimes at a rate of more than one a week. The 113th Congress, however, has passed far fewer federal criminal laws, and far fewer with *mens rea* (“guilty mind”) requirements that do not adequately protect the innocent, than previous Congresses did. That alone is a step in the right direction.
- Both the lack of new criminal laws with insufficient *mens rea* requirements and the introduction of legislation intended to address problems with fair notice and fair sentencing are encouraging.
- The next step is to repeal unjust criminal laws and to ensure that legislation introduced to combat overcriminalization is enacted.

This paper, in its entirety, can be found at <http://report.heritage.org/lm131>

**The Heritage Foundation**  
214 Massachusetts Avenue, NE  
Washington, DC 20002  
(202) 546-4400 | [heritage.org](http://heritage.org)

Nothing written here is to be construed as necessarily reflecting the views of The Heritage Foundation or as an attempt to aid or hinder the passage of any bill before Congress.

address overcriminalization problems. Accordingly, there is reason to be hopeful that Congress is paying attention to this problem and may decide to change the status quo.

### The Problems Caused by Overcriminalization

Overcriminalization deprives citizens of constitutionally guaranteed fair notice of what the penal code outlaws.<sup>2</sup> We are all familiar with the maxim “Ignorance of the law is no excuse.” Today, ignorance of the law is a reality that legislators cannot ignore. There are approximately 4,500 federal statutes and another 300,000 (or more) implementing regulations with potential criminal penalties for violations scattered throughout the 51 titles of the United States Code and the far more voluminous Code of Federal Regulations.<sup>3</sup> Those criminal statutes and regulatory crimes can be so complex that even judges and lawyers, let alone average members of the public, have difficulty discerning what conduct is illegal.<sup>4</sup>

The problem of fair notice is exacerbated by the fact that many federal criminal laws do not adequately protect those who had no reason to think what they did was illegal. A few years ago, The Heritage Foundation and the National Association of Criminal Defense Lawyers analyzed federal criminal laws

from 2000 through 2007 and published their findings in the 2010 report *Without Intent: How Congress Is Eroding the Criminal Intent Requirement in Federal Law*.<sup>5</sup> The report disclosed that in many cases, *mens rea* requirements in federal criminal offenses do not adequately protect defendants from punishment for “making honest mistakes or engaging in conduct that [is] not sufficiently wrongful to put them on notice of possible criminal responsibility.”<sup>6</sup>

Other statutes are so vaguely worded that, as, John Malcolm, Director of the Heritage Foundation’s Edwin Meese III Center for Legal and Judicial Studies, has put it, “the limit of their reach is constrained only by the charging prosecutor’s creativity.”<sup>7</sup> In addition, Congress often delegates the authority to define criminal penalties to regulatory agencies that lack the public accountability provided by the normal legislative process.<sup>8</sup>

The Heritage Foundation has advanced a number of proposals to address these problems: enacting laws that require proof of a meaningful *mens rea* requirement for any criminal offense (unless Congress clearly intended otherwise);<sup>9</sup> directing courts to construe any existing *mens rea* term in a criminal offense as applying to each material element of an offense;<sup>10</sup> identifying and listing all federal crimes in a manner that makes them accessible over the

1. See, e.g., Paul J. Larkin, Jr., *Public Choice Theory and Overcriminalization*, 36 HARV. J.L. & PUB. POL’Y 715 (2013); Evan Bernick, “The Best of Disinfectants”: Using Publicity to Fight Overcriminalization, THE HERITAGE FOUND. ISSUE BRIEF No. 4120 (Jan. 8, 2014), available at <http://www.heritage.org/research/reports/2014/01/using-publicity-to-fight-overcriminalization>; Paul Rosenzweig, *Ignorance of the Law Is No Excuse, But It Is Reality*, THE HERITAGE FOUND. BACKGROUNDER No. 2812 (June 17, 2013), available at <http://www.heritage.org/research/reports/2013/06/ignorance-of-the-law-is-no-excuse-but-it-is-reality>.
2. See *Bouie v. City of Columbia*, 378 U.S. 347, 350 (1964) (“[A] criminal law must give fair warning of the conduct it makes a crime”).
3. See Edwin Meese III & Paul J. Larkin, Jr., *Reconsidering the Mistake of Law Defense*, 102 J. CRIM. L. & CRIMINOLOGY 725, 733–36 (2012).
4. See, e.g., Glenn Harlan Reynolds, *Ham Sandwich Nation: Due Process When Everything Is a Crime*, 113 COLUM. L. REV. SIDEBAR 102, 108 (2013) (“[A]ny reasonable observer would have to conclude that actual knowledge of all applicable criminal laws and regulations is impossible, especially when those regulations frequently depart from any intuitive sense of what ‘ought’ to be legal or illegal. Perhaps placing citizens at risk in this regard constitutes a due process violation; expecting people to do (or know) the impossible certainly sounds like one.”); see also, e.g., JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 166 (3d ed. 2001) (explaining that “many modern statutes are exceedingly intricate,” and “even a person with a clear moral compass is frequently unable to determine accurately whether conduct is prohibited.”); William J. Stuntz, *Self-Defeating Crimes*, 86 VA. L. REV. 1871, 1871 (2000) (“[E]ven criminal law professors rarely know much about what conduct is and isn’t criminal in their jurisdictions”).
5. BRIAN W. WALSH & TIFFANY M. JOSLYN, WITHOUT INTENT: HOW CONGRESS IS ERODING THE CRIMINAL INTENT REQUIREMENT IN FEDERAL LAW (2010).
6. *Id.* at 7.
7. John G. Malcolm & Norman L. Reimer, *Over-Criminalization Undermines Respect for Legal System*, THE WASHINGTON TIMES, Dec. 11, 2013, <http://www.washingtontimes.com/news/2013/dec/11/malcolmreimer-over-criminalization-undermines-resp/>.
8. See, e.g., WALSH & JOSLYN, *supra* note 5, at 23–24 (finding that 14 percent of the nonviolent, non-drug criminal provisions that Congress introduced in 2005 and 2006 and 22 percent of those it enacted “delegated criminal lawmaking authority to unelected regulators”).
9. See Rosenzweig, *supra* note 1.
10. *Id.*

Internet without charge to the public; and keeping that list up to date so that conscientious citizens can always find the current version of the criminal law.<sup>11</sup>

In many cases, the effect of overcriminalization is worsened by sentencing laws that do not allow for adjustment in cases where a legislatively fixed sentence would be manifestly unjust. In particular, drug offenses, which make up a significant proportion of mandatory minimum sentences, can result in arbitrary, severe punishments. There is a significant difference between the sentences meted out to defendants who distribute a drug quantity that triggers a mandatory minimum and those who distribute a quantity that does not. Such sentencing will often produce a devastating “cliff effect” by which one extra ounce of cocaine in the defendant’s possession could mean the difference between a short sentence and five years in prison.<sup>12</sup> Even proponents of mandatory minimums find the cliff effect problematic.<sup>13</sup>

### **Stemming the Tide of Overcriminalization**

The pace of overcriminalization has slowed during the 113th Congress. In the not-too-distant past, Congress created new federal crimes at a rate of more than one a week.<sup>14</sup> During the past year, however, Congress has applied the brakes. To date, the 113th Congress has passed far fewer federal criminal laws, and far fewer with *mens rea* (“guilty mind”) requirements that do not adequately protect the

innocent, than previous Congresses did. That alone is a step in the right direction.

The authors of *Without Intent* and their researchers studied 446 nonviolent criminal offenses in 203 bills introduced by the 109th Congress, evaluating the *mens rea* requirements for each offense. The authors concluded that 113 proposed offenses contained no *mens rea* requirement—that the defendant’s knowledge, intent, misperceptions, mistakes, or accidents would have been deemed irrelevant to guilt. Also, 142 of those offenses included some *mens rea* requirements, but the offenses used only the term “knowingly,” which the Supreme Court explained in *Bryan v. United States* “does not necessarily have any reference to a culpable state of mind or to knowledge of the law.”<sup>15</sup> That *mens rea* requirement is a “weak” one, the authors noted, because it protects only some morally innocent defendants. Finally, although Congress enacted only 36 of these offenses into law, 14 offenses contained weak *mens rea* requirements, and nine contained no *mens rea* requirements at all.

By contrast, the 113th Congress has moved at a slower rate. Members have introduced 115 new bills containing criminal penalties, but Congress has passed only three of them since the task force began its work: the Violence Against Women Reauthorization Act of 2013, the Stolen Valor Act of 2013, and an amendment to the Animal Welfare Act that prohibits spectating at and taking children under the age of 16 to animal fights.<sup>16</sup> Even so, the acts proscribed

---

11. *Id.*; Paul J. Larkin, Jr., *Supplying the Information Required by Law: Directing the Federal Government to Identify All Federal Criminal Laws*, THE HERITAGE FOUND. ISSUE BRIEF No. 4143 (Feb. 10, 2014), available at <http://www.heritage.org/research/reports/2014/02/overcriminalization-and-the-identification-of-all-federal-criminal-laws>.

12. See Stephen J. Schulhofer, *Rethinking Mandatory Minimums*, 28 WAKE FOREST L. REV. 199, 209 (1993).

13. See Prepared Statement of David B. Muhlhausen, Senior Policy Analyst, The Heritage Found., to the U.S. Sentencing Comm’n 9 (May 27, 2010) (acknowledging that “drug mandatory minimum statutes impose harsh sentencing ‘cliffs’ based on what are often small differences between cases”).

14. See Larkin, *supra* note 1, at 725 (Congress passed 450 new crimes from 2000 through 2007).

15. 524 U.S. 184, 193 (1998).

16. See Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, 127 Stat. 54 (2013); Stolen Valor Act of 2013, Pub. L. No. 113-12, 127 Stat. 448 (2013); Agricultural Act of 2014, Pub. L. No. 113-79, § 12308 (2014) (amending Section 26 of the Animal Welfare Act, 7 U.S.C. § 2156).

in all three of these laws are duplicative of state or other federal criminal laws.<sup>17</sup> Given that there are already more than 4,500 federal statutory criminal offenses, Congress ought to be scrupulous in considering every expansion of federal criminal law.

### Positive Legislative Developments

Congress did not adopt any statutes that addressed overcriminalization this year, nor did it repeal any unnecessary criminal laws. But positive legislative developments took place in both chambers that bode well for the future.

**The House of Representatives.** The House took special efforts this past term to draw attention to overcriminalization. The bipartisan Overcriminalization Task Force held a number of hearings, heard testimony from professors and practitioners, and listened to the stories of ordinary people like Lawrence Lewis who were victimized by the criminal law.<sup>18</sup> The original six-month authorization for the Overcriminalization Task Force expired toward the end of last year, but earlier this year the House Judiciary Committee reauthorized the task force for an additional six months.

The task force did not issue an interim report last year, but it may pen a final report at the end of the current reauthorization. If it does, it will be interesting to see whether the task force recommends the repeal of any unnecessary criminal laws or the adoption of any new statutes that might address this problem, such as a default *mens rea* provision<sup>19</sup> or a mistake of law defense.<sup>20</sup>

Shortly after announcing the formation of the task force, Chairman Sensenbrenner introduced the Criminal Code Modernization and Simplification Act. The bill would consolidate criminal offenses so that Title 18 includes all major criminal provisions, create a uniform set of definitions for the entire title, provide consistent definitions for intent requirements, and eliminate criminal offenses that have not been used in the past 30 years or that have been subsumed by other offenses.<sup>21</sup>

The House Committee on Natural Resources, which focuses on regulatory crimes, also devoted attention to overcriminalization. On May 16, 2013, it held a hearing on the Lacey Act,<sup>22</sup> which, among other things, makes it a crime to import flora or fauna in violation of a foreign law, whether that

- 
17. See NATIONAL RESOURCE FOR VICTIMS OF CRIME, CRIMINAL STALKING LAWS, available at <http://victimsofcrime.org/our-programs/stalking-resource-center/stalking-laws/criminal-stalking-laws-by-state> (listing stalking laws) (last visited Feb. 21, 2014); STUART P. GREEN, LYING, CHEATING, AND STEALING: A MORAL THEORY OF WHITE-COLLAR CRIME 152 (2006) (“Under American federal law, for example, there are now dozens of statutory provisions that criminalize offenses such as mail fraud, wire fraud, bank fraud, health care fraud, tax fraud, computer fraud, securities fraud, bankruptcy fraud, accounting fraud, and conspiracy to defraud the government.”); *id.* at 152 n.23 (citing 18 U.S.C. §§ 1341 (mail fraud), 1343 (wire fraud), 1344 (bank fraud), 1347 (health care fraud), 26 U.S.C. § 7201 (tax fraud), 18 U.S.C. § 1030 (computer fraud), 15 U.S.C. §§ 77x, 78ff (securities fraud), 18 U.S.C. §§ 157 (bankruptcy fraud), 371 (conspiracy to commit fraud against the United States) (2006)); NEIL MILLER, DOMESTIC VIOLENCE: A REVIEW OF STATE LEGISLATION DEFINING POLICE AND PROSECUTION DUTIES AND POWERS, INSTITUTE FOR LAW AND JUSTICE 7 (2004) (“Common law crimes that are often invoked in domestic violence incidents include homicide offenses, assault and battery, sexual assault, and criminal trespass.... [E]very state provides criminal penalties for homicide and assault and battery”); Jared Paul Haller, *United States v. Alvarez: What Restrictions Does the First Amendment Impose on Lawmakers Who Wish to Regulate False Factual Speech?*, 45 IND. L. REV. 191, 211 (2011) (“[E]xisting fraud laws cover cases where false claims are made in order to obtain some benefit”); Patrick Graves, Keith Mosman, & Shayna Rogers, *2011 Legislative and Administrative Review*, 18 ANIMAL L. 361, 365 (2011) (“[F]orty-nine states have already enacted statutes prohibiting spectatorship.”).
18. See *Regulatory Crime: Solutions: Hearing Before the Congressional Task Force on Overcriminalization of the House Comm. on the Judiciary*, 113th Cong. (2013); *Regulatory Crime: Identifying the Scope of the Problem: Hearing Before the Congressional Task Force on Overcriminalization of the House Comm. on the Judiciary*, 113th Cong. (2013); *Mens Rea: The Need for a Meaningful Intent Requirement in Federal Criminal Law: Hearing Before the Congressional Task Force on Overcriminalization of the House Comm. on the Judiciary*, 113th Cong. (2013); *Defining the Problem and Scope of Over-criminalization and Over-federalization: Hearing Before the Congressional Task Force on Overcriminalization of the House Comm. on the Judiciary*, 113th Cong. (2013).
19. See Paul J. Larkin, Jr., *Prohibition, Regulation, and Overcriminalization: The Proper and Improper Uses of the Criminal Law*, 42 HOFSTRA L. REV. 745, 757 (2014).
20. See Paul J. Larkin, Jr., *The Need for a Mistake of Law Defense as a Response to Overcriminalization*, THE HERITAGE FOUND. LEGAL MEMORANDUM No. 91 (April 11, 2013), available at <http://www.heritage.org/research/reports/2013/04/the-need-for-a-mistake-of-law-defense-as-a-response-to-overcriminalization>.
21. See H.R. 1823, 112th Cong. (2013). Chairman Sensenbrenner issued a section-by-section analysis to accompany the bill. See *Criminal Code Modernization and Simplification Act of 2011: Hearing on H.R. 1823 Before the H. Comm. on the Judiciary*, 112th Cong. 83 (2011).
22. See 16 U.S.C. §§ 3371–78 (2012).

foreign law is criminal, civil, or regulatory.<sup>23</sup> The Lacey Act is a prime example of overcriminalization: Ordinary Americans can hardly be expected to have comprehensive knowledge of all of the criminal, civil, and regulatory laws of their own country, let alone those of foreign countries.<sup>24</sup> The hearing gave experts with a variety of viewpoints an opportunity to testify as to whether the burdens that the Lacey Act imposes on companies and individuals are unreasonably onerous.<sup>25</sup>

In an effort to reduce federal prison costs, Congressmen Jason Chaffetz (R-UT) and Bobby Scott introduced the Public Safety Enhancement Act of 2013.<sup>26</sup> This bill would direct the Attorney General to develop a risk-needs assessment in connection with “good time” or “earned time” early release programs. Bureau of Prison officials would use this assessment to classify the risk level of participants in the early release programs and ultimately permit alternative custody arrangements for low-risk prisoners.<sup>27</sup> Such measures are intended to lower recidivism rates and reduce crime.

**The Senate.** In January, the Senate Judiciary Committee approved and sent to the floor a bill intended to address unduly harsh sentencing laws and to identify and organize federal criminal law.<sup>28</sup> The Smarter Sentencing Act is concerned primarily with federal mandatory minimums for nonviolent

drug crimes.<sup>29</sup> The Act would modestly expand the existing safety valve<sup>30</sup> by permitting a district judge to impose sentences without regard to any mandatory minimum if the court finds that the other criteria set forth in the safety valve have been met and that the defendant has no more than two criminal history points, as defined by the U.S. Sentencing Guidelines, and was not convicted of a disqualifying offense, such as a violent crime.<sup>31</sup>

The Smarter Sentencing Act would also make retroactive the Fairness in Sentencing Act of 2010, which reduced the disparity between the amount of crack cocaine and powder cocaine needed to trigger mandatory minimum sentences and eliminated the five-year mandatory minimum sentence for simple possession of crack cocaine by enabling defendants sentenced under the old crack-powder regime to petition the sentencing court for a reduction in sentence.<sup>32</sup>

The Smarter Sentencing Act also contains a provision that addresses the fair notice problem.<sup>33</sup> It directs the Attorney General to prepare a report within one year that lists all federal criminal offenses, the punishment authorized for a violation of each offense, the *mens rea* required for each offense, and the number of federal prosecutions that the federal government (or the relevant agency) has brought for each offense within the past 15 years.<sup>34</sup>

- 
23. See *The 2008 Lacey Act Amendments: Hearing Before the Subcommittee on Fisheries, Wildlife, Oceans and Insular Affairs of the H. Comm. on Natural Resources*, 113th Cong. (2013).
24. See Paul J. Larkin, Jr., *Why U.S. Citizens Should Not Be Branded as U.S. Criminals for Violating Foreign Law*, THE HERITAGE FOUND. LEGAL MEMORANDUM No. 107, available at <http://www.heritage.org/research/reports/2014/01/why-us-citizens-should-not-be-branded-as-us-criminals-for-violating-foreign-law> (“[I]f the average person cannot keep track of regulatory offenses defined by American law, he or she certainly cannot keep track of regulatory offenses defined by hundreds of foreign nations.”).
25. See, e.g., *The 2008 Lacey Act Amendments: Hearing Before the Subcommittee on Fisheries, Wildlife, Oceans and Insular Affairs of the H. Comm. on Natural Resources* (statement of Steven McCreary on behalf of National Association of Music Merchants), 113th Cong. 4 (2013) (discussing the “unintended consequences” of the Act and urging Congress to take up “common sense proposals to modify the law”).
26. See H.R. 2656, 113th Cong. (2013).
27. See Paul J. Larkin, Jr., *Managing Prisons by the Numbers: Using the Good-Time Laws and Risk-Needs Assessments to Manage the Federal Prison Population*, 1 HARV. J.L. & PUB. POL’Y: FEDERALIST 1 (2014).
28. See S. 1410, 113th Cong. (2013).
29. See Evan Bernick & Paul J. Larkin, Jr., *Reconsidering Mandatory Minimums: The Arguments for and Against Potential Reforms*, THE HERITAGE FOUND. LEGAL MEMORANDUM No. 110 (Feb. 10, 2014), available at <http://www.heritage.org/research/reports/2014/02/reconsidering-mandatory-minimum-sentences-the-arguments-for-and-against-potential-reforms>.
30. The existing safety valve is codified at 18 U.S.C. § 3553(f).
31. See S. 1410 § 2.
32. See *id.* §§ 3–4.
33. See John G. Malcolm, *The Case for the Smarter Sentencing Act*, 26 FED. SENT’G REP. 298 (2014).
34. See S. 1410 § 7.
-

Finally, the Smarter Sentencing Act directs the Attorney General to compile an index of each criminal offense listed in the report and to make that index publicly accessible without charge on the Department of Justice website.<sup>35</sup> Similar directives are given to specified federal agencies.<sup>36</sup> As Heritage Senior Legal Research Fellow Paul Larkin wrote when the bill was introduced, this provision, by making it easy for average citizens to find federal law, “would take a significant step toward remedying one of the major problems that overcriminalization causes the average person.”<sup>37</sup>

### Conclusion

There is evidence that Congress is finally paying attention to the problem of overcriminalization. Both the lack of new criminal laws with insufficient

*mens rea* requirements and the introduction of legislation intended to address problems with fair notice and fair sentencing are encouraging. The next step is to repeal unjust criminal laws and to ensure that legislation introduced to combat overcriminalization is enacted.

—*Evan Bernick is a former Visiting Legal Fellow, Paul J. Larkin, Jr., is Senior Legal Research Fellow, and Jordan Richardson is a Visiting Fellow in the Edwin Meese III Center for Legal and Judicial Studies at The Heritage Foundation. The authors would like to thank Laura Jean Berger, Jonathan Formichella, James Hampson, and Peter McGinley, members of the Young Leaders Program at The Heritage Foundation, for valuable research in connection with this Legal Memorandum.*

---

35. *Id.*

36. *Id.*

37. Paul J. Larkin, Jr., *Supplying the Information Required by Law: Directing the Federal Government to Identify All Federal Criminal Laws*, THE HERITAGE FOUND. ISSUE BRIEF No. 4143, at 2 (Feb. 10, 2014), available at <http://www.heritage.org/research/reports/2014/02/overcriminalization-and-the-identification-of-all-federal-criminal-laws>.