

BACKGROUND

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Shining a Light on Overcriminalization

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Abstract

Overcriminalization—the overuse or misuse of the criminal law to address societal problems—manifests itself in a variety of ways, including overly broad definitions of criminal acts, excessively harsh sentencing, and criminal sanctions for simple mistakes or accidents under a theory of strict liability. However, overcriminalization has a more tangible aspect beyond legislation and legal theory: American citizens all too often find themselves trapped by the very system that they assumed existed for their protection and prosecuted for crimes that most people would not even recognize as criminal offenses. Criminal justice reform is about more than policy debates in Congress or legal procedure; it is about how the lives and fortunes of ordinary Americans are threatened by abuse of the law. Only by identifying the problem and highlighting why it matters will any meaningful change take place.

Overcriminalization—the overuse or misuse of the criminal law to address societal problems—is a troubling phenomenon that touches every segment of society.¹ It manifests itself in a variety of ways, including overly broad definitions of criminal acts, excessively harsh sentencing, and criminal sanctions for simple mistakes or accidents under a theory of strict liability.²

However, overcriminalization has a more tangible aspect beyond legislation and legal theory: For every problematic law or criminal procedure, there is a victim with a story to tell. Those victims include three fishermen in Florida who were sentenced to over six years in prison for importing lobsters packed in plastic rather than paper,³ a North Carolina man who was jailed for 45 days for selling hot dogs without a license,⁴ and an autistic teenager from

KEY POINTS

- Americans all too often find themselves trapped by the very system that they assumed existed for their protection and prosecuted for crimes that most people would not even recognize as criminal offenses.
- Examples of government overreach extend beyond criminal charges. In several instances, local governments have attempted to enforce inapplicable or obscure regulations that essentially prohibit ordinary behavior.
- In many cases, media has informed the public about how law enforcement officials were unfairly or wrongly targeting their fellow citizens. Public pressure was the catalyst to convince the authorities to reverse course.
- Although we should applaud the decision of public officials who eventually recognized that they had overstepped their authority and reversed course, there is still much more to be done.
- When ordinary people are turned into criminals for engaging in morally blameless behavior, the legitimacy of the justice system is undermined. Serious reform is essential.

This paper, in its entirety, can be found at <http://report.heritage.org/bg3017>

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Pennsylvania who was threatened with wiretapping charges after he recorded being bullied in school by his classmates.⁵ American citizens all too often find themselves trapped by the very system that they assumed existed for their protection and prosecuted for crimes that most people would not even recognize as criminal offenses.

The Heritage Foundation has made it a priority to report instances of overcriminalization and provide solutions to the root causes of this issue. One of the more effective ways to explain the importance of reform is by telling the stories of people who have been hurt by abuse of the criminal law.⁶ It is common to discuss changes in the system in terms of legislation or arcane legal concepts, but seeing the human side of overcriminalization is much more powerful.

Public Pressure

Reporting stories of people who have been needlessly and callously caught up in the criminal justice system has a two-fold benefit: First, it informs the public of the serious nature of overcriminalization and how it could equally harm them too; second, it exposes public officials and law enforcement officers who engage in misbehavior or exercise terrible judgment. The latter effect, especially, could help both to alter outcomes for individuals who are victimized by overcriminalization and to provide a catalyst for change.

During the past year, The Heritage Foundation has recounted the stories of people who were victims of overcriminalization. In several of these cases, positive outcomes ensued, in all likelihood as a result of the public ridicule that such injustices received. Although there is no quantifiable method to determine whether media pressure was the deciding factor that influenced public officials to reverse course after pursuing charges or fines against these individuals, it is wise to heed former Supreme Court Justice Louis Brandeis's wisdom: "Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman."⁷

The following examples are illustrative:

- Lazaro Estrada was arrested and charged with obstruction of justice for simply filming a Miami police officer who arrested his friend.⁸ Despite the fact that citizens should be presumptively free under the First Amendment to film officers in public places,⁹ Estrada faced significant punishment for turning on his camera. After his video of the incident went viral, the charges against Estrada were dropped.
- Shaneen Allen, a single mother from Pennsylvania, was arrested after being pulled over for a traffic violation and the officer was informed that she had a handgun in her car.¹⁰ Allen legally

1. See, for example, Jordan Richardson, "You Could Break the Law and Not Even Know It: Why Overcriminalization Is Everyone's Problem and How to Fix It," The Heritage Foundation, *The Insider*, Winter 2015, p. 32, <http://insideronline.org/archives/2015/Winter/InsiderArticle5.pdf>.

2. See generally Paul J. Larkin, Jr., "The Extent of America's Overcriminalization Problem," Heritage Foundation *Legal Memorandum* No. 121, May 9, 2014, http://thf_media.s3.amazonaws.com/2014/pdf/LM121.pdf.

3. Brian W. Walsh, "The Worst Thing that Anybody Can Do to You Is Take Away Your Freedom," *The Daily Signal*, August 8, 2011, <http://dailysignal.com/2011/08/08/the-worst-thing-that-anybody-can-do-to-you-is-take-away-your-freedom/>.

4. Evan Bernick, "'I Know My Rights': Woman Jailed After Filming Traffic Stop," *The Daily Signal*, February 22, 2014, <http://dailysignal.com/2014/02/22/know-rights-woman-jailed-filming-traffic-stop/>.

5. Evan Bernick, "The Crime of Being Bullied: 15-Year-Old Special Needs Student Convicted of Disorderly Conduct for Recording Evidence of Bullying," *The Daily Signal*, April 15, 2014, <http://dailysignal.com/2014/04/15/crime-bullied-15-year-old-special-needs-student-convicted-disorderly-conduct-recording-evidence-bullying/>.

6. Evan Bernick, "'The Best of Disinfectants': Using Publicity to Fight Overcriminalization," Heritage Foundation *Issue Brief* No. 4120, January 8, 2014, http://thf_media.s3.amazonaws.com/2014/pdf/IB4120.pdf.

7. Louis Brandeis, "What Publicity Can Do," *Harper's Weekly*, Vol. 8 (December 13, 1913).

8. Evan Bernick, "'What Did I Do Wrong?': (Another) Floridian Arrested for Exercising First Amendment Right to Film Police in Public," *The Daily Signal*, May 5, 2014, <http://dailysignal.com/2014/05/05/wrong-another-floridian-arrested-exercising-first-amendment-right-film-police-public/>.

9. Evan Bernick & Paul J. Larkin, Jr., "Filming the Watchmen: Why the First Amendment Protects Your Right to Film the Police in Public Places," Heritage Foundation *Legal Memorandum* No. 127, June 12, 2014, http://thf_media.s3.amazonaws.com/2014/pdf/LM127.pdf.

10. Jordan Richardson, "Single Mother Arrested for Carrying Gun to Protect Her Children," *The Daily Signal*, July 22, 2014, <http://dailysignal.com/2014/07/22/single-mother-arrested-carrying-gun-protect-children/>.

registered the gun in her home state and mistakenly assumed that it was legal for her to travel with it for protection across state lines. Her mistake could have sent her to prison for three years. After immense media pressure, the prosecutor allowed Allen to enter a diversion program, and New Jersey Governor Chris Christie subsequently pardoned her.

- Arnold Abbott, a 90-year-old charity worker from Fort Lauderdale, Florida, was threatened with arrest and a \$500 fine for feeding homeless people in the local city park.¹¹ A city ordinance required Abbott to comply with strict food handling and facility regulations—a mandate that would have made it nearly impossible to feed hungry people. Publicity from major news outlets soon prompted city officials to allow Abbott to continue his charitable works.

Examples of government overreach extend beyond criminal charges. In several instances, local governments have attempted to enforce inapplicable or obscure regulations that essentially prohibit ordinary behavior.

- Spencer Collins, a nine-year-old boy from Leawood, Kansas, built a miniature library box in his front yard as a Mother’s Day gift. Local authorities levied a \$500 fine against Spencer’s family and threatened to tear down the library because the box supposedly violated an ordinance against freestanding structures. Public outrage forced the city to reconsider, and the ordinance was amended to allow citizens to build little libraries.¹²
- Tiffany Miranda, a 10-year-old girl who suffers from a serious and incurable disease called Lennox-Gastaut syndrome, received her very own playground from the Make-A-Wish Foundation. The city government of Santa Fe Springs,

California, ordered Tiffany’s parents to tear down the playground because, in their estimation, it was a “public nuisance.” After facing an intense media backlash for trying to crush the dreams of a little girl with a serious illness, city officials quickly backtracked and allowed the playground to stay.¹³

Stories like these illustrate both the human cost of overcriminalization and the absurd but all too real instances of governmental overreach in general. In all of the cases mentioned here, media and news reports informed the public about how law enforcement officials were unfairly or wrongly targeting their fellow citizens. As a result, public pressure was the catalyst to convince the authorities to reverse course. Awareness precedes reform.

Reform Is Needed

The sobering reality of overcriminalization is that there are many more stories of victims that have not received media attention. Although we should applaud the decision of public officials who eventually recognized that they had overstepped their authority and reversed course, there is still much more to be done. Shaneen Allen, the single mother who faced three years in prison, now has her life back after receiving a pardon from a governor, but not everyone is so fortunate as to have a high-level official intervene in his or her case. Many voices go unheard.

If overcriminalization is left unchecked, it will continue to be a problem. Our Founders warned us long ago about the dangers of an expansive legal system that arbitrarily creates and enforces numerous criminal laws. James Madison, writing in the *Federalist Papers*, stated:

It will be of little avail to the people, that the laws are made by men of their own choice, if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood;

11. Jordan Richardson, “Pastor Charged with Criminal Penalty for Feeding the Homeless,” *The Daily Signal*, November 6, 2014, <http://dailysignal.com/2014/11/06/pastor-charged-criminal-penalty-feeding-homeless/>.

12. Jordan Richardson, “Young Boy Takes on City Council...and Wins,” *The Daily Signal*, July 14, 2014, <http://dailysignal.com/2014/07/14/young-boy-takes-city-counciland-wins/>.

13. Jordan Richardson, “Unbelievable: City Demands Girl Tear Down Her Playground...That She Received from Make-A-Wish Foundation,” *The Daily Signal*, October 10, 2014, <http://dailysignal.com/2014/10/10/unbelievable-city-demands-girl-tear-playground-received-make-wish-foundation/>.

if they be repealed or revised before they are promulgated, or undergo such incessant changes that no man, who knows what the law is today, can guess what it will be to-morrow. Law is defined to be a rule of action; but how can that be a rule, which is little known, and less fixed?¹⁴

When ordinary people are turned into criminals for engaging in morally blameless behavior, the legitimacy of the justice system is undermined. Serious reform is essential.

Conclusion

Criminal justice reform is about more than policy debates in Congress or legal procedure; it is about how the lives and fortunes of ordinary Americans are threatened by abuse of the law. The criminal justice reform movement should focus on telling the stories of those who are affected by an overly zealous government and the excessive power of the state.

Only by identifying the problem and highlighting why it matters will any meaningful change take place. Overcriminalization is not an easy problem to solve, but it is one that demands our attention.

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14. *The Federalist* No. 62, in *The Federalist Papers*, ed. Clinton Rossiter (New York: New American Library, 1961), p. 367.