

17. Overcriminalization

Policymakers should

- override the old maxim that “ignorance of the law is no excuse” (given the breadth of the criminal codes now on the books, that doctrine no longer makes sense);
- strengthen the rule of lenity for criminal cases by enacting a statute that explicitly provides for the strict construction of all criminal laws; and
- prohibit administrative agencies from creating new crimes.

Over the past 10 years, there has been much discussion in academic and policy circles concerning “mass incarceration” in the United States. Many have observed that there is something incongruous about America, the land of the free, finding itself with one of the highest incarceration rates in the world. The United States has about 2 million inmates and another 7 million persons under the “supervision” of the criminal justice system. Something is amiss, but the root of the problem is not sentencing policy; rather, it is the burgeoning criminal codes at the “front end” of the criminal system. Policymakers at all levels of government have criminalized so many activities that it should come as no surprise that our courthouses are clogged with cases and our prisons are overflowing with inmates. Politicians have recklessly sought short-term political advantage by taking “credit” for new laws while ignoring the long-term consequences of their policy decisions. It is no overstatement to say that the politics of criminalization threaten the very foundation of our free society.

The Legal Minefield

Every year American lawmakers add new crimes to the law books. Under the Constitution, crime fighting is supposed to be reserved to state

and local government. But over the past 40 years, Congress has federalized many of the crimes that have always been investigated by local police. Politicians have also found ways to recriminalize criminal conduct. “Hate crimes,” for example, duplicate crimes such as murder and assault and add stiffer penalties when prosecutors can prove that bigotry was a motivating factor behind the violence.

The criminal law has also followed the rise of the regulatory state. In addition to the thousands of criminal laws, there are now tens of thousands of regulations that carry criminal penalties, including prison time. The web of rules has become so vast that it seems as if most Americans are now criminals whether they realize it or not.

The overcriminalization phenomenon extends beyond the realm of violence, fraud, vice, and commercial regulations. Consider these cases:

- A river guide saw a teenager in distress and so left his boat and swam to save her. He was charged with “obstructing government operations” for not waiting for the search and rescue team.
- Federal prosecutors indicted computer prodigy Aaron Swartz for improperly downloading articles from the digital library JSTOR. The Justice Department maintains that when a website owner’s terms-of-service policy is violated, a crime is also committed—even though owners retain the right to change the terms at any time and without prior notice. Frightened by the prospect of bankruptcy, a long prison sentence, or both, Swartz took his own life.
- Retired race car driver Bobby Unser was prosecuted by federal authorities for driving his snowmobile on protected federal land. Unser and his friend got lost during a snowstorm and were desperately seeking shelter or assistance.
- Nevada rancher Dudley Hiibel was jailed for declining to give his name to a policeman.
- Members of a Christian outreach group were arrested and prosecuted for feeding the homeless in a Ft. Lauderdale park. Local rules restricted food sharing.

There was a telling moment before the Supreme Court in 2009 when a government lawyer was explaining the scope of the federal “honest services” law. The lawyer from the Department of Justice said that law criminalized any ethical lapse in the workplace. In response, Justice Stephen Breyer exclaimed, “There are 150 million workers in the United States. I think possibly 140 million of them flunk your test.” The government lawyer did not deny Justice Breyer’s observation. As unbelievable as it

may sound, the federal government considers more than a hundred million Americans to be criminals. And that is only under its interpretation of a single federal statute. As noted, there are thousands and thousands more. The overcriminalization phenomenon is thus quite real.

The Consequences of Overcriminalization

There are several reasons to be alarmed by the exponential growth of criminal rules and regulations. First and foremost, America has always prided itself on its freedom; but a society in which the criminal rules are so pervasive that no one is safe from arrest and prosecution cannot be described as free. The traditional common law crimes—murder, rape, theft, assault—do not restrict the freedom of the citizenry to live their own lives peaceably. However, as soon as the government goes beyond the basic crimes to prohibit other human activities, the adverse impact on liberty becomes evident. As the criminal law expands, there is a concomitant diminution of liberty.

Second, when criminal code violations become virtually unavoidable, the safeguards in the Bill of Rights become ineffectual. As the Harvard legal scholar Henry Hart observed, “What sense does it make to insist upon procedural safeguards in criminal prosecutions if anything whatever can be made a crime in the first place?” Hart’s point was that if some rule can be shown to have been violated, a speedy trial cannot help the person facing a prison sentence. And an able defense attorney can only help his client by making a plea for leniency.

Third, law enforcement resources are limited. The police and courts are busy enough with violent crimes, theft, and extortion. Those cases will be neglected if the police are burdened with additional responsibilities. Andrew McCarthy, a former federal prosecutor, reminds us that there is no getting around the tradeoff: time and money “spent investigating conduct that is not inherently criminal are time and money lost to the thwarting of much more serious crime.”

Fourth, policymakers should always pause to remember that every rule brings about the possibility that the police will have to employ violence to enforce that rule. Eric Garner was killed by New York City police as they were trying to enforce a rule against selling individual cigarettes (“loosies”) on the street. Yale Law School professor Stephen Carter has noted that if policymakers want to seriously reduce the opportunities for dangerous interactions between police and civilians, they should stop talking about “better police training” and scale back the criminal codes.

Fifth, another inevitable consequence of overcriminalization has been more governmental errors. Innocent people are sometimes arrested, prosecuted, and imprisoned. Wrongful convictions are not only unjust to the prisoner, but to his or her family—children, spouse, parents, and siblings. One effective way to limit those miscarriages of justice is to keep the criminal system as small as possible. If America has two million people imprisoned and the government has done its job properly in 95 percent of the cases, that means 100,000 people are unjustly imprisoned. By scaling back the criminal codes, so that the total number of people prosecuted and imprisoned is reduced, policymakers could also reduce the number of innocent persons mistakenly imprisoned.

Reform Measures

Of course, overcriminalization can be addressed in many ways. The following are three possible routes to correcting the system.

Override the Old Maxim That “Ignorance of the Law Is No Excuse”

It is absurd and unjust for the government to impose a legal duty on every citizen to “know” all of the mind-boggling rules and regulations that have been promulgated over the years. The old maxim that “ignorance of the law is no excuse” only makes sense when the criminal law covers conduct that is plainly and inherently wrongful, such as murder and theft.

To illustrate the rank injustice that can occur, take the case of Carlton Wilson, who was prosecuted because he possessed a firearm. Wilson’s purchase of the firearm was perfectly legal. Years later, a judge issued a restraining order against Wilson during his divorce proceedings. He didn’t know that meant he had to give up the firearm. When Wilson protested that the judge never informed him of that obligation and that the restraining order itself said nothing about firearms, prosecutors shrugged, “ignorance of the law is no excuse.” Although the courts upheld Wilson’s conviction, Judge Richard Posner filed a dissent: “We want people to familiarize themselves with the laws bearing on their activities. But a reasonable opportunity doesn’t mean being able to go to the local law library and read Title 18. It would be preposterous to suppose that someone from Wilson’s milieu is able to take advantage of such an opportunity.” Judge Posner noted that Wilson would serve more than three years in a federal penitentiary for an omission that he “could not have suspected was a crime or even a civil wrong.”

Policymakers should override the “ignorance-is-no-excuse” maxim by enacting a law that requires prosecutors to prove that regulatory violations are “willful” or, in the alternative, that permits defendants to plead a good-faith belief in the legality of one’s conduct. The former rule is already in place for our complicated tax laws. It should also shield unwary Americans from all laws and regulations as well.

Strengthen the Rule of Lenity

Even if there were only a few crimes on the books, the terms of our criminal laws ought to be drafted with precision. After all, there is little difference between a secret law and a published regulation that cannot be understood. The American Revolutionaries believed in the Latin maxim *nullum crimen sine lege*, which means there can be no crime without a law. In other words, people can be punished only for conduct previously prohibited by law. That principle is clearly enunciated in the ex post facto clause of the Constitution (Article I, Section 9). But the purpose of that clause can be subverted if the legislature can enact a criminal law with vague terms that can be interpreted broadly by prosecutors or judges. Such a law would not give citizens fair warning of the prohibited conduct.

One way to address the problem of vague laws that were previously enacted would be for legislators to direct the courts to follow the “rule of lenity.” That doctrine resolves legal uncertainties in favor of the accused, not the government. Unfortunately, the courts have not invoked that doctrine consistently.

Prohibit Administrative Agencies from Creating New Crimes

Beyond the thousands of criminal statutes enacted by legislatures, there are also thousands of regulations that carry criminal penalties. It is the responsibility of elected officials to carefully consider what infractions can result in a criminal conviction and prison time.

The case law that has thus far allowed the delegation of lawmaking has drawn criticism. U.S. district judge Roger Vinson, for example, has observed:

A jurisprudence which allows Congress to impliedly delegate its criminal lawmaking authority to a regulatory agency such as the Army Corps—so long as Congress provides an “intelligible principle” to guide that agency—is enough to make any judge pause and question what has happened. Deferent and minimal judicial review of Congress’ transfer of its criminal lawmaking function to other bodies, in other branches, calls into question

the vitality of the tripartite system established by our Constitution. It also calls into question the nexus that must exist between the law so applied and simple logic and common sense.

Making conduct criminal is a serious matter. It is a decision that ought to be made by the people's elected representatives, whether in Congress, the state legislatures, or city councils.

Conclusion

Political observers have noted that criminal justice reform is one of the few policy areas that is now finding support from across the political spectrum. On the left, law professor Michelle Alexander, author of *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*, tells her students that even though she has earned fancy degrees, she is a criminal. She challenges others to come clean as well. After all, just because a person has not been caught does not mean she is not a criminal in the eyes of the law. Alexander believes reform will happen when more people come to terms with their own "criminality." On the right, U.S. circuit judge Alex Kozinski makes a similar point in his article, "You're (Probably) a Federal Criminal." Most Americans are criminals, but don't know it, he writes.

There are some indications that the policy climate is becoming more receptive to fundamental reform. A recent cover story in *Harper's* was titled, "Legalize It All: How to Win the War on Drugs." A few weeks later, a cover story in *The New York Times Magazine* posed the question, "Should Prostitution Be a Crime?" While these questions are still being debated, it seems clear that more and more people are coming to recognize that vices are not crimes that warrant the intervention of police powers. Over the past few years, policymakers in Vermont, Maine, Colorado, and New Hampshire have voted to repeal criminal laws regarding adultery. These developments are welcome, but policymakers should move more aggressively toward criminal code reform and prune the law books of unnecessary and unjust criminal provisions. An expansive criminal code is inimical to a free society.

Suggested Readings

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