



OVERCRIMINALIZATION IN AMERICA



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By Luke Hogg

Introduction

Every year, throughout the United States, thousands of citizens are being abused by a growingly authoritarian federal government. The sheer volume of federal statutes and regulations that carry criminal penalties means that every American could be considered a criminal by federal authorities for one thing or another. Unfortunately, most people do not take the time to consider the issue of overcriminalization until they are at the receiving end of a federal subpoena. In order to combat this epidemic of overcriminalization, legislators, bureaucrats, and other decision makers must recognize the scope of this issue and begin by plucking the lowest hanging fruit to address it.

Towards that end, policy makers should consider three essential reforms. Creating a thorough list of federal statutes and regulations that carry criminal penalties would help ensure that individuals are not prosecuted for actions they would have little way of knowing were illegal, since there is no way to access the full scope of federal laws and regulations. Ensuring strong and appropriate *mens rea* requirements for all crimes would further protect individuals from adjudication when they had no intent to commit a crime. Furthermore, strengthening the rule of lenity for regulatory crimes to resolve ambiguities in the law in favor of the defendant would begin the necessary transition away from the current state of regulatory deference that inhibits courts by resolving ambiguities in favor of the regulator.

Background

ACT I: THE CONSTITUTION

“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.”

– James Madison, Federalist #62¹

In laying out the framework for a fledgling nation, the framers of our Constitution only saw fit to include three crimes in our foundational document: counterfeiting, piracy, and treason. It wasn't until three years later in April of 1790 that the First United States Congress began to fill in the gaps of the new constitutional framework to create a functional government. From Federal Hall in New York City, this first

1 Madison, James. *The Federalist Papers: No. 62*. Coventry, 2015.

American legislature passed the Punishment of Crimes Act which defined those few constitutional crimes, as well as codifying several new offenses such as larceny, manslaughter, murder, and perjury.² The Crimes Act also amended the Judiciary Act of 1789—the law that established federal courts—to outline criminal procedure and punishments for these new crimes.

In total, the Crimes Act, which “fit on two sheets of parchment, each around 27 inches by 22 inches,” established 17 federal offenses.³ These first few criminal offenses, like murder and theft, were simply defined and clearly established so that every person could understand them. Furthermore, as former Attorney General Ed Meese wrote, “virtually all crimes required proof that the accused had acted with a ‘guilty mind’— that is, with the intent to do a wrongful act.”⁴ Beyond quelling the occasional tax revolt, the early federal government rarely got involved in criminal matters. This relatively *laissez faire* approach to criminal justice resulted in strong state and municipal courts with minimal federal intervention.

After the Civil War tore our nation apart, the federal government undertook a radical centralization in its efforts to bring the southern slave states back into the Union. One of the largest byproducts of reconstruction is a continuing legacy of increasing federal control. Subsequently, the rise of the administrative state in response to the excesses of the Gilded Age followed by the blossoming of the Anti-Trust Era saw federal payrolls expanding year upon year.

This time period also ushered in a new era of federal criminalization. The federal enforcement of alcohol prohibition, and the resulting rise in organized crime, pushed the federal government to take a hands-on approach to interstate crime. Suddenly, Americans were faced with a plethora of new federal crimes, from bootlegging to racketeering and money laundering, with a new focus on financial crimes that still ripples today. This form of federal criminalization led to the creation of the J. Edgar Hoover’s Federal Bureau of Investigation (FBI), as well as several other new federal law enforcement agencies like the Federal Bureau of Prisons. By the mid-twentieth century, the federal government had grown to a size that would be unimaginable to the framers.

2 “First Congress, Sess. II, Ch. IX - An Act for the Punishment of certain Crimes against the United States.” *Library of Congress Statutes at Large: 1st Congress*. April 30, 1790. <https://www.loc.gov/law/help/statutes-at-large/1st-congress/session-2/c1s2ch9.pdf>

3 “An Act for the Punishment of Crimes.” *Wall Street Journal*. July 22, 2011. <http://www.wsj.com/articles/SB10001424053111903461104576462471530874138>

4 Meese III, Edwin. “The Constitution and Crime.” *Heritage Foundation*. September 15, 2010. <https://www.heritage.org/the-constitution/commentary/the-constitution-and-crime>

ACT II: “LAW & ORDER”

“Justice is merely incidental to law and order.”

- J. Edgar Hoover⁵

It was the inauguration of President Richard Nixon in 1969 that brought in a new era of criminal justice. His unprecedented use of federal authority to clean up America’s streets came under the guise of “law and order,” a phrase invoked by every president since. Rather than relying on state and municipal authorities, as had historically been the case, Nixon determined to use federal agents to do the job of local police. This policy, which has continued through all subsequent administrations, coincided with the expansion of mandatory minimum sentencing measures, so-called “three-strikes” rules, and federal grant programs that facilitated the militarization of local police forces. It was under their direction that federal law enforcement ballooned into the alphabet soup of agencies we currently have, including the Drug Enforcement Agency (DEA), Bureau of Alcohol Tobacco, and Firearms (ATF), Customs and Border Protection (CBP), and the Financial Crimes Enforcement Network (FinCEN), just to name a few.

The quintessential example of “law and order” policy is the fundamentally flawed Violent Crime Control and Law Enforcement Act championed by then-Senator Joe Biden in the Senate and signed by President Bill Clinton in 1994.⁶ This bill provided federal funding for 100,000 new police officers and \$9.7 billion to expand prisons, as well as creating dozens of new federal crimes. Today, the 1994 Crime Bill is recognized as a tipping point towards systemic over-incarceration. In reflecting on the 20th anniversary of the signing of the 1994 Crime Bill, which he attended, Jeremy Travis, now the president of the John Jay College of Criminal Justice, lamented his involvement. “Here’s the federal government coming in and saying we’ll give you money if you punish people more severely,” he told National Public Radio. “We now know with the fullness of time that we made some terrible mistakes, and those mistakes were to ramp up the use of prison.”⁷

ACT III: THE MODERN ERA

“There is no crueller tyranny than that which is perpetuated under the shield of law and in the name of justice.”

- Montesquieu⁸

The result of all these policies has been an epidemic of over-incarceration in America. One significant driver of this unprecedented growth in incarceration

5 <http://www.jedgarhooverfoundation.org/>

6 H.R. 3355, 103rd Congress. (1994)

7 Johnson, Carrie. “20 Years Later, Parts Of Major Crime Bill Viewed As Terrible Mistake.” *National Public Radio*. September 12, 2014. <https://www.npr.org/2014/09/12/347736999/20-years-later-major-crime-bill-viewed-as-terrible-mistake>

8 Montesquieu. *Considerations on the Causes of the Greatness of the Romans and their Decline*. 1876. <https://archive.org/details/cu31924028288722>

has been the expansion of the size and scope of federal criminal offenses and its normalization of the same across the states. Unfortunately, making a full accounting of federal crimes is much more difficult than it may appear. When the Congressional Research Service (CRS) was given this task in the past by the House Over-Criminalization Task Force in 2013, “CRS’ initial response to [the] request was that they lack the manpower and resources to accomplish this task.” As Task Force Chairman Jim Sensenbrenner put it, “I think this confirms the point that all of us have been making on this issue and demonstrates the breadth of over-criminalization.”⁹

What we know for certain is that there are over 4,500 federal statutes that carry criminal penalties.¹⁰ There are also an estimated 300,000+ federal regulations that carry criminal penalties. A far cry from the simple social rules imposed by our founding fathers under the Crimes Act, today’s federal crimes cover an ever-expanding array of increasingly minute rules. The executive bureaucracy—the fourth branch of our federal government—has grown to an unquantifiable size and has a tighter grip on American communities than ever before.¹¹ The regulatory state has grown so large that some have posited that every citizen is a federal criminal.

In his book, *Three Felonies a Day: How the Feds Target the Innocent*, attorney Harvey Silvergate demonstrates how the Code of Federal Regulations is so convoluted that the normal law-abiding citizen unwittingly commits an average of three felonies per day.¹² Law professor John Baker put it more bluntly: “There is no one in the United States over the age of 18 who cannot be indicted for some federal crime.”¹³ The reason for this phenomenon is that the breadth of federal statutes and regulations has grown to cover practically everything under the sun. To demonstrate this point, Mike Chase, author of the satirical book *How to Become a Federal Criminal*, created a Twitter account @CrimeADay to highlight some of the ridiculous federal crimes, such as:¹⁴

- 21 USC §§610, 676 & 9 CFR §319.306 make it a federal crime to sell spaghetti with meatballs and sauce without prominently declaring the presence of the sauce
- 21 USC §§1037, 1041(a) & 1033(g)(6) make it a federal crime to sell a leaky egg
- 16 USC §1375(b), 50 CFR §§18.3 & 18.13(c) make it a federal crime to sell a

9 Hearing Transcript of the House Over-Criminalization Task Force. “Defining the Problem and Scope of Over-Criminalization and Over-Federalization.” *Government Printing Office*. June 14, 2013. <http://www.gpo.gov/fdsys/pkg/CHRG-113hhrg81464/pdf/CHRG-113hhrg81464.pdf>

10 Baker, John. “Revisiting the Explosive Growth of Federal Crimes.” *The Heritage Foundation*. June 16, 2008. <http://www.heritage.org/research/reports/2008/06/revisiting-the-explosive-growth-of-federal-crimes>

11 Crews Jr, Clyde Wayne. “How Many Federal Agencies Exist? We Can’t Drain The Swamp Until We Know.” *Forbes*. July 5, 2017. <https://www.forbes.com/sites/waynecrews/2017/07/05/how-many-federal-agencies-exist-we-cant-drain-the-swamp-until-we-know/#779b352b1aa2>

12 Silvergate, Harvey. *Three Felonies a Day: How the Feds Target the Innocent*. Encounter Books. September 2009. <http://www.amazon.com/Three-Felonies-Day-Target-Innocent/dp/1594032556/>

13 Fields, Gary and John R. Emshwiller. “Many Failed Efforts to Count Nation’s Federal Criminal Laws.” *Wall Street Journal*. July 23, 2011. <http://www.wsj.com/articles/SB10001424052702304319804576389601079728920>

14 <https://twitter.com/CrimeADay>

walrus

- 33 USC §1 & 33 CFR §207.20(q)(8)(i) make it a federal crime to take a horse to a picnic at the Cape Cod Canal
- 16 USC §1375 & 50 CFR §17.108(c)(14)(ix)(E) make it a federal crime to attempt to pinch a manatee in the Kings Bay Manatee Refuge

Unfortunately, these seemingly silly regulations have real consequences and are indicative of a much larger issue: the ease with which any given activity can be criminalized by federal powers so far removed from individuals' lives. Every day, unassuming American citizens are becoming victims of such criminal and regulatory overreach. In an effort to relieve injustices committed against Americans under the criminal justice system and the regulatory state, FreedomWorks launched the American Freedom Initiative (AFI). As part of his project, we shine a spotlight on some of the individuals who have been victims of over-criminalization.

One such individual that has been highlighted by the AFI, as well as other like-minded organizations like the Institute for Justice, is Randy Sowers, a dairy farmer from Frederick County, Maryland. Having grown tired of using generic middlemen, Sowers wanted to tap into the growing trend of fresh, local produce by selling his milk directly to his neighbors at farmers markets and from their farm. In February of 2012, two agents from the Internal Revenue Service (IRS) came to Sowers' farm and informed him that they had seized his entire bank account—totalling over \$60,000—because some of his customers had been paying in cash. Although Sowers was never charged with any crime, the federal government kept his life's savings through a common practice known as civil asset forfeiture.

After a lengthy legal battle with significant *pro bono* assistance from outside groups, Sowers fortunately got some of his money back from the IRS.¹⁵ But his story is echoed by thousands of others who have not been as lucky.

Criminal Abuse

"The only power government has is the power to crack down on criminals. Well, when there aren't enough criminals, one makes them. One declares so many things to be a crime that it becomes impossible for men to live without breaking laws."

– Dr. Floyd Ferris, *Atlas Shrugged*¹⁶

Since Roman times, one of the commonly held principles of the common law is that "ignorance of the law excuses no one." Unfortunately, with over 4,500 federal criminal statutes that carry criminal penalties, not even attorneys can be expected

¹⁵ Sibilla, Nick. "Maryland Dairy Farmer Beats The IRS, Will Recover Nearly \$30,000 Seized Through Civil Forfeiture." *Forbes*. June 29, 2016. <https://www.forbes.com/sites/instituteforjustice/2016/06/29/maryland-dairy-farmer-beats-the-irs-will-recover-nearly-30000-seized-through-civil-forfeiture/#893565b73378>

¹⁶ Rand, Ayn. *Atlas Shrugged*. Random House, 1957.

to know every instance in which they might be breaking some law. This issue is only magnified when the mass of federal rules and regulations that carry penalties are factored into the equation. If counting federal criminal statutes was difficult, counting federal regulations is practically impossible. The nearest full accounting was made in 1991 and found “over 300,000 federal regulations that may be enforced criminally.”¹⁷

This unfortunate fact perfectly encapsulates two important aspects of over-criminalization that need to be addressed. The first problem relates to knowledge while the second relates to intent.

With such a mass of criminal law and federal regulation, it has become nearly impossible for any individual to not inadvertently commit some sort of federal crime. Though the federal government obviously does not prosecute every single regulatory violation, the reality remains that we are all felons, and have been for some time. Back in 2010, Bryan Walsh and Tiffany Joslyn perfectly expressed the first underlying cause of over-criminalization. As with many other areas of policy, it is largely a consequence of Congress delegating its responsibility to the executive branch.

“When Congress enacts a single offense authorizing regulatory criminalization, it effectively attaches criminal penalties to regulations, rules, and orders that may not yet have been contemplated, let alone drafted and made into law. A single criminal offense may serve as the authority for any number of additional, regulatory criminal offenses... Regulatory criminalization thus has profound implications for the problem of how to ensure individuals and businesses receive fair notice of what conduct can be punished criminally.”¹⁸

If we are to get a handle on over-criminalization in America, we must first know the size and scope of the problem. Section 5 of the Smarter Sentencing Act,¹⁹ sponsored by Sen. Mike Lee (R-Utah), and the Count the Crimes Act,²⁰ sponsored by Rep. Chip Roy (R-Texas), are two proposals that would require a full accounting of federal criminal statutes and regulations.

The other issue created by our incomprehensible mass of rules and regulations is that most of these criminal penalties do not require intent on the part of the offender in order to be prosecuted. There is an important difference between an individual who willfully and maliciously violates the law and those who are ignorant

17 Coffee, John C. “Does ‘Unlawful’ Mean ‘Criminal’?: Reflections on the Disappearing Tort/Crime Distinction in American Law.” 71 B. U. L. REV.193 (1991). https://scholarship.law.columbia.edu/faculty_scholarship/527

18 Walsh, Bryan and Tiffany Joslyn. “Without Intent: How Congress Is Eroding the Criminal Intent Requirement in Federal Law.” *Heritage Foundation*. May 5, 2010. http://s3.amazonaws.com/thf_media/2010/pdf/WithoutIntent_lo-res.pdf

19 U.S. Congress, Senate. *Smarter Sentencing Act of 2019*. S. 2850. 116th Cong., Second Session. <https://www.congress.gov/116/bills/s2850/BILLS-116s2850is.pdf>

20 U.S. Congress, House. *Count the Crimes to Cut Act of 2020*. H.R. 7270. 116th Cong., Second Session. <https://www.congress.gov/116/bills/hr7270/BILLS-116hr7270ih.pdf>

of their crime. First formally established under the English common law in the 13th century, the principle of *mens rea* requires that a person have a “guilty mind” to be a criminal.²¹ An illegal act without an illegal mindset should not be a crime.

It was Oliver Wendell Holmes who expressed this principle most eloquently in *The Common Law*. He recognized that the common law evolved from humanity’s long history of feuds and vengeance. Yet, even the ancients recognized the important distinction of intent. In Holmes’ words, “even a dog distinguished between being stumbled over and being kicked.”²²

Unfortunately, although *mens rea* was an essential element of our criminal justice system originally, it has since been severely eroded. A study conducted by the Heritage Foundation of all proposed criminal offenses in the 109th Congress found that over half had “weak *mens rea* requirements.”²³ Of the 36 proposed criminal offenses that became law between 2005 and 2007, 64 percent either had an insufficient requirement or no *mens rea* requirement at all. Once again, this problem is only magnified when one considers the fact that the vast majority of regulatory crimes also lack *mens rea* requirements.

Administrative Abuse

“What did the regulations say? Anything, or nothin’. They write them regulations so a man’s never sure what they mean; that way they can jump clear if the britches ever start to bind.”

- Charlie Flagg, *The Time it Never Rained*²⁴

The problem of over-criminalization is not limited to sending people to prison. Federal regulatory fines and forfeitures can be just as devastating. With an average of 27 regulatory rules implemented for every statutory law in the last decade, the vast majority of over-criminalization has taken the form of over-regulation.²⁵ As was the case with Randy Sowers, all too often family’s livelihoods are being ripped away from them without due process through administrative adjudication. Under this system, regulators act as judge, jury, and executioner, oftentimes leaving no room for legitimate appeal.

Within the 240 volumes and around 175,000 pages of the Code of Federal Regulations rest thousands of reasons that federal agents can seize your assets. Unfortunately, as the Office of Management and Budget recognizes, “The growth of

21 Chesney, Eugene J. “Concept of Mens Rea in the Criminal Law,” *Journal of Criminal Law and Criminology*. 1938-1939. <https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=2828&context=jclc>

22 Holmes, Oliver Wendell. *The Common Law*. Project Gutenberg. December, 2000. <http://www.gutenberg.org/ebooks/2449>

23 Walsh and Joslyn. “Without Intent.” *Heritage*. 2010. <https://www.heritage.org/crime-and-justice/report/without-intent-how-congress-eroding-the-criminal-intent-requirement>

24 Kelton, Elmer. *The Time it Never Rained*. TCU Press, 1984.

25 Crews, Clyde Wayne. “How Many Rules And Regulations Do Federal Agencies Issue?” *Forbes*. August 15, 2017. <https://www.forbes.com/sites/waynecrews/2017/08/15/how-many-rules-and-regulations-do-federal-agencies-issue/#5eaaa9521e64>

administrative enforcement and adjudication over the last several decades has not always been accompanied by commensurate growth of protections to ensure just and reasonable process.”²⁶ The most poignant evidence of such lack of protection is the noticeable increase in federal receipts from administrative adjudication. According to the Annual Combined Treasury Statements, in 2019 alone, federal agencies collected over \$11.2 billion in fines, penalties, and forfeitures from American families and businesses, up from only \$2.7 billion in 2001.²⁷

There are many reasons that federal receipts from fines and forfeitures have quadrupled in less than 20 years, but the most pressing is that our current administrative adjudication process lacks the proper due process protections found in the judicial courts. Although “formal adjudication” is governed by the Administrative Procedure Act—requiring on-the-record hearings being presided over by an administrative law judge (ALJ)—“a great deal of federal administrative adjudication, referred to by the misleading name ‘informal adjudication,’ is conducted partly or wholly outside the auspices of the APA.”²⁸ An estimated 90 percent of all adjudication proceedings are “informal” and not entirely covered by the APA.²⁹

While those being adjudicated against technically retain the right to judicial review, the reality of the situation is that, “Whatever legitimacy the Article III courts promise must seem like a distant mirage for the vast majority of immigrants, claimants, and others as they litigate in obscure hearing rooms, far away from the grandeur of the federal courts.”³⁰

Solutions

“We are not to simply bandage the wounds of victims beneath the wheels of injustice, we are to drive a spoke into the wheel itself.”

- Dietrich Bonhoeffer³¹

Although there has been much recent focus given to sentencing reform, recidivism, and rehabilitation, over-criminalization is an equally important part of the prison pipeline. In order to begin overcoming decades of over-criminalization, policymakers must take several steps now to build a foundation for deeper reform.

One of the best things policymakers can do to begin curtailing the pandemic of

26 “Request for Comment: Improving and Reforming Regulatory Enforcement and Adjudication.” *Office of Management and Budget*. 85 FR 5483. <https://www.federalregister.gov/documents/2020/01/30/2020-01632/improving-and-reforming-regulatory-enforcement-and-adjudication>

27 “Combined Statement of Receipts, Outlays, and Balances of the United States Government.” *Bureau of the Fiscal Service*. 2001, 2019. <https://fiscal.treasury.gov/reports-statements/combined-statement/previous.html>

28 Asimow, Michael. “A Guide to Federal Agency Adjudication.” American Bar Association. 2003. P. xiv.

29 Ibid.

30 Gelbach, Jonah and David Marcus. “Rethinking Judicial Review of High Volume Agency Adjudication.” *Texas Law Review*. Volume 96 - Issue 6. <https://texaslawreview.org/rethinking-judicial-review-of-high-volume-agency-adjudication/>

31 Bonhoeffer, Dietrich. Notable Quotes. <https://tdbi.org/dietrich-bonhoeffer/notable-quotes/>

over-criminalization would be to enact default *mens rea* requirements through legislation. Such a requirement would provide statutory protection for otherwise law-abiding citizens who had no intention of committing a crime. Ideally, such a requirement would create a blanket standard of *mens rea* for all criminal offenses, both regulatory and otherwise. Such a default standard would also mitigate strict liability offenses.

Given the complexity of federal criminal statutes and regulations, a blanket *mens rea* requirement may not be feasible. In such cases, policymakers should consider implementing a stronger rule of lenity. Such a rule holds that ambiguities in criminal law ought to be resolved in the favor of the defendant. As it stands, the rule of lenity has been applied incredibly sparingly.³² Expanding such a rule would have the added benefit of preempting the issues created by existing deference rules that often leave defendants without access to proper judicial review.

Finally, in order to combat the issue created by the incomprehensible mass of criminal statutes and regulations, policymakers should create an easily-accessible, online list of federal criminal statutes and regulations carrying criminal penalties. Such a program would significantly reduce the possibility that individuals might commit crimes or violate rules that they didn't even know existed. Additionally, it would inevitably hold legislators and regulators more accountable to the public, which likely in turn encourages those making the penalties to be more careful in their actions. In a simpler sense, merely creating a full accounting of all criminal statutes and regulations would be a massive improvement over the status quo.

There is no silver bullet to solve the problems of over-criminalization. This is a problem that was created over decades of bipartisan work, and it will take just as much effort to undo, if not more. Hopefully, policymakers can come together behind common sense solutions to a problem that affects every American.

³² Blackman, Josh. "Does the Rule of Lenity Still Exist?." JoshBlackman.com June 9, 2011. <http://joshblackman.com/blog/2011/06/09/does-the-rule-of-lenity-still-exist/>

