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Ellen S. Podgor

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INTRODUCTION

OVERCRIMINALIZATION: NEW APPROACHES TO A GROWING PROBLEM

ELLEN S. PODGOR*

Ours is a reactive society. A major incident happens, and Congress passes legislation in response. The Savings & Loan crisis in the 1980s brought us the Financial Institutions Reform, Recovery, and Enforcement Act of 1989.¹ The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001—commonly referred to as the Patriot Act—was a direct response to the terrorist attacks of September 11th.² The Enron debacle brought us the Sarbanes–Oxley Act of 2002.³

The reaction to our recent financial crisis could be heard in President Obama’s 2012 State of the Union speech, where he proposed a legislative approach to assist with compliance. The President spoke of a Financial Crimes Unit and suggested that the legislature “pass legislation that makes the penalties for fraud count.”⁴

This is not something determined by partisan affiliation, such as whether the actor is Republican, Democrat, liberal, or conservative. It is our society that provokes the reaction, and this reaction is premised on a

* Gary R. Trombley Family White-Collar Crime Research Professor and Professor of Law, Stetson University College of Law. The author thanks research assistant Rachel M. Batten and Stetson University College of Law.

¹ Pub. L. No. 101-73, 103 Stat. 183 (1989) (codified as amended in scattered sections of 12 U.S.C. (2006)).

² Pub. L. No. 107-56, 115 Stat. 272 (2001) (codified as amended in scattered sections of 8 U.S.C., 15 U.S.C., 18 U.S.C., 22 U.S.C., 31 U.S.C., 42 U.S.C., 49 U.S.C., 50 U.S.C. (2006)).

³ Pub. L. No. 107-204, 116 Stat. 745 (2002) (codified as amended at 15 U.S.C. §§ 78, 7201–66 and 18 U.S.C. §§ 1348–50, 1514(a), 1519–20 (2006)).

⁴ President Barack Obama, An America Built to Last, State of the Union Address (Jan. 24, 2012), *available at* http://www.c-span.org/uploadedFiles/Content/The_Administration/State_of_the_Union/SOTU-2012.pdf.

tragedy with a specific need that warrants correction and most definitely new legislation. After all, that is what gets the legislator elected. On one hand, it is good to see Congress and Presidents taking problems seriously and enacting or attempting to enact legislation that will counteract the problems. But they also need to consider the ramifications of this reactive conduct.

The continuous multiplication of laws creates problems. You end up adding more laws to the existing ones, without discarding any in the process. This dynamic is the problem of overcriminalization and overfederalization.

As aptly noted by the late Professor William Stuntz:

Criminal law is both broad and deep: a great deal of conduct is criminalized, and of that conduct, a large proportion is criminalized many times over. I believe these propositions would be accepted by anyone who read an American criminal code, state or federal. Explaining them might therefore seem like belaboring the obvious. But the propositions are perhaps not so obvious as they might seem, since American criminal codes are rarely read, even by those who teach, litigate, and interpret them.⁵

Many have written about the evils of overcriminalization and overfederalization.⁶ After all, it lessens the value of existing and important legislation when you flood the landscape with so many pieces of legislation. It makes it unwieldy, impossible for the lay person to understand what is criminal and what is not, and it grows the power of prosecutors—who can then pick and choose the crime of their choice. Punishment, the centerpiece of American criminal law, can lose its deterrent, educative, rehabilitative, and even retributive qualities when you have overly broad statutes, superfluous statutes (as described by Professor Erik Luna in his past work), and a system that is uncoordinated and illogical.⁷

Today we have an incredible number of federal statutes. Professor John Baker counted over 4,000 in 2004,⁸ and estimates by others indicate

⁵ William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 512 (2001).

⁶ See, e.g., John S. Baker, Jr., *Jurisdictional and Separation of Powers Strategies to Limit the Expansion of Federal Crimes*, 54 AM. U. L. REV. 545, 547 (2005) (exploring remedies for the overexpansion of federal criminal law); Sara Sun Beale, *The Many Faces of Overcriminalization: From Morals and Mattress Tags to Overfederalization*, 54 AM. U. L. REV. 747, 749 (2005) (describing the existing state of moral laws and scope of contemporary federal criminal law, and exploring the harmful consequences of its expansion); Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703, 719–39 (2005) (discussing the causes, consequences, and possible solutions to the problem of overcriminalization).

⁷ Luna, *supra* note 6, at 716–18.

⁸ Baker, *supra* note 6, at 548.

that there were over 4,450 criminal statutes by the end of 2007.⁹ To make matters worse, these statutes are scattered across the federal code. One also needs to recognize that there are many administrative regulations with criminal ramifications.¹⁰ In addition, there are statutes like the Lacey Act that allow for incorporation of laws from other jurisdictions—even when these jurisdictions cannot provide a clear assessment of what the law covers.¹¹ There are also statutes, such as RICO, that incorporate an array of different state crimes.¹²

We are not speaking here only about long-accepted federal statutes that are firmly set in our legal landscape. Rather, many of these criminal statutes were recently enacted. The ABA's Task Force on the Federalization of Criminal Law noted that 40% of all federal criminal statutes were passed into law from 1970 to 1996.¹³ The Task Force, chaired by former Attorney General Edwin Meese III, stated that "Congress ought to reflect long and hard before it enacts legislation which puts federal police in competition with the states for the confidence of its citizenry and limited law enforcement resources."¹⁴

Then-Chief Justice William H. Rehnquist stated in his 1998 Year-End Report of the Judiciary that the trend to federalize crimes traditionally handled in state courts is not only "taxing the Judiciary's resources and

⁹ See BRIAN W. WALSH & TIFFANY M. JOSLYN, HERITAGE FOUND. & NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, *WITHOUT INTENT: HOW CONGRESS IS ERODING THE CRIMINAL INTENT REQUIREMENT IN FEDERAL LAW* 6 (2010), available at www.nacdl.org/WorkArea/linkit.aspx?LinkIdIdentifier=id&ItemID=17613.

¹⁰ *Reining in Overcriminalization: Assessing the Problem, Proposing Solutions: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Sec. of the H. Comm. on the Judiciary*, 111th Cong. 15 (2010) (statement of Jim E. Lavine, President, Nat'l Ass'n of Criminal Def. Lawyers), available at http://judiciary.house.gov/hearings/printers/111th/111-151_58476.PDF ("[A]t least 10,000, and quite possibly as many as 300,000, federal regulations that can be enforced criminally. The truth is no one, including the government, has been able to provide an accurate count of how many criminal offenses exist in our federal code.").

¹¹ See Ellen S. Podgor, *A New Dimension to the Prosecution of White Collar Crime: Enforcing Extraterritorial Social Harms*, 37 MCGEORGE L. REV. 83, 94 (2006) (discussing the *McNab* case involving Lacey Act charges for conduct that the Attorney General of Honduras claimed did not violate Honduran law).

¹² RICO defines "racketeering activity" to include acts under state laws such as "murder, kidnapping, gambling, arson, robbery, bribery, extortion," as well as other state acts or threats of acts. See 18 U.S.C. § 1961 (2006). Other terms under RICO do limit the statutes' reach. See *Reves v. Ernst & Young*, 507 U.S. 170 (1993) (requiring that the required predicate acts have continuity plus relationship).

¹³ AM. BAR ASS'N, *THE FEDERALIZATION OF CRIMINAL LAW* 7 (1998), available at http://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_pubs_catalog_fedcrimlaw1.authcheckdam.pdf.

¹⁴ *Id.* at 4.

affecting its budget needs, but it also threatens to change entirely the nature of our federal system.”¹⁵ Justice Rehnquist noted:

The pressure in Congress to appear responsive to every highly publicized societal ill or sensational crime needs to be balanced with an inquiry into whether states are doing an adequate job in these particular areas and, ultimately, whether we want most of our legal relationships decided at the national rather than local level.¹⁶

There is not only a problem of an explosion of federal statutes, but many of the statutes lack or have a weak mens rea requirement. The joint report of the Heritage Foundation and the National Association of Criminal Defense Lawyers, *Without Intent: How Congress is Eroding the Criminal Intent Requirement in Federal Law*,¹⁷ examined the mens rea terms or lack thereof, finding that during the 109th Congress, 446 criminal statutes were proposed “that did not involve violence, firearms, drugs and drug trafficking, pornography, or immigration violations,” and of these 446 proposed non-violent criminal offenses, 57% lacked an adequate mens rea requirement.¹⁸ Twenty-three of these new criminal offenses that were enacted into law lacked an adequate mens rea requirement.¹⁹

So it is not surprising that this Symposium is on the topic of overcriminalization. There is much in the scholarly literature on this topic, with two key prior symposia by the *American University Law Review*²⁰ and George Mason’s *Journal of Law, Economics and Policy*.²¹ But this Symposium is different from those in the past.

There have been prior efforts to tackle the overcriminalization problem. Professor Roger Fairfax notes that the rhetoric of the Johnson Crime Commission’s Report served as a prelude to recognizing the problem of overcriminalization.²² But the real efforts on fighting overcriminalization occurred starting in 1966, just years after the successful adoption of the American Law Institute’s Model Penal Code. It was called the National Commission on Reform of Federal Criminal

¹⁵ WILLIAM H. REHNQUIST, THE 1998 YEAR-END REPORT OF THE FEDERAL JUDICIARY (1999), reprinted in 11 FED. SENT. R. 134, 135 (1998).

¹⁶ *Id.*

¹⁷ WALSH & JOSLYN, *supra* note 9.

¹⁸ *Id.* at IX.

¹⁹ *Id.*

²⁰ See generally 54 AM. U. L. REV. 541–820 (2005) (containing articles discussing topics concerning the problem of overcriminalization).

²¹ See generally 7 J.L. ECON. & POL’Y 565–744 (2011) (publishing articles regarding solutions and reform efforts to solve the overcriminalization problem).

²² Roger A. Fairfax, Jr., *From “Overcriminalization” to “Smart on Crime”*: American Criminal Justice Reform—Legacy and Prospects, 7 J.L. ECON. & POL’Y 597, 603–06 (2011) (discussing the history of the overcriminalization movement).

Laws,²³ although some called this the Brown Commission.²⁴ It produced a Senate bill with a strong bipartisan coalition. The work produced a new criminal code that offered organization, coordinated reflection, synthesis, and, like Herbert Wechsler's Model Penal Code, a new approach to criminal law.²⁵ But it failed, disappointing many.²⁶

Recently, Senator Jim Webb of Virginia had a bill with bipartisan support—eventually with approximately 100 organizations aligning with his proposal, including the Fraternal Order of Police, the NAACP, and the ACLU.²⁷ His bill, the National Criminal Justice Commission Act,²⁸ would have established a blue-ribbon, bipartisan commission of experts that would have conducted, in an eighteen-month review process, a careful study of our criminal justice system.²⁹ Although one could never be assured that the overcriminalization problem would have been solved by these efforts, it was certainly a step in the correct direction.

Senator Webb introduced this bill on March 26, 2009, and it was approved by the Senate Judiciary Committee on January 21, 2010, with thirty-four bipartisan cosponsors.³⁰ On July 28, 2010, it passed the House of Representatives with the support of Democrat and Republican cosponsors.³¹ But near the end of 2011, the National Criminal Justice Commission Act was blocked in the Senate with only fifty-seven votes in favor—three votes short of the sixty required for cloture.³²

There are also many individuals who have fought in the historical battle against overcriminalization and overfederalization. Many have worked tirelessly to bring this issue to the forefront. Friends to this cause include Ron Gainer, a Washington, D.C. attorney who formerly served as Associate Deputy Attorney General and as an ex-officio member of the

²³ *Id.* at 606–07.

²⁴ *Id.*

²⁵ *Id.* at 607–08.

²⁶ *Id.* at 616.

²⁷ Press Release, Jim Webb, Webb's Landmark Criminal Justice Legislation Called Up By Majority Leader Reid for Vote This Week (Oct. 18, 2011), *available at* <http://webb.senate.gov/newsroom/pressreleases/2011-10-18.cfm>.

²⁸ National Criminal Justice Commission Act, S. 306, 112th Cong., 1st Sess. (2011).

²⁹ *Id.* §§ 3–5.

³⁰ Press Release, Jim Webb, Webb's Landmark Criminal Justice Bill Heads for Final Vote After Victory in Judiciary Committee (Jan. 21, 2010), *available at* <http://webb.senate.gov/newsroom/pressreleases/2010-01-21-02.cfm>.

³¹ Press Release, Jim Webb, Webb's National Criminal Justice Commission Act Wins Approval in House of Representatives (July 28, 2010), *available at* <http://webb.senate.gov/newsroom/pressreleases/07-28-2010-02.cfm>.

³² Press Release, Jim Webb, Republicans Filibuster Criminal Justice Reform (Oct. 20, 2011), *available at* <http://webb.senate.gov/newsroom/pressreleases/2011-10-20-02.cfm?renderforprint=1>.

U.S. Sentencing Commission; former Attorney General Edwin Meese III, who has been a leader in this movement; Paul Rosenzweig; Erik Luna; and Stephen F. Smith.³³ Many of the participants in this Symposium have been strong voices in the movement against overcriminalization.

There is a strong and rich history to the movement to stop overcriminalization. Perhaps what has been the most impressive aspect of this movement is that it has no political or ideological colors. Its voice comes from the left, the right, Democrats, Republicans, and provides the strongest coalitions that one could possibly expect. Despite these strong alliances, overcriminalization remains a problem.

But noticeably different today is that the movement is finally gaining attention and momentum. We see more groups and individuals espousing phrases like “Right on Crime”³⁴ or “Smart on Crime.”³⁵ The Texas Policy Center puts out a monthly newsletter pertaining to Right on Crime initiatives and issues. A Westlaw search shows the term “Right on Crime” in 143 recent journal articles.³⁶ And slowly but surely, the public is getting educated that passing a new criminal law does not necessarily solve the issue of the day.

The first set of articles in this Symposium looks beyond legislative responses for solving the overcriminalization problem. Professor Stephen F. Smith, in his article *Overcoming Overcriminalization*, moves beyond a quantitative view of overcriminalization, suggesting a paradigm premised on examination of the problem from a qualitative approach.³⁷ He notes how prosecutorial power impedes legislative correction of this problem. He offers several corrections in this regard, including judicial consideration.³⁸ Professor Paul Rosenzweig, in his article, *Reflections on the Atrophying Pardon Power*, calls for a new construct on administering pardons to revitalize this executive power that has diminished over the years.³⁹ He explains how no president has ever been criticized for not pardoning

³³ See Ronald L. Gainer, *Remarks on the Introduction of Criminal Law Reform*, 7 J.L. ECON. & POL'Y, 587, 589 (2011); Jeffrey S. Parker, *Developing Consensus Solutions to Overcriminalization Problems: The Way Ahead*, 7 J.L. ECON. & POL'Y 725, 731 n.26 (2011).

³⁴ RIGHT ON CRIME, <http://www.rightoncrime.com/> (last visited Apr. 17, 2012).

³⁵ See generally Fairfax, *supra* note 22, at 609–16; Mary Price, *Sentencing Reform: Eliminating Mandatory Minimums, Easing Harsh Sentencing Structures and Building “Smart-On-Crime” Solutions—One State at a Time*, 28 CHAMPION 18, 18–20 (2004).

³⁶ This number was obtained as of November 24, 2012, by using the search term “right on crime” in the database “jlr” in Westlaw and limiting the search to a three-year period.

³⁷ See Stephen F. Smith, *Overcoming Overcriminalization*, 102 J. CRIM. L. & CRIMINOLOGY 537 (2012).

³⁸ *Id.* at 578.

³⁹ See Paul Rosenzweig, *Reflections on the Atrophying Pardon Power*, 102 J. CRIM. L. & CRIMINOLOGY 593 (2012).

individuals. Both authors approach the overcriminalization problem from beyond the typical legislative approach, looking at the roles of the judiciary and the executive.

The second set of articles includes Professor John F. Stinneford's *Punishment Without Culpability*,⁴⁰ in which he examines culpability in statutes and how it affects overcriminalization. Paul J. Larkin Jr.'s co-authored article with former Attorney General Edwin Meese III, titled *Reconsidering the Mistake of Law Defense*,⁴¹ focuses on the defense side as opposed to looking at the statutes or to prosecutors. He calls for re-examination of this defense to allow for further consideration of problems accruing from overcriminalization.⁴² This set of articles also considers new issues of overcriminalization, such as those presented by Professor Jennifer Chacón in her piece, *Overcriminalizing Immigration*,⁴³ where she offers a novel approach to this topic.

The third set of articles focuses on what can be done about the overcriminalization problem. Professor Erik Luna, in his article *Prosecutorial Decriminalization*,⁴⁴ points out how prosecutors are the most powerful players in the judicial system. As the individuals charging or not charging crimes and holding the cards in plea negotiations, he calls prosecutors lawmakers and adjudicators.⁴⁵ He advocates for overt prosecutorial decriminalization.⁴⁶ Ms. Juliene James, Ms. Lauren-Brooke Eisen, and Mr. Ram Subramanian,⁴⁷ in their article *A View From the States: Evidence-Based Public Safety Legislation*,⁴⁸ look at the back end of the system, namely sentencing. They look at various prison numbers, such as how long people are staying, who are the individuals who are coming into prison, the sentences received by individuals, who is being detained, and

⁴⁰ See John F. Stinneford, *Punishment Without Culpability*, 102 J. CRIM. L. & CRIMINOLOGY 653 (2012).

⁴¹ See Edwin Meese III & Paul J. Larkin, Jr., *Reconsidering the Mistake of Law Defense*, 102 J. CRIM. L. & CRIMINOLOGY 725 (2012).

⁴² *Id.*

⁴³ See Jennifer Chacón, *Overcriminalizing Immigration*, 102 J. CRIM. L. & CRIMINOLOGY 613 (2012).

⁴⁴ See Erik Luna, *Prosecutorial Decriminalization*, 102 J. CRIM. L. & CRIMINOLOGY 785 (2012).

⁴⁵ *Id.* at 795.

⁴⁶ *Id.* at 801.

⁴⁷ The three coauthors work together at the Center on Sentencing and Corrections of the Vera Institute of Justice.

⁴⁸ See Juliene James, Lauren-Brooke Eisen & Ram Subramanian, *A View From the States: Evidence-Based Public Safety Legislation*, 102 J. CRIM. L. & CRIMINOLOGY 821 (2012).

the operation of good-time laws.⁴⁹ They speak to solutions such as using assessment tools that look at cognitive behavior.⁵⁰

The keynote speaker at the Symposium of January 27, 2012, was Edwin Meese III, who offered his thoughts on overcriminalization and captured key points. In discussing the overcriminalization movement, he emphasized the importance of using case studies to move politicians and the public. He talked about important hearings in the judiciary on this subject and the hope of seeing current legislation passed. He emphasized that statutes need to be written specifically and that courts needed to construe them narrowly, with increased use of the rule of lenity. Among his many suggestions, he said that it is also important to have a default mens rea in our statutes.

This Symposium will strengthen the case against overcriminalization. It looks at how we arrived here and focuses on how to solve this growing problem. What is particularly unique here is that the solutions offered go far beyond the typical legislative calls for action. Looking to the executive and judicial branches for remedies, as well as looking to new subject areas such as immigration, may offer new approaches to an old problem.⁵¹

⁴⁹ *Id.* at 834.

⁵⁰ *Id.* at 826.

⁵¹ *See, e.g.,* Chacón, *supra* note 43.