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FOREWORD

OVERCRIMINALIZATION: THE POLITICS OF CRIME

ELLEN S. PODGOR*

The Heritage Foundation and the National Association of Criminal Defense Lawyers (NACDL), two groups with very distinct missions, joined together with the American University Law Review to examine the topic of overcriminalization. Despite standing at different points on the philosophical spectrum, the two groups recognized the grave implications of a criminal justice system that fails to consider increased federalization, the diminished recognition of a *mens rea* element in criminal statutes, and a growing prosecution of conduct that could be addressed via civil sanctions.

Friday, October 19, 2004 proved to be a day rich with legal analysis and practical commentary when speakers from across the country explored the concept of overcriminalization, the many forms in which it appears, and its ramifications. As so aptly noted by Paul Rosenzweig in his epilogue, the day provided an “agenda for change.”¹ This Symposium Issue, under the superb guidance of Andrew Bernstein, Senior Special Events Editor, and Steven C. Serio, Editor-in-Chief, of the American University Law Review, memorializes this extraordinary day.

The initial panel, titled “Policies and Perspectives on Criminalization,” presents the scholarship of Professors Sara Sun Beale, John S. Baker, Jr., and Erik Luna.² Each of these panelists approaches the topic from the

* Professor of Law, *Georgia State University College of Law* & National Association of Criminal Defense Lawyers, Board of Directors. The title to this Symposium is credited to Edward A. Mallett, Esq. of Houston Texas, President of the NACDL (2000-01). Thanks also go to Professor Stephen Wermeil, without whom this symposium would not have occurred.

1. See Paul Rosenzweig, *Epilogue: Over-criminalization—An Agenda for Change*, 54 AM. U. L. REV. 809 (2005).

2. The moderator of this panel was Paul Rosenzweig, Research Fellow, The Heritage Foundation.

outside, looking into this area of law and expressing general views on what they observe about overcriminalization. The papers from this panel define the concept of overcriminalization, suggest theories that assist in understanding the amorphous nature attributed to overcriminalization, and in some instances offer explicit suggestions to alleviate the concerns flowing from this phenomena.

In connecting the dots between overfederalization and morals legislation, Professor Beale describes five commonalities inherent in the concept of overcriminalization.³ Professor Baker details statistics that confirm the “expansion of federal criminal law.” He follows this with three suggestions to ease this unchecked growth.⁴ Professor Luna presents examples of overcriminalization, a structure to examine the issue, and concludes by suggesting a libertarian perspective as a methodology to address the problem.⁵

A second panel, titled “Ramifications of the Expansion of Criminal Law,” provides articles offering a second level to the initial discourse. As opposed to the generalized policy perspectives discussed in the first panel, the scholarly papers of Professors John Hasnas, Peter Henning, and Geraldine Szott Moohr offer discussions of overcriminalization through specific applications. As such, they approach the topic from the inside, looking outward.

Professor Hasnas focuses on the ethical dimension of white collar crime, describing how increased prosecution of business crimes will not foster an ethical environment.⁶ Professor Henning considers how lawyers, and the advice they provide, have been implicated by an increased overcriminalization.⁷ He notes that overcriminalization can be a function of both increased legislation and also the application of existing legislation through prosecutorial discretion. By targeting legal advice, prosecutors transform a necessary component of the judicial process into criminal activity. A third analysis of overcriminalization presents an intellectual property perspective. Professor Moohr, after suggesting a unique cost-benefit analysis to define overcriminalization, places this analysis in the context of criminal copyright laws.⁸

3. See generally Sara Sun Beale, *The Many Faces of Overcriminalization: From Morals and Mattress Tags to Overfederalization*, 54 AM. U. L. REV. 747 (2005).

4. See generally John S. Baker, Jr., *Jurisdictional and Separation of Powers Strategies to Limit the Expansion of Federal Crimes*, 54 AM. U. L. REV. 545 (2005).

5. See generally Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703 (2005).

6. See generally John Hasnas, *Ethics and the problem of White Collar Crime*, 54 AM. U. L. REV. 579 (2005).

7. See generally Peter J. Henning, *Targeting Legal Advice*, 54 AM. U. L. REV. 669 (2005).

8. See generally Geraldine Szott Moohr, *Defining Overcriminalization Through Cost-*

After six scholarly presentations, the Symposium moved to the views of practitioners, who experience overcriminalization in their representation of clients. Moderated by Professor Cynthia Jones of American University, Washington College of Law, the four panelists described the direct effects of overcriminalization in their daily practices. Sheldon Krantz⁹ used an example from a health care prosecution. William Moffit¹⁰ focused on a case that used the Racketeer Influenced and Corrupt Organization Act (RICO) as an avenue for a prosecution of an alleged support of terrorism. Paul Kamenar¹¹ used environmental examples, and Margaret Love¹² noted the sentencing and collateral consequences that are an outgrowth of overcriminalization.

Although the Symposium was a day filled with enormous fear of an ever increasing problem, it was a day filled with energy. The scholarly papers that follow reflect the importance of this topic and demonstrate the necessity of energizing others to re-evaluate the existing politics of crime.

Benefit Analysis: The Example of Criminal Copyright Laws, 54 AM. U. L. REV. 783 (2005).

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12. Attorney, Law Office of Margaret Love.