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WHITE-COLLAR CRIME

Expert Analysis

Overcriminalization of Non-Violent Conduct: Time for Real Reform

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Observations about the proliferation of federal criminal laws are not new. This column regularly has documented the growing number of legal theories relied upon by the federal government to prosecute perceived white collar wrongdoing, along with the ever-expanding legislative response to the country's various financial crises, which has resulted in hundreds of new criminal laws and the seemingly limitless application of existing criminal statutes. The resulting increase in the federal prison population, which is approximately 40 percent above capacity, costs taxpayers almost $7 billion a year and accounts for almost 30 percent of the Justice Department's budget.[1] Further, the length of sentences in certain white collar and serious fraud offenses has substantially increased in recent years, principally as a result of changes to the penalty provisions for such crimes in the United States Sentencing Guidelines.

As a new bipartisan taskforce of the House Judiciary Committee convenes to consider the issue of overcriminalization—the term typically used in reference to the expansion of federal criminal law—cries for reform are rising in volume as political groups on the left and right recognize a common interest in examining the problem and looking for solutions.

The Problem

Congress has added an average of 500 new crimes to the books in each of the past three decades, in addition to the tens of thousands of regulations that carry criminal penalties.[2] In many instances, these crimes are "untethered from the common-law tradition of mens rea, which holds that a crime must involve a criminal intent—a guilty mind."[3] The 109th Congress, the term of which ran from 2005 through 2006, serves as an example. In one year, that Congress proposed 446 criminal offenses that did not involve violence, firearms, drugs, pornography, or immigration violations. Of those 446 proposed crimes, 57 percent lacked a mens rea requirement; 23 criminal offenses lacking a mens rea requirement were enacted into law.[4] Critics assert that the creation of crimes without an intent requirement violates fundamental principles of fair notice, and subjects individuals to criminal punishment for conduct that they did not know was illegal.[5]

In addition, overcriminalization provides federal prosecutors with access to too many charging choices, which can lead to overcharging. Overcharging concerns are two-fold. The first is that prosecutors will use their discretion to first pick the people to be prosecuted and then search the law books for an offense to charge. "In short, prosecutors' discretion to charge—or not to charge—individuals with crimes is a tremendous power, amplified by the huge number of laws on the books."[6]

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The second concern with overcharging is that prosecutors will pile on the charges to gain leverage in plea negotiations. A recent high-profile example is the case of Reddit founder Aaron Swartz, the 26-year old Internet activist who committed suicide after being named in a federal indictment containing 13 felony counts carrying a possible 50-year sentence for allegedly hacking into a computer database to download academic journals.[7]

Many believe the government was too aggressive in pursuit of its case against Swartz. Political journalist George Will believes that cases like this demonstrate that the continuous multiplication of laws not only enables government misconduct, but "incite[s] prosecutors to intimidate decent people who never had culpable intentions. And to inflict punishments without crimes."[8]

University of Tennessee law professor, Glenn Harlan Reynolds writes: "Overcriminalization has thus left us in a peculiar place: Though people suspected of a crime have extensive due process rights in dealing with the police, and people charged with a crime have even more extensive due process rights in court, the actual decision whether or not to charge a person with a crime is almost completely unconstrained. Yet because of overcharging and plea bargains, that decision is probably the single most important event in the chain of criminal procedure."[9]

Another natural by-product of overcriminalization is an increase in the prison population. The federal rate of incarceration has continued to grow in recent years. In fiscal year 2006, the Bureau of Prisons had approximately 192,500 inmates. According to the Justice Department inspector general, five years later, that number had grown by 14 percent to almost 219,000.[10] This, of course, translates into more government dollars being spent on federal prisons.

In a recent speech, Attorney General Eric Holder stated, "Too many people go to too many prisons for far too long for no good law enforcement reason. It is time to ask ourselves some fundamental questions about our criminal justice system." Holder further noted that legislative actions mandating sentences irrespective of the facts of an individual case breed disrespect for the system and "are ultimately counterproductive."[11]

Holder is not alone in this sentiment. For years, federal judges have grappled with guidelines mandating sentences disproportionate to the wrongdoing committed. The fraud guidelines are one such area of struggle. As a result of congressional pressure to increase the penalties associated with fraud offenses, changes to the Sentencing Guidelines over the past decade have transformed sentences in high-loss fraud cases from less than five years under the original guidelines to a sentence of life imprisonment.[12] In some cases, experienced federal judges have responded by sentencing below the guideline range to offset the excessively punitive effect of the guidelines.[13] Below range sentences vary greatly across the federal

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circuits; however, with the U.S. Court of Appeals for the Second Circuit—the federal circuit with the greatest number of white collar cases—well above the national average for such sentences.[14]

Proposed Remedies

The problem of overcriminalization and its effects clearly indicate that something within the system is broken and needs to be fixed. Reaction to the problem has created many strange bedfellows. In 2010, the conservative Heritage Foundation and the National Association of Criminal Defense Lawyers joined forces to release a non-partisan report titled "Without Intent: How Congress Is Eroding the Criminal Intent Requirement in Federal Law." Intended to serve as a "blueprint" for reform, the report makes a number of recommendations to Congress, including: i) detailed written justification for and analysis of all new federal criminalization; ii) codification of the rule of lenity, which grants defendants the benefit of the doubt when Congress fails to legislate clearly; and iii) judiciary committee oversight of every bill proposing criminal offenses or penalties.[15] The report was well-received and may have started to build momentum for real, substantive change.

• Legislative Reform. Overcriminalization has been the topic of several House Judiciary Committee hearings over the years. Just last month, Congress announced the creation of a new federal criminal justice taskforce to reexamine the federal criminal code. The bipartisan taskforce is being led by Representative F. James Sensenbrenner (R-Wis.), who previously has sought to introduce legislation that would cut the size of the criminal code by a third. Sensenbrenner has opined that "[o]vercriminalization is a threat to personal liberty and an expensive and inefficient way to deal with a lot of problems."[16]

Democrats on the taskforce are keen to look at mandatory minimums and other factors causing an increase in the federal prison populations, while Republicans are focused on the encroachment of federal law into state domain. However, "[u]nifying both sides is the number of defendants who can receive criminal punishment for what are often technical violations and the budgetary strains brought about by a ballooning federal prison population."[17]

• Judicial Reform. The judiciary also has a part to play in curing the ills that result from a too-expansive criminal code. In *United States v. Goyal*, the U.S. Court of Appeals for the Ninth Circuit reversed a corporate CFO's fraud conviction finding that no reasonable jury could have found the defendant guilty beyond a reasonable doubt. Chief Judge Alex Kozinski wrote a brief concurring opinion noting the inordinate amount of taxpayer resources spent on the case and the personal and professional devastation wreaked upon the defendant. Kozinski stated, "This is just one of a string of recent cases in which courts have found that federal prosecutors overreached by trying to stretch criminal law beyond its proper bounds."[18] Opining that "[t]his is not the way criminal law is supposed to work," he called upon federal prosecutors to act more cautiously in separating conduct that is criminal from conduct that is legal given the dire consequences of a conviction and the fact that "criminal law represents the community's sense of the type of behavior that merits the moral condemnation of society."[19]

Recently proposed legislation promotes judicial discretion with regard to one effect of overcriminalization, namely the imposition of lengthy mandatory sentences. The bipartisan Justice Safety Valve Act of 2013, introduced by Senate Judiciary Committee Chairman Patrick Leahy (D-Vt.) and Senator Rand Paul (R-Ky.), seeks to expand the "safety valve" that allows federal judges to impose a sentence below the mandatory minimum in qualifying drug cases to all federal crimes. The press release announcing the bill explained that "[b]y giving judges this greater flexibility, they will not be forced to administer needlessly long sentences for certain offenders, which is a significant factor in the ever-increasing Federal prison population and the spiraling costs that steer more and more of the justice budget toward keeping people in prison."[20] Even without legislative reform, scholars suggest that judicial consideration of mass incarceration at sentencing could provide some systematic relief.[21]

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• Other Systematic Reforms. In his research paper addressing overcriminalization, Professor Reynolds defines the problem as one that "stems from a dynamic in which those charged with crimes have a lot at risk, while those doing the charging have very little skin in the game." He suggests that a shift from absolute prosecutorial immunity, which protects a prosecutor from suit for decisions made within the scope of his duties, to a qualified immunity, which would apply only in those situations where the prosecutor has been shown to have acted in "good faith," would change the imbalance significantly. Reynolds also points to the problematic impact of plea bargaining, which undermines the discipline that being required to prove every criminal charge in court imposes on prosecutors.

Many also propose grand jury reform to curtail the overcharging that results from overcriminalization. As it stands now, the grand jury is the prosecutor's domain. Notably, only a handful of states in the United States allow suspects the right to present exonerating evidence. In New York, one such state, approximately 6 to 10 percent of criminal cases are struck down by the grand jury, a much higher percentage than the national average.[22] Without a doubt, proposals such as amending prosecutorial immunity and grand jury reform are far-reaching. They are significant, however, in focusing legislators, judges, and practitioners on those parts of the federal criminal justice system that perpetuate overcriminalization, overcharging and overincarceration.

Conclusion

The call is growing for reforms to cure some of the ills of overcriminalization. Recognition of the problem by groups on both sides of the political spectrum holds out the hope for real progress, but time will tell if the political will exists to reverse or even significantly slow this long-term trend.

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2. Douglas A. Berman, "New Bipartisan House Judiciary Committee Taskforce to Examine Overcriminalization," Sentencing Law and Policy Blog (May 6, 2013).
3. George Will, "Blowing the Whistle on the Federal Leviathan," The Washington Post, July 27, 2012.
4. NACDL and The Heritage Foundation, "Fact Sheet—Without Intent: How Congress Is Eroding the Criminal Intent Requirement in Federal Law" (available at: http://www.nacdl.org/withoutintent/).
5. Id.
6. Glenn Harlan Reynolds, "Ham Sandwich Nation: Due Process When Everything Is a Crime," Legal Studies Research Paper #206 (April 2013) (available at: http://ssrn.com/abstract=2203713).
7. Superseding Indictment, *United States v. Swartz*, No. 11-CR-10260 (D. Mass. Sept. 12, 2012).
8. Will, "Blowing the Whistle on the Federal Leviathan."
9. Reynolds, "Ham Sandwich Nation: Due Process When Everything Is a Crime."
10. Douglas A. Berman, "Noting Some New GOP Sentencing Reform Voices Inside the Beltway," Sentencing Law and Policy Blog (May 13, 2013).
11. Eric Holder, Speech at the 15th Annual National Action Network Convention (April 4, 2013) (available at: http://www.justice.gov/iso/opa/ag/speeches/2013/ag-speech-130404.html).
12. United States Sentencing Guidelines §2B1.1.
13. See, e.g., *United States v. Gupta*, __F.Supp.2d__, 2012 WL 5246919 (S.D.N.Y. Oct. 24, 2012); *United States v. Adelson*, 441 F.Supp.2d 506 (S.D.N.Y. 2006).
14. United States Sentencing Commission, "2012 Annual Report and Sourcebook of Federal Sentencing Statistics," Table N-2 (Second Circuit downwardly departing in 38.3 percent of its cases in fiscal year 2012 as compared to the national average of 17.8 percent).
15. "Fact Sheet—Without Intent: How Congress Is Eroding the Criminal Intent Requirement in Federal Law." Of the 446 new criminal offenses proposed by Congress in 2005-2006, less than half were evaluated by the House and Senate Judiciary Committees.
16. Gary Fields and Neil King Jr., "Taskforce Aims to Lighten Criminal Code," The Wall Street Journal (May 5, 2013).
17. Id.
18. 629 F.3d 912, 922 (9th Cir. 2010) (citing *Arthur Andersen v. United States*, 544 U.S. 696 (2005); *United States v. Reyes*, 577 F.3d 1069 (9th Cir. 2009); *United States v. Brown*, 459 F.3d 509 (5th Cir. 2006)).
19. Id.
20. Press Release, Office of Senator Patrick Leahy, "Bipartisan Legislation to Give Judges More Flexibility for Federal Sentences Introduced" (March 20, 2013).
21. Anne R. Traum, "Mass Incarceration at Sentencing," forthcoming 64 Hastings Law Journal 423 (2013).
22. Leon Neyfakh, "Can Juries Tame Prosecutors Gone Wild?" The Boston Globe (Feb. 3, 2013).