



TESTIMONY OF BIANCA TYLEK, EXECUTIVE DIRECTOR OF WORTH RISES,
BEFORE THE SUBCOMMITTEE ON CRIME AND FEDERAL GOVERNMENT SURVEILLANCE
OF THE U.S. HOUSE OF REPRESENTATIVES COMMITTEE ON THE JUDICIARY

April 30, 2024

Overreach: An Examination of Federal Statutory and Regulatory Crimes

Good morning Chairman Biggs, Ranking Member Jackson Lee, and members of the Committee. I am Bianca Tylek, Executive Director of Worth Rises, a national advocacy organization working to remove the financial incentives to incarcerate.

Thank you for the opportunity to appear before you to discuss the issue of federal overreach in criminal law and the resulting overcriminalization of Americans. I know the committee has contended with this issue several times over the years and appreciate that you are revisiting this again today. Unfortunately, overcriminalization remains an issue and a critical conversation, but I am certain there are ways that we can align to address it. We all want safe and thriving communities, and we can get there by working together.

While the others on this panel will speak to some of the legal specifics of overcriminalization in the federal criminal code, which I mention later in my testimony, I would like to start the conversation by centering those most heavily impacted by federal overcriminalization and its broader impact on carceral policy across our country.

Every three seconds someone in the U.S. is arrested, amounting to 10.5 million arrests annually, with over 80% for low-level offenses like drugs and disorderly conduct.¹ Those arrested are disproportionately Black and brown, immigrant, and low-income people,² leading to the over incarceration and over surveillance of these communities. Further, two million of those booked into jails every year have a serious mental illness, and 37% of those in our federal prisons have a history of mental illness.³ Prisons and jails have become de facto mental health facilities, though they are not built, financed, or structured to

¹ <https://www.vera.org/publications/arrest-trends-every-three-seconds-landing/arrest-trends-every-three-seconds/findings>

² <https://www.vera.org/publications/arrest-trends-every-three-seconds-landing/arrest-trends-every-three-seconds/findings>

³ <https://www.nami.org/advocacy/policy-priorities/stopping-harmful-practices/criminalization-of-people-with-mental-illness/>

provide adequate treatment. In fact, we have come to rely almost exclusively on law enforcement to respond to social issues like mental illness, drug addiction, poverty, and homelessness, though they would be better served with community social supports.

Importantly, overcriminalization does not just impact those who are arrested or sentenced, but all of us. Overcriminalization dramatically hinders public safety by exacerbating the social conditions that lead to crime in the first place. It negatively impacts the financial stability and economic mobility of those who are arrested, their families, their children, and their communities.

And in doing so, it lines the pockets of the niche prison industry. Bringing in \$80 billion each year,⁴ the prison industry—made up of extensive public-private partnerships—has a deep financial interest in the overcriminalization of Americans and lobbies toward that end. In fact, major players in the prison industry have plainly stated that declining crime rates, which improve our safety, hurt their business.⁵ So while other industries might advertise, they use public fearmongering to hide their interests and boost their business. A huge reason for overcriminalization at the federal and state level since the 1980s, we must put an end to the prison industry if we are to set smart criminal justice policy that centers safety, freedom, and justice.

I urge you not to seek minor tweaks to existing policy but truly shift the trajectory of our nation by ending federal overcriminalization and using the federal “power of the purse” to incentivize state and local agencies to do the same.

IMPACTS OF FEDERAL OVERCRIMINALIZATION

Overcriminalization at the federal level has a wide range of negative impacts. It disproportionately affects marginalized communities, particularly Black and brown, immigrant, and low-income communities. It has a substantial negative impact on the financial stability and economic mobility of those prosecuted and their families. And its influence on state policy has a massive multiplier effect.

Disparities

Federal overcriminalization most heavily impacts marginalized people in our communities, specifically Black and brown, immigrant, and low-income people. In 2023, nearly 75% of those sentenced for a federal offense were Black or Latino, and Black people were least likely to receive relief from mandatory minimums.⁶ Unsurprisingly then, Black and Latino men receive sentences 13% and 11% longer than white men, respectively.⁷ Moreover, in 2023, roughly a third of those sentenced for federal offenses were non-U.S. citizens.⁸

While there is limited data regarding the economic circumstances of people arrested or incarcerated specifically for federal offenses, existing research shows that people who are incarcerated are

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⁴ <https://www.prisonpolicy.org/reports/money.html>

⁵ <https://ir.corecivic.com/static-files/d1c47b4a-b39d-41d6-9552-60a09b0f6c1d>

⁶ https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick_Facts_Mand_Mins_FY22.pdf

⁷ https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2023/20231114_Demographic-Differences.pdf

⁸ https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick_Facts_Mand_Mins_FY22.pdf

disproportionately low-income. A 2016 report by the Bureau of Justice Statistics revealed that 78% of people in federal prison have at most a high school degree, and 57% have less. The same report also found that 32% of people in federal prison grew up in households that relied on public assistance.⁹ A 2015 analysis by Prison Policy Initiative found that in the years prior to their incarceration, people who are incarcerated earn 41% less than non-incarcerated peers.¹⁰ Further, people who are unhoused are ten times more likely to come in contact with police and nine times more likely to have spent a night in jail in the previous six months than those with shelter.¹¹

Marginalized people have a harder time securing adequate representation, pretrial release, and other legal resources critical to navigating prosecution. In fact, 90% of those charged with a federal offense are unable to afford counsel, and in many jurisdictions, they are jailed before their initial bail appearance without being given counsel.¹² Federal judges also routinely disregard law that protects people from being detained pretrial on federal charges due to their inability to pay bail, imposing monetary bail conditions in 37% of cases with 95% of those receiving such conditions being Black or Latino.¹³ Even when judges do not impose monetary conditions for bond, they impose conditions that are still hard to meet for low-income people, like housing. And pretrial detention makes it easier for prosecutors to coerce pleas from people eager to be released. In the end, overcriminalization exploits these difficulties, making it harder for people from marginalized communities to receive equitable treatment in the system and fair outcomes.

Congress should:

- Collect and publish robust data on disparities in criminal legal outcomes related to race, gender, income, and citizenship.
- Decriminalize minor offenses, especially those with the most disparate impacts, including drug and regulatory offenses, that can be better addressed through community social supports.
- Ensure federal judges do not impose monetary bail conditions where they are prohibitive to pretrial release and prohibit federal judges from imposing non-monetary, wealth-based conditions on pretrial release.
- Use federal funding to urge states to decriminalize minor offenses, especially drugs, that can be better addressed through community social supports.

Collateral Consequences & Family Impact

Even minor, non-violent federal offenses can result in prison time and other severe punishments. These punishments have a significant impact on a person's life, from job loss to family separation, and follow them for a lifetime.

When someone is arrested, they and their families suffer immediate emotional and financial trauma. Roughly 57% of people in federal prison are the parents of minor children,¹⁴ and nearly 30% lived with their children at the time of their incarceration.¹⁵ Moreover, more than half of incarcerated parents were

⁹ <https://bjs.ojp.gov/content/pub/pdf/ppi16.pdf>

¹⁰ <https://www.prisonpolicy.org/reports/income.html>

¹¹ <https://www.urban.org/features/five-charts-explain-homelessness-jail-cycle-and-how-break-it>

¹² <https://news.uchicago.edu/story/report-reveals-federal-jailing-crisis-disproportionately-affects-people-color>

¹³ <https://news.uchicago.edu/story/report-reveals-federal-jailing-crisis-disproportionately-affects-people-color>

¹⁴ <https://bjs.ojp.gov/content/pub/pdf/ppi16st.pdf>

¹⁵ <https://bjs.ojp.gov/content/pub/pdf/ppi16.pdf>

the primary breadwinners for their families before they were incarcerated.¹⁶ Having law enforcement rip them out of their homes can threaten the psychological safety of families, especially minor children. A simple arrest can lead to job loss, while a criminal conviction and, worse yet, incarceration can lead to long-term loss of income, financial stability, and economic mobility.

Contact with the criminal legal system can have a host of collateral consequences—45,000 nationwide.¹⁷ These consequences can limit one's ability to get professional licenses, access housing and public assistance, register to vote, and more. Given the impediment they create to economic mobility, collateral consequences related to employment are perhaps the most significant. One study found that family income dropped 22% when a parent was incarcerated, and while that number rebounded slightly after release, it was still 15% lower than pre-incarceration.¹⁸ Even four years after release, 65% of incarcerated people do not have employment, and those who are employed, earn far less than the general population.¹⁹ As a result, it is rare that formerly incarcerated people and their families move up the economic ladder, and this has substantial intergenerational impacts on their children.

For those incarcerated, the familial consequences are even more dire. About half of families with an incarcerated loved one report struggling to make ends meet.²⁰ They suffer not just a loss of income, though their incarcerated loved one is likely working full time in prison, but also new expenses related to the incarceration of their loved ones. To the surprise of many, they end up shouldering the cost of courts fees, basic food and hygiene needs, and communication, which penny prison wages simply cannot cover. These costs can be egregious. For example, a recent investigation by *The Appeal* revealed that food and hygiene products in prison commissaries can cost as much as five times more than similar products in the free world.²¹ And if covering prison-related living costs was not enough, the federal Bureau of Prisons recently sought to garnish as much as 75% of the funds deposited by families for their incarcerated loved to cover various fines and fees.²²

Thankfully, one carceral cost was recently lifted, at least in federal prisons—the cost of calls. For decades, one in three families with an incarcerated loved one has gone into debt simply trying to stay connected over calls and visits. Charges as high as \$0.50 per minute—often shared between prison telecoms and their agency partners—force many to cut off contact because they cannot afford it. And this is detrimental to correctional officers and public safety too, with studies repeatedly showing that when incarcerated people are in regular contact with their communities, violence in facilities decreases and reentry success increases.²³ But Congress made real strides in addressing the gross exploitation of families at the hands of prison telecoms when it passed the Martha Wright Reed Just and Reasonable Communications Act, granting the FCC regulatory authority over all prison and jail phone and video calls nationwide. Even better, Congress made all prison calls free in the federal system through the CARES Act, a policy I urge Congress to implement permanently.

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¹⁶ <https://everysecond.fwd.us/>

¹⁷ <https://niccc.nationalreentryresourcecenter.org/consequences>

¹⁸ <https://www.pewtrusts.org/-/media/3975EB366428437FADA60843AA02C2FC.ashx>

¹⁹ <https://www.prisonpolicy.org/blog/2022/02/08/employment/>

²⁰ <https://ellabakercenter.org/wp-content/uploads/2022/09/Who-Pays-FINAL.pdf>

²¹ <https://theappeal.org/locked-in-priced-out-how-much-prison-commissary-prices/>

²² <https://www.federalregister.gov/documents/2023/01/10/2023-00244/inmate-financial-responsibility-program-procedures>

²³ <https://www.partnersforjustice.org/evidence/strong-social-ties-increase-safety>

For too long, women like Martha Wright Reed, who skipped medication to afford calls with her grandson in federal prison, have shouldered the cost of overcriminalization. One study showed that over 80% of carceral costs—like the cost of calls, commissary, and court fees—are shouldered by women, largely Black and brown women. The issue of overcriminalization is not just about criminal justice but about gender equity, children’s health, family unity, privacy rights, regressive taxes, economic justice, and more. The intersection of these issues—all or one of which matter to you—should bring us collectively to the table to address them.

Congress should:

- Collect and publish robust data on the economic consequences of incarceration.
- Pass legislation providing fully free prison communication in federal prisons, permanently codifying a policy from the CARES Act.
- Prohibit the federal Bureau of Prisons from garnishing the wages of incarcerated people or deposits made by families.
- Pass the Abolition Amendment (HJR 72) to end the exception in the Thirteenth Amendment that still allows slavery as criminal punishment.
- Establish labor rights for people who are incarcerated, including the right to fair wages.

Influence over State Overcriminalization

Federal policies often have influence over state policies, but that is particularly true when funding is attached. This was the case throughout the 1990s and 2000s when Congress provided federal funding for prison construction to states that enacted tough-on-crime laws like mandatory minimums.²⁴ Today, the federal government continues to encourage overcriminalization at the state level through its own criminal code and funding, which must be part of this conversation.

For example, the federal overcriminalization of drug offenses has created a financial incentive for state and local law enforcement to also overcriminalize drugs. Federal civil asset forfeiture laws that allow state and local law enforcement to share in the assets retrieved from joint enforcement efforts produced \$474 million for state and local agencies in 2023,²⁵ with the majority stemming from drug enforcement. For some local agencies, civil asset forfeiture proceeds have become a critical funding source,²⁶ rooting the overcriminalization of drugs in budgetary policy. And with the average seizure less than \$400 in some states, these funds are not coming from massive drug enterprises.²⁷

Unsurprisingly then, drugs are the most arrested offense in the U.S., with someone arrested for drugs every 31 seconds. For the millions of Americans struggling with drug addiction, this overcriminalization increases the likelihood of overdoses, both inside and outside of prisons. Addressing drug addiction requires a deft approach centered on care rather than a hard one focused on criminalization that leads many not to seek help or, worse yet, to engage in increasingly risky behaviors.

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²⁴ <https://www.brennancenter.org/our-work/analysis-opinion/1994-crime-bill-and-beyond-how-federal-funding-shapes-criminal-justice>

²⁵ https://www.justice.gov/d9/2024-01/report2b_all_states_fy2023.pdf

²⁶ <https://www.washingtonpost.com/sf/investigative/2014/10/11/asset-seizures-fuel-police-spending/>

²⁷ <https://www.propublica.org/article/police-say-seizing-property-without-trial-helps-keep-crime-down-a-new-study-shows-theyre-wrong>

Drug offenses are not the only ones that should be addressed with social support in communities rather than criminalization. For example, petty theft and trespass are crimes of poverty and homelessness. Using the “power of the purse,” Congress can encourage states to avoid criminalizing such minor offenses and instead provide support to their residents.

Congress should:

- Continue to roll back the civil asset forfeiture Equitable Sharing Program, preventing state and local agencies from relying on these funds for their operation.
- Pass the Driving for Opportunity Act to encourage states to stop suspending and revoking drivers’ licenses for failure to pay court fines and fees.
- Use federal funding to encourage states to eliminate other unnecessary and harmful collateral consequences, such as those restricting professional licenses, public assistance, and voting.

FEDERAL OVERREACH

In the nation’s first hundred years, the role of the federal government in setting and upholding criminal law was limited. With few exceptions, that responsibility belonged to states, which have the “police power” to protect the health and welfare of their citizens.²⁸ However, in the last half-century or so, Congress has enormously expanded the federal criminal code and federal prosecutions.

Overfederalization

While efforts to count the number of federal offenses have consistently failed over the years,²⁹ best estimates suggest that there were roughly 3,000 federal offenses in the 1980s³⁰ as compared to 5,200 in 2019,³¹ an astounding increase of 73%. And there are consistent efforts to introduce new federal offenses, often driven by anecdotal media stories, corporate propaganda, and political fearmongering.

For example, fears around organized retail theft have captured media headlines in the last few years. CEOs of major retailers described it as an “epidemic” that necessitated increasing prices for consumer goods, and some even threatened to shutter stores.³² The panic created a frenzy in D.C. and state capitols for legislative action. But data soon revealed a different picture, inventory loss was consistent with prior years and primarily due to employee theft and errors—organized retail theft was estimated to account for just 5% of all inventory loss.³³ Retailers were already facing declining sales³⁴ and the feared store closures were not in the stores with the highest theft³⁵ and, in some cases, had been preplanned.³⁶

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²⁸ https://law.asu.edu/sites/default/files/pdf/academy_for_justice/4_Reforming-Criminal-Justice_Vol_1_Overfederalization.pdf

²⁹ <http://online.wsj.com/article/SB10001424052702304319804576389601079728920.html>

³⁰ <https://blogs.loc.gov/law/2013/03/frequent-reference-question-how-many-federal-laws-are-there/>

³¹ <https://www.heritage.org/crime-and-justice/report/count-the-code-quantifying-federalization-criminal-statutes>

³² <https://www.themarshallproject.org/2023/02/27/shoplifting-retail-theft-lawmakers-response>

³³ <https://www.nytimes.com/2023/12/08/business/organized-shoplifting-retail-crime-theft-retraction.html>

³⁴ <https://www.thestreet.com/retail/target-accused-of-making-huge-retail-theft-mistake>

³⁵ <https://www.nbcnews.com/nightly-news/video/shuttered-target-stores-had-less-crime-than-other-open-locations-nearby-cnbc-investigation-200766533567>

³⁶ <https://www.vice.com/en/article/g5ve49/we-cried-too-much-walgreens-cfo-admits-retail-theft-isnt-the-crisis-it-portrayed>

Operating in haste inevitably leads to poor policy with disparate impacts for the most marginalized. That is exactly what happened in states that moved quickly to pass organized retail theft laws, like Texas, where prosecutors levied the steeper optional charge of organized retail theft against Black people twice as often as they did against white people who committed the same offense.³⁷ That disparity was exacerbated in wealthier communities.³⁸ Nevertheless, California, New York, Florida, and others have already passed or are considering passing legislation regarding organized retail theft.

Further, many federal offenses overlap significantly with state criminal laws, leading to parallel criminal prosecutions in federal and state courts that undermine the commonly understood premise of double jeopardy and subject people to excessive punishment.

For example, in 2001, 24-year-old Sheron Edwards of Mississippi was prosecuted and convicted in both federal and state court for a robbery and carjacking that took place a few years earlier. He was sentenced to 20 years in each court to be served consecutively. In 2017, Sheron finished his federal sentence and was transferred to the Mississippi Department of Corrections to serve his state sentence. Because of his parallel prosecution, and the federalization of what should have only been a state offense, Sheron has 13 more years to serve. He will be 62 years old when he is released.

Congress should:

- Thoroughly collect and analyze data regarding social concerns before introducing new federal offenses, being careful not to respond hastily to headlines and providing detailed written justification for and analysis of all new federal offenses.
- Avoid creating new federal crimes that should be state crimes or that can otherwise be handled through civil law, like the civil tort of conversion.
- Clean up the federal criminal code to avoid doubling jurisdiction on criminal prosecutions unless there is a strong countervailing federal interest, like the need to uphold civil rights.

Faulty Code Construction

The issue is not just the grossly expanded number of federal offenses but also their vague drafting that allows for incredibly broad application. Ambiguous language plagues a wide range of federal offenses, from drug to regulatory crimes, and can lead to unintentional violations and unjust prosecutions.

Among the many component parts that have been eroded by the vague drafting of federal criminal law is the requirement for intent, or *mens rea*. The omission of a *mens rea* requirement creates confusion for the public and courts about what is and is not a crime, especially when an action is not inherently immoral. A 2010 report by the National Association of Criminal Defense Lawyers and Heritage Foundation found that 57% of laws related to non-violent and non-drug offenses lacked a *mens rea* requirement.³⁹ A follow-up report in 2020 found that while Congress has taken some steps toward enacting strong *mens rea*

³⁷ <https://www.themarshallproject.org/2023/02/27/shoplifting-retail-theft-lawmakers-response>

³⁸ <https://www.themarshallproject.org/2023/02/27/shoplifting-retail-theft-lawmakers-response>

³⁹ <https://www.nacdl.org/getattachment/8d5312e0-70f8-4007-8435-0ab703dabda9/without-intent-how-congress-is-eroding-the-criminal-intent-requirement-in-federal-law.pdf>

requirements, including Congressional oversight of executive agency regulations proposing criminal offenses, there is still much to do.⁴⁰

Coupled with excessive sentencing guidelines that include mandatory minimums, the vagueness of federal criminal laws grants prosecutors the unchecked power to use their charging discretion to coerce pleas. Threatened with egregious charges and sentences and afraid of what might happen at trial with such vague laws, even those who might otherwise prevail plea to lesser charges and sentences out of fear. Given the risk of suffering a trial penalty, few have the courage, or even privilege, to exercise their constitutional right to a jury trial. In fact, in 2022, only 2% of all those charged with federal offenses went to trial, nearly 90% accepted pleas.⁴¹ Taking a plea, regardless of how apparently lenient, imparts a lifetime criminal record and a host of other collateral consequences. This exposes a critical system failure that only rare Presidential pardons have remedied in recent years.

Perhaps the biggest beneficiary of such vaguely construed federal offenses carrying mandatory minimums is the failed War on Drugs. Prosecutors have abused overly broad conspiracy laws to sentence sex trafficking victims, domestic violence victims, and people struggling with addiction as drug trafficking kingpins. While efforts have been made over the years to curb some mandatory minimums, over 70% of drug trafficking cases in 2022 still carried a mandatory minimum sentence, as compared to just 6% of sexual abuse cases, the next highest offense category.⁴² Today, 44% of the federal prison population is serving time on drug charges, which is more than double the second most common offense category.⁴³

For example, in 1994, 23-year-old Kemba Smith was arrested and charged with drug conspiracy related to her abusive boyfriend's drug business. Despite never using, handling, or selling drugs herself and being seven months pregnant at the time, Kemba pled and was sentenced to 24 and half years in prison. She became the poster child for the War on Drugs. After missing the first six years of her son's life, Kemba was pardoned by President Clinton and released in 2000.⁴⁴

Congress should:

- Clean up the federal criminal code to remove ambiguous of vague language and ensure every federal criminal offense is clear and precise.
- Enact default rules of interpretation that ensure guilty-mind requirements are adequate to protect against unjust conviction.
- Codify the common-law rule of lenity, which explicitly provides for the strict construction of all criminal laws and grants defendants the benefit of the doubt when Congress fails to legislate clearly.

⁴⁰ <https://www.nacdl.org/getattachment/97250c93-0444-49fa-8eae-7edfa30c07bc/without-intent-revisited-assessing-the-intent-requirement-in-federal-criminal-law-10-years-later.pdf>

⁴¹ <https://bjs.ojp.gov/document/fjs22.pdf>

⁴² https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick_Facts_Mand_Mins_FY22.pdf

⁴³ https://www.bop.gov/about/statistics/statistics_inmate_offenses.jsp

⁴⁴ <https://www.naacpldf.org/case-issue/kemba-smith-black-women-and-mass-incarceration/>

CONCLUSION

In closing, I would be remiss not to address that the roots of overcriminalization date back to the Reconstruction Era, when states passed Black Codes that applied only to newly freed Black people and criminalized minor offenses like vagrancy. This intentional overcriminalization ushered in the most brutal era of a practice referred to as “convict leasing,” by which states leased incarcerated people to private businesses. Within a decade, the nation’s prison population went from 99% white to 99% Black, and several states became highly reliant on the revenue they earned from this practice. It has been more than a century since that time, yet we are still dealing with the overcriminalization of minor offenses that disproportionately impacts Black and brown people. There is clearly still work to do and an urgency for it.

I appreciate the opportunity to appear before this Committee, and thank you again for your commitment to this issue. I look forward to answering any questions you may have.

Sincerely,

A handwritten signature in black ink, appearing to read "B. Tylek". The signature is fluid and cursive, with a large initial "B" and a stylized "Tylek".

Bianca Tylek
Executive Director
Worth Rises