

Testimony Before the United State House of Representatives Judiciary Committee, The Subcommittee on Crime and Federal Government Surveillance.

Public Hearing on Overreach: An Examination of Federal Statutory and Regulatory Crimes Testimony by Patrick Purtill, Director of Legislative Affairs, Faith & Freedom Coalition April 30, 2024

Mr. Chairman, Madame Ranking Member, and other Members of the Committee: My name is Patrick Purtill and I serve as the Director of Legislative Affairs for the Faith & Freedom Coalition. Thank you for the opportunity to speak to you today on the topic of overcriminalization and its impact on our criminal justice system and the rule of law. I commend the Committee for examining this important but often overlooked issue.

To begin, the power to punish is the greatest domestic power a government wields. But as many have observed across the decades, one of the most obvious truths of government is that it grows exponentially. The number of bureaucrats it employs grows. The amount it taxes and spends grows. Its reach into every corner of our lives grows. And the number of acts and beliefs it prohibits grows too.

Overcriminalization is when laws proliferate, often in vague or ambiguous terms, expanding the scope of criminal behavior beyond reasonable limits. This proliferation results in a regime of statutes that criminalize conduct previously considered innocuous or non-criminal. Consequently, individuals, including those with no intent to break the law, find themselves ensnared in a complex web of statutes and regulations that are difficult if not impossible to navigate.

It is useful to remember that under common law, there were only nine major felonies (Murder, Robbery, Arson, and Rape for example) and various misdemeanors (assault, battery, false imprisonment, and perjury to name a few). When the United States was founded, the Constitution specified a total of three federal crimes: piracy, counterfeiting, and treason. Today, there are more than 5,200 crimes in the federal code, and there are so many rules and regulations with criminal consequences that no one has been able to count them all. A couple of systematic efforts at a count stopped their efforts when they surpassed 300,000.

This is a chief reason that one in three Americans has a criminal record of some sort and why many Americans have lost faith and trust in the impartiality of the justice system and in the equal application of our laws. It cannot be overstated how dangerous this loss of faith and trust in the justice system is for a democratic republic.

Why Is This Important?

Overcriminalization is critically important for several reasons.

First, so many criminal laws tilt the playing field too far in the prosecutor's favor and have effectively undermined the Sixth Amendment right to a trial by jury. A report released in February of 2023 by the American Bar Association (ABA) reported that in an average year, 98% of criminal cases in federal court end with a plea. This report stated there is "substantial evidence that innocent people are coerced into guilty pleas because of the power prosecutors hold over them." This is an environment that can prioritize prosecutorial success rates above truth and fairness.

Too many laws make Overcharging, or Charge Stacking, one of the most common tools used by federal prosecutors to, in essence, compel a defendant into submission with threats of extremely long prison sentences, heavy fines, and an increasingly expensive trial process if they do not plead guilty to a reduced charge(s). Because of this, the same ABA report found that "trials have become rare legal artifacts" and even "non-existent" in some US district courts.

For those few cases that do go to trial, another motivation to overcharge by federal prosecutors is that they know juries usually do not find a defendant guilty of all charges and insufficient evidence will often lead to some charges being dropped or dismissed. Far too often, prosecutors overcharge defendants to coerce testimony against another defendant. Also, overcharging can be used to influence the jury that the defendant must have committed some crime otherwise so many charges would not be levied.

For those defendants who do go to trial, this strategy often leaves the jury with the burden of contemplating unnecessary and wasteful charges to get at the root of the actual alleged crime, costing time and taxpayer money. Additionally, extraneous overcharging produces longer trials, increased expenses for both the taxpayer and defendant, as well as potential longer sentencing verdicts that produces overcrowding in federal prisons and even more taxpayer expense. A second issue with overcriminalization is that so many criminal laws make it impossible for ordinary citizens, or anyone for that matter, to actually know what the law is. The legal maxim is that "ignorance of the law is no excuse." This makes sense when there are few laws and they prohibit actions that are inherently morally blameworthy (i.e., murder and rape). But when there are hundreds of thousands of criminal statutes and regulations penalizing actions that are not intuitively wrong, no citizen can be certain they are following the law even if that is what they desire to do. If a free citizen cannot be certain they are in compliance with the law, the problem is with overly-complicated legal regime, not with the citizenry.

As the well-known quote by New York Judge Sol Wachtler observes, "if a district attorney wanted, a grand jury would indict a ham sandwich." The simple truth is that the mass of federal criminal laws and regulations makes every American a potential criminal. Rather than seeing a crime and then investigating to find the perpetrator, the staggering labyrinth of criminal statutes and regulations means you can identify an individual for prosecution and dig until you find some rule they have violated and then prosecute them.

Third, overcriminalization is undermining the traditional nature of criminal law which has always required two elements: an act (actus reus) and a guilty mind (mens rea). This is to ensure criminal laws distinguish between morally blameworthy criminality and honest mistakes that

pose no threat to society requiring the loss of liberty. The reason a guilty mind is so critical to criminal punishment was best summed by Oliver Wendell Holmes, Jr. when he stated: “[E]ven a dog distinguishes between being stumbled over and being kicked.” Criminal law is meant to deter and punish vicious and malevolent actions, not as a “gotcha” for those who make a mistake.

Once again, this was more straightforward at common law when laws prohibited morally blameworthy actions universally recognized as wrong. But that isn’t the case today. It is currently a federal crime to leave the United States with more than \$5 in pennies or nickels without a special license from the U.S. Mint. It is a federal crime to write a personal check for less than a dollar. It is a federal crime to sell Swiss cheese without holes throughout the block. While these are comical examples of federal criminal laws, they demonstrate why legal observers estimate that every American unknowingly commits three federal crimes a day.

Conclusion

Overcriminalization represents a huge cost to the American taxpayer through greater incarceration for longer periods of time. Congress has demonstrated its recognition of this in recent years with the passage of the First Step Act, in relevant portions of the Cares Act, and in many bipartisan bills currently making their way through the legislative process to better supervise the federal Bureau of Prisons and other measures to more quickly move nonviolent offenders off of supervision once they have completed their sentences and demonstrated compliance with the terms of their release. Overcriminalization is also important because the effects of a conviction stick with a person for the rest of their lives. Every criminal record comes with a host of consequences that we rarely think about. These collateral consequences are legal and regulatory restrictions that limit or prohibit people convicted of crimes from accessing employment, business and occupational licensing, housing, voting, education, and other opportunities. And there is rarely any distinction made between people who made a mistake and want to straighten their lives out and those who are truly dangerous to society. Once again, Congress and the states have realized that this situation makes punishment never-ending, harms families, and does not promote public safety. States as diverse as Pennsylvania, Utah, California, and Oklahoma have passed legislation in the last few years which this Congress is also considering to seal low-level, nonviolent criminal records of people who have completed their sentences and not committed any new crimes. Finally, the gravest threat of overcriminalization is that it undermines American faith and trust in the rule of law and its fair, unbiased application. This jeopardizes the very foundation of our democratic republic and is the most important reason that Congress needs to act. We would be well-served to remember the wisdom of James Madison who observed that “[I]t 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; if they be repealed or revised before they are promulgated, or undergo such incessant changes that no man, who knows what the law is to-day, can guess what it will be to-morrow. Law is defined to be a rule of action; but how can that be a rule, which is little known, and less fixed?” As Mr. Madison concluded, “[I]t poisons the blessing of liberty itself.”

Thank you for inviting me here today and I would be happy to answer any questions you may have