



Overcriminalization in the States

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Findings

- Criminal penalties should be reserved for conduct that is inherently blameworthy.
- All criminal statutes must include a *mens rea* component.
- Criminal penalties should be no more punitive than necessary to restore the victim, deter future offenders, and incapacitate and/or rehabilitate the offender.
- Law enforcement must be given a reasonable—but not excessive—amount of discretion to ticket, arrest, and prosecute.
- Policymakers should recognize that overcriminalization is not merely a federal problem; state overcriminalization has also become a significant threat to individual liberty.

Introduction

“Crime” is a word that is easy to define for everyone except lawyers. The Stanford Encyclopedia of Philosophy, for example, offers a definition from a legal philosopher that begins by stating that crimes “are kinds of conduct that are defined by the law as wrong,” but then expands on this definition for another nine paragraphs!¹

Henry M. Hart, one of the most important legal philosophers of the past century, offered his own definition when he wrote that a crime “is not simply anything which a legislature chooses to call a ‘crime.’ It is not simply antisocial conduct which public officers are given a responsibility to suppress. It is not simply any conduct to which a legislature chooses to attach a “criminal” penalty. It is conduct, which, if duly shown to have taken place, will incur a formal and solemn pronouncement of the moral condemnation of the community.”²

Roscoe Pound, yet another major 20th century legal thinker, offered a definition that focused intensely on the idea of intent being necessary to criminality. A crime, he wrote, is something “based upon a theory of punishing the vicious will. It postulates a free agent confronted with a choice between doing right and doing wrong and choosing freely to do wrong.”³

Crafting a concise technical definition of crime is difficult, but it is clear that certain personal intuitions are factored into any definition. For instance, there is a sense that a crime is not just an irritant—or even just a damaging action—but rather something that fundamentally violates a society’s moral instincts. There is also the sense that a crime must be an action—not just any action, but a deliberate one, or at least an action so careless that the offender should reasonably know that the society’s moral instincts would be bothered by it. Thus, a mere accident

is inadequate to constitute a crime. Finally, there is a sense that a crime must have a victim, and society demands a proportionate response that will restore the victim.

The Definition of Crime is Expanding

It is increasingly evident that the definition of crime has expanded far beyond these intuitive guidelines. Actions which, traditionally, would never have been considered criminal are now regularly classified as such, and harsh criminal penalties—such as incarceration—are often applied. Many of these activities are of the sort that would be better punished by civil or administrative fines rather than criminal penalties—such as violations of certain environmental regulations. In some cases involving a freely agreed-upon exchange between two parties, even civil and administrative fines are arguably inappropriate. (Certain antitrust laws, for example, might fit into this category.)⁴

To a large extent, the horror stories that are frequently told about overcriminalization are examples of federal overcriminalization. For example, the U.S. Fish and Wildlife Service’s raids on Gibson Guitar’s Tennessee factories, authorized by the Lacey Act, made national headlines in 2011. Similarly, prominent prosecutions in North Dakota of energy companies and their executives, made under the Migratory Bird Act, drew national attention and were even mentioned in one of the 2012 presidential debates.⁵

These stories are indeed worrying, and it is right to be concerned about the federal government’s abuse of the criminal law. To some extent, however, the emphasis on federal overcriminalization has “crowded out” discussion and analysis of state-level overcriminalization. Although the federal government is increasingly (and unconstitutionally) inserting itself into state and local law enforcement matters, it is still the case that

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far more law enforcement occurs at the state level than the federal level—so many of the worst overcriminalization abuses inevitably occur at the state level.

Examples of Overcriminalization in the States

From nothing more than a simple scan of recent headlines, it is easy to find numerous examples of state-level overcriminalization. The list provided here contains several examples of actions that should not be classified as “crimes.” Some of the behaviors may be more appropriately treated as civil actions, punishable by civil fines. Some of the actions, however, should not be treated as wrongful conduct at all—of either a criminal or civil nature. Perhaps the most important take-away from this very brief list, though, is that while prosecutors should be given a certain amount of latitude for discharging their duties, statutes must be written in such a way as to limit—not maximize—prosecutorial abuse.⁶

1. **Arizona**—Gary Rissmiller and Larry Park were landscaping and gardening entrepreneurs in Arizona who were fined by the state’s Structural Pest Control Commission (SPCC) in 2005 for using over-the-counter herbicides (such as Roundup) to kill weeds. Under the SPCC’s regulations, Rissmiller’s and Park’s actions were illegal because they did not obtain the appropriate license.⁷ A total of 3,000 hours of training would have been required to obtain the necessary landscaping/gardening license. According to an estimate proffered by Rissmiller’s and Park’s lawyers at the Institute for Justice, assuming a 40-hour work week, this would have amounted to 18 months away from work for the two men. The lawsuit they filed against the SPCC gained so much public attention in Arizona that it prompted a legislative fix in 2006: the state carved out a licensing exemption. Following the change in the law, the case was dismissed.⁸
2. **California**—Kay Leibrand, a 61-year old grandmother, was cited in 2002 for xylosma bushes that she had been maintaining outside her house since the late 1960s. She tried to demonstrate that the bushes posed no threat to public safety, but law enforcement authorities denied her a hearing, and emphasized that a municipal ordinance in Palo Alto, California criminalizes a homeowner’s failure to keep hedges below a height of two feet.⁹ Leibrand was forced to surrender to the police and had her fingerprints and mug shots taken. The case eventually settled out of court.¹⁰
3. **Connecticut**—Lisa Martinez sold teeth-whitening services at a Connecticut shopping mall kiosk and was threatened with up to five years of incarceration because teeth-whitening services may only be performed by licensed dentists. The kits which Martinez used, however, may be legally purchased online by any consumer—there is no age restriction on purchases—and used at home. The kits are regulated and fully approved by the federal Food and Drug Administration.¹¹
4. **Indiana**—An Indiana couple, Jeff and Jennifer Counciller, saw an injured baby whitetail deer and reported it to the state Department of Natural Resources. The department, citing the state law criminalizing unlawful possession of a deer, told the couple to leave the injured deer alone and “let nature take its course.” The couple ignored the instruction and took the deer home to nurse it back to health. The state then charged the Councillers with “unlawful possession of a deer.” It was only after an extraordinary public outcry—mentions in *The Wall Street Journal* and *Good Morning America*, and a Facebook page with thousands of “likes”—that the charges were dropped.¹²
5. **Florida**—Anthony Brasfield was charged with violating the Florida Air and Water Pollution Control Act, an environmental protection statute, when he released 12 helium-filled, heart-shaped balloons for his girlfriend in a Florida parking lot. He was arrested and charged with a felony that carried a prison sentence of up to five years.¹³
6. **Georgia**—Miles Rankin, a 12-year-old Boy Scout, brought his two-inch Boy Scout pocket knife to school and showed it to several other students in the school bathroom. He did not “brandish” the knife and other students did not report feeling threatened in any way. However, under the “zero tolerance” policy in Henry County, Georgia, the possession of a weapon at school triggers automatic expulsion and referral to juvenile court—and no mitigating circumstances such as intent are considered. Rankin was arrested at school, handcuffed in class, and forced to leave campus in a police car. He was expelled, placed under 30-day house arrest, and given 180 days of probation.¹⁴
7. **Maryland**—In 2013, a 7-year-old in Maryland was suspended from school for two days for chewing a toaster pastry into the shape of a gun, pointing it (either at a fellow student or at the ceiling—it is unclear), and saying, “bang,

- bang.” The boy’s father, concerned about the potential ramifications of a school record that lists a gun violence infraction asked the school to remove the word “gun” from the student’s record. The school refused.¹⁶
8. **Michigan**—Lisa Snyder was prosecuted for violating a Michigan law that prohibits the operation of a daycare without the appropriate license. She had offered to watch her neighbors’ children at her home on weekday mornings because the school bus picked up students near her driveway. She volunteered this service and accepted no payment. Michigan officials threatened Snyder with various fines and jail time for “operating a daycare”. The case became a cause célèbre, and the prosecution was only halted after the intervention of the governor.¹⁷
 9. **North Carolina**—In 2010, Ashley Smithwick, a 17-year-old high school senior in North Carolina, inadvertently brought her father’s lunchbox to school, and the lunchbox contained a small paring knife for cutting apples. Because bringing a knife on campus is a Class 1 misdemeanor in North Carolina, Ashley was suspended from school for the remainder of senior year and forced to take online courses to earn her diploma.¹⁸
 10. **Oklahoma**—In 2012, Ashley Warden, the mother of a 3-year-old boy in Oklahoma, was issued a \$2,500 fine because her son urinated in his grandmother’s front yard. The officer who issued the citation was an 18-year veteran of the force. When Warden asked whether the offense could be disregarded because the offender was merely a toddler, the officer simply told her “[i]t’s public urination and in public view.”¹⁹
 11. **Oregon**—Gary Harrington built several ponds on his property in Oregon, and over time he collected 13 million gallons of pooled rain and melted snow. Under a 1925 Oregon law, however, rainwater may be collected only if it falls from artificial surfaces (such as a rooftop) and is gathered in rainwater barrels. Gathering rainwater in a pond on private property is criminal without the appropriate permits issued by the Oregon Water Resources Department. Harrington, therefore, was sentenced to 30 days in jail and assessed a \$1,500 fine.²⁰
 12. **Texas**—Ryan Adams of Pflugerville, Texas grilled and ate a white-winged dove that died when it flew into his window in 2012. Under the Texas Parks and Wildlife Code, it is illegal to possess wildlife that has not been acquired while following certain protocols (e.g., hunting within season, using a particular type of firearm and ammunition, etc.). Texas dove season had begun the previous day, and had Adams killed the dove with an appropriately licensed gun and grilled it, he would have been within the scope of the law. In this instance, however, Adams was subject to a criminal fine. The warden who investigated the case did not fine Adams, purely out of an exercise of discretion. Remarkably, however, he would have been permitted to do so under existing Texas law.²¹
 13. **Utah**—Utah resident Jestina Clayton is a refugee from Sierra Leone who braids hair for a living. African hair-braiding is a much in-demand industry in Salt Lake City, which has a large African refugee community. Clayton was told, however, that she cannot braid hair without paying for a cosmetology license and undergoing 2,000 hours of training as required by a Utah occupational licensing law. Violators of the law are charged with a Class A misdemeanor. Hair braiding, notably, is not a part of the 2,000 hours of training.²²
 14. **Virginia**—Woodpeckers are protected under the federal Migratory Bird Act and generally may not be transported. In 2011, an 11-year-old girl named Skylar Capo ran afoul of the law when she saved an injured baby woodpecker. Her mother was fined \$535 and threatened with a year in prison. This was an example of federal, not state, overcriminalization, but it is notable that a Virginia state trooper accompanied the federal agent who went to the girl’s home to issue her a citation. It underscores the degree to which state and federal law enforcement officials often work in concert to investigate and prosecute these “crimes.”²³

In this list, a number of common themes emerge. One is the frequency of prosecutions for occupational licensing violations. Another is the way in which “zero tolerance” policies in schools have become a significant part of the overcriminalization phenomenon. Still another is the way in which numerous and duplicative laws effectively allow law enforcement to ticket, arrest, and prosecute almost anyone—their discretion is maximized rather than checked.

Some might argue that concerns about overcriminalization are exaggerated. After all, in several of the cases above, no jail

time was served and fines were ultimately dismissed. It is inadequate, however, to base a system of criminal law so heavily on the discretion of individual law enforcement officers. Many will surely exercise their discretion reasonably, but many others will not. Some will not exercise their discretion reasonably until forced to do so by overwhelming public pressure—and of course those “defendants” whose cases do not happen to gain media notoriety will be out of luck.

Conclusion

To reverse the slide towards overcriminalization, states should—first and foremost—reserve criminal penalties for conduct that is inherently blameworthy. Secondly, states must ensure that appropriate *mens rea* protections are included in

all criminal statutes. Indeed, states would further be advised to pass a “default *mens rea*” rule to cover any statutes for which the necessary mental state of the offender may be in doubt. Third, states should appreciate that penalties must be no more punitive than is necessary to restore the victim, deter future offenders, and incapacitate and/or rehabilitate the offender. In short, law enforcement must be given a reasonable—but not excessive—amount of discretion to ticket, arrest, and prosecute individuals. Anything else is simply unsuitable for any state that aspires to have “a government of laws, and not of men.”²⁴ ★

¹ Duff, Antony, “Theories of Criminal Law”, *The Stanford Encyclopedia of Philosophy* (Summer 2013 Edition), Edward N. Zalta (ed.)

² Henry M. Hart Jr., “The Aims of the Criminal Law,” *23 Law and Contemporary Problems* 401-441 (Summer 1958).

³ Roscoe Pound, Introduction to Sayre, *Cases on Criminal Law* (1927) cited in *Morissette v. United States*, 342 U.S. 246, 251 n. 4 (1952).

⁴ See Bill Peacock and Josiah Neeley, *Protecting Innovation: The Role of State Attorneys General in Antitrust Enforcement* 5, 15-16 (Texas Public Policy Foundation: January 2013).

⁵ *U.S. v. Brigham Oil and Gas, L.P.*, 840 F. Supp. 2d 1202 (D.N.D. 2012); “Full Transcript of the Second Presidential Debate,” *New York Times* (16 Oct. 2012). “Mr. Romney: ... The administration brought a criminal action against the people drilling up there for oil, this massive new resource we have. And what was the cost? Twenty or 25 birds were killed, and they brought out a migratory bird act to go after them on a criminal basis.”

⁶ Thomas Jefferson famously argued that the purpose of writing down a law—such as the Constitution—was to limit abuses of discretion: “In questions of power, then, let no more be heard of confidence in man, but bind him down from mischief by the chains of the Constitution.” Thomas Jefferson, *Resolutions Relative to the Alien and Sedition Acts*.

⁷ Laurie Roberts, “Homeowners Beware: Crooks Spraying Weeds,” *Arizona Republic* (28 Sept. 2005).

⁸ S.B. No. 1221, 47th Legislature (2006).

⁹ City of Palo Alto Ordinance No. 4722.

¹⁰ Trent England, Anrew M. Grossman, and Erica A. Little, Burnings Bushes, in *One Nation Under Arrest: How Crazy Laws, Rogue Prosecutors, and Activist Judges Threaten Your Liberty*, 23-30 (Paul Rosenzweig & Brian Walsh, eds. 2010).

¹¹ See *Martinez v. Mullen*, Complaint for Declaratory and Injunctive Relief 1-10 (16 Nov. 2011); see also Jennifer Levitz, “Whitening Upstarts Make Dentists Gnash Teeth,” *The Wall Street Journal* (15 Nov. 2011).

¹² Mark Peters, “Oh, Deer: Indiana Considers Case of Dani’s Caretakers,” *The Wall Street Journal* (31 Jan. 2013).

¹³ Erika Pesantes, “Love hurts: Man arrested for releasing helium balloon with his girlfriend,” *Sun Sentinel* (22 Feb. 2013).

¹⁴ *One Nation Under Arrest*, 47-49.

¹⁵ Press Release, State of Louisiana Department of Wildlife and Fisheries, Livingston Parish Man Sentenced for Hunting Violations (23 Jan. 2012).

¹⁶ Donna St. George, “Anne Arundel second-grader suspended for chewing his pastry into the shape of a gun,” *Washington Post* (14 March 2013).

¹⁷ Tahman Bradley, “Michigan to Mom: Shun Daughter’s Schoolmates,” *ABCNews.com* (30 Sept. 2009).

¹⁸ “Small knife in lunchbox gets N.C. student suspended, charged with weapons possession,” *FoxNews.com* (29 Dec. 2010).

¹⁹ Katie Kindelan, “Toddler’s Public Potty Break Gets \$2,500 Ticket, Then an Apology,” *ABCNews.com* (7 Nov. 2012).

²⁰ Matt Hickman, “Gary Harrington, Oregon Resident, Sentenced To Jail For Stockpiling Rainwater,” *The Huffington Post* (16 Aug. 2012).

²¹ “Dove dinner lands Texas man in hot water with law,” *CBS DFW* (11 Oct. 2012).

²² Jacob Goldstein, “So you think you can be a hairbraider?,” *New York Times* (12 June 2012).

²³ “Girl saves woodpecker, but her mom fined \$535,” *CBS News* (4 Aug. 2011).

²⁴ *Marbury v. Madison*, 5 U.S. 137, 163 (1803) (“The Government of the United States has been emphatically termed a government of laws, and not of men.”); see also *The Political Writings of John Adams*, 155 (George Carey, ed. 2000).

