

The Overcriminalization of America

How to reduce poverty and improve race relations by rethinking our justice system.

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As Americans, we like to believe the rule of law in our country is respected and fairly applied, and that only those who commit crimes of fraud or violence are punished and imprisoned. But the reality is often different. It is surprisingly easy for otherwise law-abiding citizens to run afoul of the overwhelming number of federal and state criminal laws. This proliferation is sometimes referred to as “overcriminalization,” which affects us all, but most profoundly harms our disadvantaged citizens.

Overcriminalization has led to the mass incarceration of those ensnared by our criminal justice system, even though such imprisonment does not always enhance public safety. Indeed, more than half of federal inmates are nonviolent drug offenders. Enforcing so many victimless crimes inevitably leads to conflict between our citizens and law enforcement. As we have seen all too often, it can place our police officers in harm’s way, leading to tragic consequences for all involved.

How did we get in this situation? It began with well-intentioned lawmakers who went overboard trying to solve perceived or actual problems. Congress creates, on average, more than 50 new criminal laws each year. Over time, this has translated into more than 4,500 federal criminal laws spread across 27,000 pages of the United States federal code. (This number does not include the thousands of criminal penalties in federal regulations.) As a result, the United States is the world’s largest jailer -- first in the world for total number imprisoned and first among industrialized nations in the rate of incarceration. The United States represents about 5 percent of the world’s population, but houses around 25 percent of the world’s prisoners.

We have paid a heavy price for mass incarceration and could benefit by reversing this trend. It has been estimated that at least 53 percent of those entering prison were living at or below the U.S. poverty line when their sentence began. Incarceration leads to a 40 percent decrease in annual earnings, reduced job tenure and higher unemployment. A Pew Charitable Trust study revealed that two-thirds of former inmates with earnings in the bottom fifth upon release in 1986, remained at or below that level 20 years later. A Villanova University study concluded that “had mass incarceration not occurred, poverty would have decreased by more than 20 percent, or about 2.8 percentage points” and “several million fewer people would have been in poverty in recent years.”

African-Americans, who make up around 13 percent of the U.S. population but account for almost 40 percent of the inmates, are significantly affected by these issues. According to Harvard sociologist Bruce Western: “Prison has become the new poverty trap. It has become a routine event for poor African-American men and their families, creating an enduring disadvantage at the very bottom of American society.”

Reversing overcriminalization and mass incarceration will improve societal well-being in many respects, most notably by decreasing poverty. Today, approximately 50 million people (about 14 percent of the population) are at or below the U.S. poverty rate. Fixing our criminal system could reduce the overall poverty rate as much as 30 percent, dramatically improving the quality of life throughout society -- especially for the disadvantaged.

To bring about such a transformation we must all set aside partisan politics and collaborate on solutions. That is why we have partnered with the National Association of Criminal Defense Lawyers for more than 10

years to bring about positive changes in our justice system.

We support a five-step approach to criminal justice reform:

First, “do no more harm.” Legislators must resist the temptation to criminalize activities that do not fit a common-sense understanding of what is a “crime.” Criminal laws should not impose liability if the accused did not knowingly and willfully intend to commit the bad act. This explosion of criminal laws has led to imposing liability on activities that ordinary citizens would have no reason to believe would be criminal such as converting a wild donkey into a private donkey, bathing in the Arkansas Hot Springs National Park without a doctor’s note, and agreeing to take mail to the post office but not dropping it off. It has led to criminal liability for amateur arrowhead collectors who had no idea their hobby could be a federal crime, as well as criminal charges and a conviction for a former Indianapolis 500 champion who got lost while snowmobiling during a blizzard and unwittingly ended up on federal land.

Second, we must address prosecutorial abuses -- especially in the discovery and grand jury processes. Even the late Sen. Ted Stevens fell victim to prosecutorial abuse in his trial when during the discovery process, federal prosecutors systematically concealed evidence that supported the Senator’s defense and testimony. Prosecutors must disclose all evidence favorable to the accused to ensure that every American should be treated equally and fairly under the law, whether the accused is a disadvantaged urban teenager or a wealthy corporate executive.

Third, we must ensure that all those charged with a crime receive their Sixth Amendment right to representation by a lawyer. Inadequate or no legal representation results in devastating

consequences for criminal defendants and their families.

Fourth, end unduly harsh sentences and resulting disparities by eliminating mandatory minimum sentences that dictate punishment unrelated to the nature or harm of the underlying crime and facts of the case. We must honor the ideal of the punishment fitting the crime by allowing judges to exercise discretion.

Finally, after a sentence is served, we should restore all rights to youthful and non-violent offenders, such as those involved in personal drug use violations. If ex-offenders can’t get a job, education or housing, how can we possibly expect them to have a productive life? And why should we be surprised when more than half of the people released from prison are again incarcerated within three years of their release?

Hopefully, every lawmaker and committed citizen will support these proposed reforms. Overcriminalization leads to mass incarceration, undermines race relations and ultimately keeps more people in poverty. We believe the proposed reforms will improve well-being for all Americans, especially the most disadvantaged.

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