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Six Questions About Overcriminalization

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Abstract

The allegation that criminal justice systems (and that of the United States in particular) have become guilty of overcriminalization is widely accepted by academics and practitioners on nearly all points along the political spectrum (Dillon 2012). Many commentators respond by recommending that states decriminalize given kinds of conduct that supposedly exemplify the problem. I urge those who are theoretically minded to proceed cautiously and address several preliminary matters that must be resolved before genuine progress is possible. In the absence of a position on several controversial normative and conceptual issues, discussions of overcriminalization and decriminalization are bound to be oversimplified and superficial. My review is organized around six of these issues. I invite commentators to examine (*a*) what the criminal law is; (*b*) what overcriminalization means; (*c*) why overcriminalization is thought to be pernicious; (*d*) whether overcriminalization is a de jure or de facto phenomenon, i.e., whether it is a function of the law on the books or the law in action; (*e*) what normative criteria might be invoked to alleviate the predicament; and (*f*) whether and to what extent overcriminalization is a serious concern in our penal system. Even though these six issues are analytically distinct, positions about one invariably blur into commitments about the others. Although theorists rarely dissent from the claim that states are guilty of something called overcriminalization, uncertainties about the foregoing topics mar their treatments. I conclude that a deep understanding of the problem of overcriminalization depends on how these six issues are resolved.

INTRODUCTION

Scholars now accept the claim that many states are guilty of something called overcriminalization. Although this allegation is made most often about the United States, other countries have expressed concerns about this trend as well (Molina 2011, Xiong & Liang 2013). These concerns are relatively new in legal history. Even though earlier worries about the phenomenon were voiced by Herbert Packer (1968), Sanford Kadish (1967) should be credited for first calling the situation a "crisis" and making the term a staple of legal thought. But William Stuntz (2001) was the first prominent theorist to focus on and stimulate wide discussion of the issue. Since that time, interest in the topic has mushroomed. Douglas Husak (2008) wrote the first monograph on the issue, and countless articles and conferences have addressed it in the past several years. Politicians have taken notice and joined the chorus initiated by academics. The House Judiciary Committee created a task force to study the issue in 2013. That group met on several occasions, eventually producing a report that summarized their views and listed potential solutions (**https://perma.cc/D3UV-MDYN**). But no one believes the problem has been fixed.

Despite the volume of interest from both scholars and politicians, I fear that much of the treatment of this issue is plagued by several conceptual and normative confusions. In this review, I examine six important issues that must be clarified before anyone can hope to thoroughly assess (let alone make progress on) the problem of overcriminalization. In what follows, I invite theorists to examine (*a*) what the criminal law is; (*b*) what overcriminalization means; (*c*) why overcriminalization is thought to be pernicious; (*d*) whether overcriminalization is a de jure or de facto phenomenon, i.e., whether it is a function of the law on the books or the law in action; (*e*) what normative criteria might be invoked to alleviate the predicament; and (*f*) whether and to what extent overcriminalization is really a serious concern in our criminal justice system. I argue that these topics must be addressed in order to understand what decriminalization can hope to achieve. As we will see, however, it proves artificial to keep these six questions distinct; an answer to one can have implications for another. Nonetheless, I hope it is illuminating to separate them. Although I sometimes adopt a position on some of these difficult topics in this review, I do not endeavor to defend my preferred solutions. For present purposes, I am more interested in showing how a perspective about overcriminalization depends on the answers to these questions. Discussions of the phenomenon are bound to be affected by the enormous uncertainties that surround these six issues.

1. THE NATURE OF THE CRIMINAL LAW

First, we can hardly begin to decide whether we overcriminalize unless we agree on what it means to criminalize in the first place. In other words, we must decide what the criminal law is. Presumably, theorists who complain about overcriminalization should not be understood to target the size of government or the regulatory state generally; they object to the scope of the criminal law in particular—even though some sociologists of law (Garland 2001) conceptualize criminal justice along a broader spectrum that includes many institutions of social control. Still, criminal law, in some way, is special and distinctive (Husak 2011). Unfortunately, theorists disagree profoundly about what makes a given law criminal—if they are sufficiently brave to tackle the definitional question at all. Not much progress has been made since Henry Hart (1958, p. 410) lamented that a crime seems to be "anything which is called a crime." The implications of this uncertainty for systematic progress on the problem of overcriminalization are devastating. Clearly, commentators who presuppose a broad conception of the nature of the criminal law are more likely to believe that we suffer from overcriminalization than those who construe the criminal law more narrowly. Moreover, many commentators propose to combat the normative

problems caused by overcriminalization by selectively decriminalizing conduct previously categorized as criminal. To assess their proposals, we need to be clear about whether and under what conditions conduct has been criminalized in the first place. Only then can we hope to understand what decriminalization might mean and whether any benefits are likely to follow from it.

Jurisdictions, legal commentators, and citizens do not use the terms crime, offense, criminalize, decriminalize, or legalize clearly or consistently. States differ in their definitions, and the public is confused. The classifications employed in New York State may be used as illustrations, although other places adopt a wholly different nomenclature. The Penal Code of New York recognizes three categories of "offenses": violations, misdemeanors, and felonies. A violation is an offense other than a traffic infraction that carries a maximum possible punishment of 15 days in jail. Many laypersons might be surprised to learn that violations are not categorized as crimes, even though an offender can be taken into custody and detained. New York contains two kinds of true crimes: felonies and misdemeanors, and each category is further subdivided into distinct types that carry different maximum sentences. The contrast between offenses that are crimes (misdemeanors and felonies) and those that are not (violations) is significant not only for sentencing severity but also for purposes of compiling criminal records (Jacobs 2015). The collateral consequences of conviction for a crime can be momentous, but even a mere arrest for a violation can have a deleterious impact on an offender's future prospects (Hoskins 2019).

Conceptual confusion is greatest in the case of minor infractions or misdemeanors. Consider the law of motor vehicles. Although New York State does not classify traffic infractions as offenses or crimes, other states differ in their categorizations. New Jersey, for example, devotes nearly half of its voluminous criminal code to the regulation of vehicles, contributing to uncertainty about whether these statutes should be regarded as crimes. According to Jordan Woods (2015), 13 states classify traffic offenses as crimes, 37 states do not, and 22 have decriminalized them since 1970. What is the significance of these designations and what would be the impact of changing them? As we will see, decriminalization of various offenses is sometimes proposed as a way to reduce the incidence of punishment and incarceration in particular. But no state presently allows incarceration for a mere traffic offense, whether or not it is regarded as a crime; incarceration is available only after a warrant has been issued for the arrest of an offender who has failed to appear in court or pay whatever fine has been incurred. Other commentators propose to decriminalize various offenses as a way to reduce the number of confrontations between police and citizens. After all, traffic laws are the most frequent source of such interactions (Krinsky & Cox 2021), many of which become violent. But only recently have some commentators (Woods 2021) proposed that traffic laws be enforced by bodies other than the police. To date, no states, and only a few municipalities (Sandler 2020), follow this innovative recommendation.

What, then, is a crime? I believe that the most philosophically respectable answer is that the criminal law is that body of law that subjects those who breach it to state punishment (Husak 2008). Punishment without crime (nulla poena sine lege) is unjust. And if the violation of a given law never authorized the state to impose punitive sanctions, we should be baffled if that law is categorized as part of the state's criminal law (but see Edwards 2017). According to this definition, true decriminalization of a kind of conduct would mean the state is no longer authorized to punish those who engage in it. If so, it might turn out that a reduction in punishments, and not just a reduction in incarceration or confrontations between police and citizens, would be the most important consequence of decriminalization. To many theorists, however, the removal of all punishments for a mode of conduct means that it has been legalized and not merely decriminalized. Terminological confusion seems inevitable unless theorists are pressed to explain what they take these terms to mean.

In any event, the foregoing (already contentious) account of the nature of the criminal law only serves to shift the controversy elsewhere. Theorists also disagree about what punishment is (Yaffe 2022) and thus about whether given sanctions are modes of it. If the state simply replaces one type of punishment with another for breaches of a given statute, the result cannot be described as decriminalization. Husak (2022) contends that punishment is best construed as the intentional imposition of a stigmatizing deprivation. Categorization of particular sanctions often proves difficult if this definition is applied. States have ample incentives to label sanctions as nonpunitive to withhold the procedural protections that are required (typically by reference to constitutional protections) when persons are accused of an offense. Debate surrounds such borderline cases as civil forfeiture, community notification for sex offenders, various collateral consequences of conviction, deportation, punitive damages, termination of benefits, and a host of others (Noorda 2021). Clearly, these sanctions can impose enormous hardships. When they are authorized for breaches of a given law, reasonable minds disagree about whether that law should be categorized as part of the state's criminal law.

These points must be kept in mind when commentators allege that given forms of conduct have been decriminalized. Few states that purport to have decriminalized given misdemeanors actually permit the previously criminalized conduct with no legal consequences whatsoever. More often, misdemeanors are converted into civil infractions; the conduct remains criminal but is penalized only by civil fines, probation, or sanctions other than jail (Brown 2016a). According to the above definition, however, it should be tolerably clear that monetary fines often are a mode of punishment. They undoubtedly impose a deprivation on those who must pay them. If they are intended to stigmatize rather than, say, to raise revenue (like user fees or taxes), they should be categorized as a mode of punishment (Coco-Vila 2022). Thus, when the sanction for violations of a given law is altered so that persons who breach it become subject to a fine rather than imprisonment, the result should not be described as decriminalization—unless the fine should not be construed as a punishment. Moreover, as Natapoff (2018) demonstrates, suspects can still be arrested and jailed, prior to trial, for misdemeanors. After conviction, offenders who do not pay their fines for these petty offenses can end up in jail for failure to pay. Thus, the significance of a claim that conduct has been decriminalized can be less than meets the eye. Reclassifying from felony to misdemeanor may reduce the prescribed penalty range without ending punishment altogether.

Finally, it follows from the above account that those radical commentators who propose to abolish punishment (Golash 2005, Zimmerman 2011) should be interpreted to propose the abolition of the criminal law itself. Punishment abolition was once something of a fringe position, advocated almost entirely by a handful of philosophers with little expertise in criminal theory. Although their position can hardly be described as mainstream, it is now taken more seriously by academics, some of whom (Parfit 2011, Tadros 2011) reject the intelligibility of the very idea of retributive blame. The evaluation of their arguments for this position is well beyond the scope of this article. My present point is that whatever body of law these abolitionists recommend should govern what is to be done to persons who commit (what are now) crimes should be understood as offering an alternative to criminal law rather than a reform of it. This point is important for present purposes. Many legal philosophers (Barnett 1977, Boonin 2008) propose the replacement of tort remedies such as restitution for conduct presently subject to punishment. But the very nature of the criminal/civil divide is notoriously unclear (Coffee 1991). If civil penalties are simply a different form of punishment rather than a true substitute for it, tort remedies would not achieve decriminalization as presently understood. In any event, I hope to have shown that confusion will persist in the absence of agreement about these fundamental issues.

2. THE MEANING OF OVERCRIMINALIZATION

Second, we need to clarify the meaning of overcriminalization. As Todd Haugh (2015, p. 1,197) writes, "for a phenomenon that has received so much sustained attention by legal scholars, identifying an accepted definition of overcriminalization is surprisingly difficult." Surely this difficulty is compounded by the foregoing uncertainties about the nature of criminalization—although few commentators who offer competing definitions seem sensitive to this confusion. I can only speculate about why so few writers on the topic of overcriminalization begin by offering an account of the criminal law. I suspect their real agenda is not to understand the phenomenon of overcriminalization with conceptual rigor but rather to urge reform of a particular area of law (for example, the war on drugs) they find ineffective and intrusive.

In any event, definitions of overcriminalization differ, sometimes significantly. Although I think it is preferable to try to preserve a distinction between the conceptual question about the nature of overcriminalization and the normative question of what is supposed to be objectionable about it, several of the definitions contained in the literature deliberately combine these two issues. For example, Sara Sun Beale (2005, p. 749) contends that overcriminalization is characterized by "(1) excessive unchecked discretion in enforcement authorities, (2) inevitable disparity among similarly situated persons, (3) potential for abuse by enforcement authorities, (4) potential to undermine other significant values and evade significant procedural protections, and (5) misdirection of scarce resources (opportunity costs)." Erik Luna (2005) asserts that "the overcriminalization phenomenon consists of: (1) untenable offenses; (2) superfluous statutes; (3) doctrines that overextend culpability; (4) crimes without jurisdictional authority; (5) grossly disproportionate punishments; and (6) excessive or pretextual enforcement of petty violations." Shon Hopwood (2017, p. 703) professes to use "overcriminalization" as "a shorthand for the large amounts of conduct covered by the criminal law, overlapping statutes covering the same conduct, and the application of excessive punishments." Additional definitions are compiled by Larkin (2014) and Haugh (2015).

In its most general sense, I take overcriminalization to refer to a broad allegation that a state has "too much" criminal law. This description invites further clarification. By what metric should anyone decide how much criminal law a given state has? The answer cannot be simply quantitative; no one thinks a verdict of overcriminalization follows simply from counting statutes. In the first place, laws are difficult to enumerate, although no one doubts that the number of statutes in federal and state codes has expanded exponentially. The quality of the fifty codes of the various states is varied, but none gets high marks from theorists who hope to eradicate overcriminalization (Robinson et al. 2000). Federal law allows for easier generalizations. Stuntz (2001, pp. 514–15) observes that the federal criminal law contained only 183 separate offenses in 1873. In the 1980s, the Department of Justice estimated that approximately 3,000 federal crimes existed, and some studies indicate that Congress has recently created more than 4,500 criminal statutes. In truth, no one is prepared to hazard a confident estimate of the volume of criminal laws, partly because the nature of the criminal law itself is uncertain. Conjectures about the number of penal regulations range from 10,000 to 300,000, and none of the legal groups who have studied the matter claims to be confident about the matter. Ronald Gainer joked "you will have died and resurrected three times and still be trying to figure out the answer" (Fields & Emshwiller 2011).

More importantly, it is not clear why much attention should be directed toward the sheer quantity of criminal laws. Allegations about overcriminalization are better construed as a complaint that a state utilizes the criminal law too often to address social problems that are best combatted in other ways. This description is deliberately designed to indicate why the phenomenon of overcriminalization is controversial. By what standard should we decide whether a state has too much (or too little or just enough) criminal law, and under what conditions should a government employ

the penal law to address a social problem? In short, we should anticipate differences of opinion about whether a state overcriminalizes if we disagree about the criteria used to decide whether a given social problem is legitimately addressed by the criminal law (Ashworth 2007–2008). At one extreme, abolitionists who regard the entire edifice of criminal justice as unjustifiable will regard any penal law to be a case of overcriminalization. At the other extreme, totalitarians who accept no normative limits on the use of the criminal law will detect no genuine instances of overcriminalization. Enormous room for dispute can be found between these two camps. Thus, we cannot decide whether and to what extent a given state overcriminalizes without a normative theory (or at least a set of principles) to distinguish the legitimate from the illegitimate uses of the penal sanction. As Darryl Brown (2011, p. 658) aptly notes, "overcriminalization is the term that captures the normative claim that governments create too many crimes and criminalize things that properly should not be crimes." Only a normative theory can respond to the problem Brown raises. Any such theory, I submit, must be philosophical in nature—or so I assume in what follows.

The application of any such normative theory should have important implications, particularly for the kinds of law that have multiplied and triggered the most scholarly opposition. Three examples stand out (Husak 2008). First, the law contains countless overlapping offenses. Conduct that has already been criminalized is recriminalized over and over again. Hate crimes, for example, often proscribe conduct for which some states already impose life imprisonment or the death penalty (Jacobs & Potter 1998). Second, the criminal law now proscribes a broad range of conduct that creates a risk rather than waiting for that risk to materialize (Ashworth & Zedner 2014). How remote from the completed harm may criminal liability first attach (Simester & Von Hirsch 2009)? Finally, the law contains many ancillary or pretextual offenses (Abrams 1989). These laws do not actually endeavor to prevent the conduct explicitly criminalized but aim to reduce some other "innocent" conduct that is associated with it. Money-laundering statutes (Hart 2014), weapons possession, going equipped for a burglary, and even drug prohibitions (Husak 2017) are examples. Many of these kinds of laws are classified as mala prohibita rather than as mala in se. The issue of whether and to what extent mala prohibita offenses are a legitimate use of the penal sanction remains a matter of ongoing controversy (Husak 2010).

What follows, then, is an exercise in legal philosophy. To be sure, many disciplines, including sociology, history, political science, and economics (Moohr 2005), have something valuable to contribute to an understanding of overcriminalization and what should be done about it. Some commentators, for example, emphasize how the tendency to overutilize the criminal sanction is bound to produce inefficiencies and unanticipated consequences (Bibas 2012). In what follows, however, my primary perspective is that of a political and legal philosopher who focuses on the principled grounds to limit the scope of the application of the penal sanction. Overcriminalization results when these principled constraints are exceeded. Needless to say, the content as well as the application of these normative principles is riddled with uncertainty. But even modest progress on this matter would be welcome. At the present time, it remains true that existing criminal law fails to conform "to any plausible normative theory—unless 'more' counts as a normative theory" (Stuntz 2001, p. 508).

A normative account has important implications for what the phenomenon of overcriminalization should be thought to encompass. If Brown (2011, p. 658) is correct that overcriminalization results when a state punishes "things that properly should not be crimes," it becomes plausible to suppose it is caused not only by creating too many offenses but also by recognizing too few defenses. An account of overcriminalization that includes defenses in addition to offenses is broader than many commentators seem to believe. But a normative account of the scope and limits of the criminal law should address not only what conduct renders persons presumptively subject to punishment but also whether they should be allowed a defense that defeats this presumption.

In my judgment, some defenses are construed too narrowly, and the defense of ignorance of the law (Husak 2017) is especially ripe for expansion. In an era of overcriminalization, it is unreasonable to expect ordinary citizens to be aware of more than a tiny fraction of the laws to which they are subject (Larkin 2017). In any event, if the primary worry about overcriminalization is that it produces too much undeserved punishment, it should be apparent that commentators who worry about the phenomenon should take a close look at the scope of defenses as well as that of offenses.

The phenomenon of overcriminalization might be broader still. It can be interpreted to encompass not only statutes that proscribe conduct that should be permitted but also statutes that dispense with normative protections that penal theorists correctly hold to be fundamental. Hence, a statute that imposes strict liability by eliminating a culpability requirement could be construed as an instance of overcriminalization (M. Serota, unpublished results). One might expect that commentators who oppose the expansive scope of the criminal sanction would be enthusiastic about mens rea reform that would require statutes to include a culpability element for every conviction (Yaffe 2018). Alas, this expectation has been dampened. President Trump's Executive Order (Executive Off. Pres. 2021a) that specified (inter alia) that administrative agencies should avoid strict liability offenses and include explicit mens rea standards for new offenses was subsequently rescinded without comment by President Biden (Executive Off. Pres. 2021b). Like so much else, the apparent consensus about the problem of overcriminalization (Levin 2019) has become a victim of partisan politics.

Perhaps the breadth of allegations about overcriminalization is even wider than I have suggested. The important point, however, is that commentators do not always agree about the scope or meaning of what constitutes overcriminalization.

3. HOW PROBLEMATIC IS OVERCRIMINALIZATION?

Third, we need to be clear about why overcriminalization is thought to be problematic. The foregoing discussions suggest two answers. If I am correct about the first issue—namely, that the criminal law is that body of law that subjects persons to punishment—it seems likely that too much criminal law would produce too much punishment. Countless contemporary legal commentators argue that the United States punishes too many persons with too much severity (Tonry 2013), and an obvious means to reduce the amount and severity of punishment is to decrease the size and scope of the criminal law itself. Moreover, several of the definitions of overcriminalization surveyed in my discussion of the second issue include an indication of why the phenomenon is objectionable. If a state overcriminalizes when it punishes conduct that should be permitted, and the "should" in this statement is construed as a matter of justice, it follows that overcriminalization contributes to injustice. Little effort should be needed to explain why injustice in the criminal law is pernicious and should be eradicated (but see Gardner 2000). Thus, perspectives on how the first two issues should be resolved are bound to influence judgments about why overcriminalization is worrisome.

These two answers contain more than a grain of truth. I have little doubt that many laypersons would concur that the single greatest problem with overcriminalization is that it produces too much unjust punishment. A state that exceeds its normative constraints by subjecting too much conduct to punitive sanctions inevitably punishes some individuals who should not have been punished. In addition, even when persons are punished for conduct that merits punitive sanctions, overcriminalization is likely to produce punishments that are disproportionate. The principle of proportionality requires the severity of the sentence to be a function of the seriousness of the offense (Von Hirsch & Ashworth 2005), and overcriminalization contributes to violations of this principle. Among the main consequences of overcriminalization is that prosecutors are able to

induce defendants to plead guilty by charge-stacking. Defendants are routinely prosecuted for multiple crimes—even when, from an intuitive perspective, they have engaged in a single instance of wrongful conduct (Ryberg et al. 2018). Defendants face a more severe sentence when multiple charges are brought against them. Prosecutors need to make credible threats that these punishments will be imposed if defendants assert their innocence. For these threats to induce guilty pleas, the sentences defendants receive through plea bargains must be discounted, i.e., made more lenient than would be imposed after a verdict of guilt in a trial (Barkow 2019). Therefore, overcriminalization helps to inflict disproportionate sentences on persons who exercise their right to be tried and are found guilty.

Despite these worries, theorists have challenged the claim that decriminalization would remedy many of the evils of overcriminalization. Brown (2016a) argues that decriminalization has not really succeeded in reducing state control or punishment but mainly serves to preserve the same kinds of regulation at lower public cost. Jurisdictions aspire to reap financial gains by converting traditional, jailable offenses into fine-only petty crimes or civil infractions. The cost of the legal process drops because the state does not have to provide counsel or jury trials for defendants charged with civil infractions that do not allow for jail. And instead of the state paying to punish defendants (by incarcerating them), the state induces defendants to pay as punishment (through fines) and also for punishment (through fees for court and probation services). State efforts to use the criminal law to make money by shifting costs to defendants raise an entirely new set of worries (Page & Soss 2017). In her unpublished work titled "More Law, More Power? Rethinking the Impact of Criminal Laws on Policing," R. Harmon expresses similar reservations about whether decriminalization will reduce the number and severity of punishments. In particular, decriminalization is likely to produce some amount of net-widening. More generally, she doubts that fewer criminal laws will lessen the opportunities for police to make arrests (Harmon 2016). Decriminalizing some minor offenses (for example, lying down in public, spitting on sidewalks, jaywalking, missing too many days of school, or panhandling) will have relatively little impact, she argues, because enough laws will remain in place to enable police and prosecutors to manipulate charging decisions to achieve whatever objectives they want. Criminologists (Bittner 1974, p. 27) have long understood that "any policeman worth his salt is virtually always in a position to find a *bona fide* charge of some kind when he believes the situation calls for an arrest." No amount of decriminalization is likely to alter this fact.

Many legal theorists, however, criticize overcriminalization on entirely different grounds. Some of their perspectives are roughly jurisprudential. A persistent theme, forcefully articulated by Stuntz (2001), is that the proliferation of laws erodes the principle of legality, jeopardizing our status as a government of laws and not of men. Overcriminalization causes an undemocratic shift in the power to create laws from legislators to police and prosecutors, as "legislative crime definition" becomes "in practice, prosecutorial crime definition" (Stuntz 2001, p. 578). When the state overcriminalizes, citizens who regard themselves as law-abiding will commit crimes on a regular basis (Healy 2004), and no discernable principle distinguishes those who are punished from those who are not (Husak 2003). Because not everyone who commits an offense can possibly be arrested and prosecuted, enforcement is necessarily selective and discretionary, and typically employed against the most vulnerable. Officials are able to make use of increasingly vague and obscure criminal laws to intimidate people selected for attention on some other basis. As a result of these several factors, Stuntz (2001, p. 599) bluntly concludes that "criminal law is not, in any meaningful sense, law at all" and is instead "a veil that hides a system that allocates criminal punishment discretionarily."

The erosion of the rule of law can be subtle (Gardner 2008). As states proscribe conduct in which citizens engage and believe to be permissible, their respect for the law probably declines, threatening the voluntary compliance on which our system depends. In addition, the criminal

law increasingly borrows categories and decisions from other domains of law, such as property, contract, and administrative law, which are often complex and difficult for ordinary persons to grasp. Decisions to ban a given substance, for example, are often made by administrative agencies rather than by democratically elected legislators.

I add my own hypothesis of why overcriminalization is pernicious. Some of the complaints about the phenomenon seem best construed as aesthetic. I draw my inspiration from the many commentators who call the criminal law a "lost cause" (Ashworth 2000), a "disgrace" (O'Sullivan 2006), a "mess" (Robinson 2014), or, most commonly of all, "broken" (Flanders & Hoskins 2016). State and (especially) federal criminal codes contain far too much clutter and are barely intelligible, even to specialists who make their living in criminal prosecution or defense. They resemble a desk that is filled so high with books and papers that nothing can be found and surprising things may well be discovered under the stack. No academic would think to assign the code to students who aspire to practice criminal law. Criminal law has become a juristic embarrassment, and one goal of those who worry about overcriminalization should be to rectify this sorry state of affairs by imposing more order and structure on penal codes (Robinson 1997).

4. DE JURE OR DE FACTO OVERCRIMINALIZATION?

The fourth matter is absolutely crucial if we hope to understand what decriminalization means and what valuable objectives it can accomplish. I do not mean to rehearse the foregoing confusions about what makes a given law criminal or whether decriminalization will mitigate the evils of overcriminalization. Instead, I urge theorists to decide whether the incidence of overcriminalization should be gauged de jure, by reference to the "law on the books," as opposed to de facto, by reference to the "law in action." Many commentators seemingly presuppose the former alternative. Why else would a good many theorists recite the plethora of "silly" laws (Silverglate 2011) that do not pass what Erik Luna (2005) calls the "laugh test?" Favorite illustrations include the unauthorized use of the "Woodsy Owl" image and the selling of untested sparklers. Needless to say, these quirky laws are almost never enforced, so they can hardly contribute to the problem of unjust punishments. Still, de jure overcriminalization is somewhat worrisome, even when it does not translate into de facto behaviors. It certainly adds to the clutter and thus to the aesthetic objections to criminal codes I mentioned above. Moreover, even the potential for enforcement can create anxiety and erode the rule of law. As we have seen, concerns about vesting unfettered authority in police and prosecutors to decide which laws will or will not be enforced is a persistent theme of the overcriminalization literature (Gilchrist 2019).

In my judgment, data about the incidence of de facto overcriminalization are more telling than those of its de jure counterpart. Political polarization tends to stall statutory reform, leaving the penal code relatively static over time, whereas the law in action changes frequently. But this generalization admits obvious exceptions. In the past decade, drug laws represent the most important area of de jure decriminalization. At present, more than half of the residents in the United States live in jurisdictions that allow the use of marijuana for medical purposes, and recreational marijuana is permitted in 19 states. Oregon has gone further, decriminalizing all drugs in small quantities, including heroin, cocaine, and methamphetamine. These changes are momentous, as drug laws are (or were) the examples cited most frequently as proof of overcriminalization. To be sure, all the drugs mentioned above remain criminal under federal law. To date, however, the federal government has shown little appetite for enforcing prohibitions in the many states that have reformed their laws. Thus, ongoing drug reform is a clear victory for those who have urged decriminalization as a way to combat overcriminalization. Millions of Americans now lawfully engage in conduct that was felonious at the time they were born.

Sex crimes provide another illustration of the blend of both de jure and de facto decriminalization. As Green (2020, p. xiii) demonstrates, the law "has become markedly more permissive in how it deals with [sexual] conduct that is consensual." Overall, the past few decades have seen a steady trend toward legalizing a range of behavior that was previously viewed as deviant—including fornication, adultery, miscegenation, and the production and possession of adult pornography. The most celebrated shift, however, has occurred in the realm of same-sex conduct. Green (2020, p. xv) lists "the steady stream of jurisdictions that have recognized private, consensual homosexual conduct as lying beyond the proper scope of the criminal law." Admittedly, the record on decriminalizing prostitution is more uneven; the trend toward adopting a more permissive stance has encountered more resistance than the parallel trend of drug reform (Dempsey 2019). Still, several jurisdictions are considering explicitly decriminalizing prostitution (McKinley 2019). In the meantime, other municipalities—such as Baltimore, Philadelphia, and New York—have openly announced they would no longer prosecute cases against prostitution (Bromwich 2021), even though buyers of sex in New York can still face charges of "patronizing a prostitute in the third degree." Other jurisdictions have made similar de facto changes more covertly.

Apart from drug and sexual offenses, the most important recent development in combatting overcriminalization consists in the many de facto discretionary decisions of progressive police and prosecutors (Murray 2022, Price 2022, Roberts 2021). Andrea Cipriano (2021) provides many illustrations. Conservative legislators in many states have enacted near-total abortion bans, voting restrictions, limits on protest activity, discriminations aimed at LGBTQ people, and prohibitions on mask requirements during the COVID-19 epidemic. Rather than challenge these laws in court, however, she documents that some progressive district attorneys have simply refused to enforce them. For example, when Republican lawmakers in Tennessee blocked a policy to ease up on low-level marijuana cases, Nashville's progressive prosecutors responded by simply not charging anyone with the crime. In Georgia, Gwinnett County prosecutors vowed not to punish anyone for the "crime of distributing food or water to voters in line." In Douglas County, Kansas, a district attorney promised not to enforce a new state law that prohibits collecting and returning absentee ballots for voters of nonpartisan groups. In Washtenaw County, Michigan, prosecutors have implemented groundbreaking policies that end the charging of consensual sex work and the possession of buprenorphine, methadone, and contraband that is confiscated in a traffic stop. In Georgia's Western Judicial Circuit, the district attorney ended the prosecution of simple possession of marijuana. These policies keep people from becoming entangled in the criminal justice system and suffering the collateral consequences of arrest and conviction. Unquestionably, the above examples represent the tip of the iceberg. Comparable decisions are made throughout the country that fly beneath the radar because they are accompanied by no explicit announcement. Here is where one finds the most important progress combatting overcriminalization.

But many theorists who lament the erosion of the rule of law and the shift in power from legislatures to police and prosecutors remain vocal in the face of these examples of de facto decriminalization. They can find any number of discretionary decisions by police and prosecutors of which they disapprove. Efforts to combat overcriminalization by trusting progressive prosecutors must respond to what Richard Briffault (2018) has called "the new preemption." His paper describes several state bills that have given attorneys general concurrent jurisdiction over given offenses that local progressive prosecutors have elected not to charge (Goldrosen 2021). Legislation or state government policies have either removed prosecutorial jurisdiction over certain crimes or displaced the authority of prosecutors altogether. In Missouri, for example, the state attorney general has been granted power over some homicide cases in cities that are not part of a

county. And some legislators have sought to require officials to more vigorously prosecute crimes associated with racial justice protests when local district attorneys have declined to do so. These (and other) examples illustrate the ongoing partisan battles between de facto overcriminalization and de facto decriminalization.

In any event, a consistent focus on de facto rather than de jure practices can help provide a more realistic perspective of what decriminalization can hope to accomplish. For example, the famous Portuguese experiment to formally decriminalize the acquisition, possession, and use of small quantities of all psychoactive drugs is often pronounced a success because the incidence of drug use remained mostly unchanged after the law went into effect. As Laqueur (2015) shows, however, the significance of this legislation is easily exaggerated. Decriminalization did not trigger dramatic changes in drug-related behavior because the de jure change largely codified existing de facto practices in the years before the law was passed. My point is that we should be cautious before supposing that the same result about drug use would be replicated in a place where de facto enforcement has been more vigorous.

Finally, if it is more important to attend to the law in action than to the law on the books, some statutes that seem to be paradigm cases of overcriminalization may in practice be less objectionable than commentators might fear. The federal crime of fraud is a perfect illustration and is noteworthy because federal law is the favorite target of commentators who worry about overcriminalization. As Samuel Buell (2019) explains, courts neither do nor should determine whether a defendant has committed a criminal fraud simply by reference to statutes. The applicable legal rules are far too broad and provide insufficient notice to potential wrongdoers. Instead, "as a rule of thumb if not of law, Party P's deceptive statement or omission potentially counts as a fraud if it is the sort of thing Party V would not have expected to be on guard for given the norms of the market in question" (Buell 2019, p. 274). Of course, these norms are a product of social convention, are constantly in flux, and vary from place to place. Clearly, different agents are aware of them to different degrees. The problem of specifying which conduct is criminal is especially troublesome when the fraud involves a nondisclosure, i.e., a failure to correct the misapprehensions of another party in a transaction. The law endeavors to protect the blameless while punishing the blameworthy by making fraud a crime of specific intent. According to Buell (2019, p. 275), "party P's deceptive statement or omission potentially counts as a fraud if P knew at the time of the conduct that the conduct was wrongful in the context. . . . P will be aware of the wrongfulness of his deceptive conduct if P knows that the norms of the relevant market treat his conduct as out of bounds."

If agents are vulnerable to the psychological proclivities many behavioral ethicists describe, however (Feldman 2018), most individuals construe their conduct favorably rather than unfavorably. Thus, many actually believe that their activities are on the legitimate rather than the illegitimate side of the fuzzy line that constitutes fraud. Under Buell's description of existing law, these individuals are not liable for their conduct. In short, the tendency of Congress to use broad statutory language to produce overcriminalization is already rectified in the law of fraud by the reluctance of prosecutors and courts to hold unwitting agents responsible for their deceptive behavior. Because cognitive biases make it difficult for agents to recognize when their "fraudulent" behavior is either immoral or illegal in a way that enables them to respond to reasons not to engage in it, the fair solution is to exempt them from liability. Hence, the de facto law of fraud does not appear to vindicate concerns about the evils of overcriminalization. Actual prosecutorial and judicial practice indicates that few defendants are punished unjustly. As this example illustrates, de facto behaviors seem more important in gauging the incidence of overcriminalization and its contribution to unjust punishments.

5. COMBATTING OVERCRIMINALIZATION

The fifth matter involves how overcriminalization might be alleviated. In raising this issue, I set aside the important practical matter of what political strategies are likely to be effective to help rectify the problem. I do not consider, for example, whether popular opinion should exert more or less influence on criminal justice policies (Brown 2016b). In keeping with my perspective as a legal philosopher, my concern is with normative criteria—even though it remains true that "legislators who vote on criminal statutes appear to be uninterested in normative arguments" (Stuntz 2001, p. 508) and legal philosophers have failed to establish any institutional mechanisms to influence lawmakers (Brown 2009). But if I am correct that overcriminalization results when states exceed the normative constraints to limit the criminal law, the only theoretically adequate solution is to formulate and defend principles of justice to constrain the scope of the penal sanction. As can be anticipated, however, it is no easy matter to do so. Even when a principle can be defended in the abstract, applying it to particular examples is highly controversial. In what follows, I briefly examine and note the enormous difficulties with three promising principles that are often invoked in efforts to retard the growth of the criminal law.

The first and most compelling principle is the wrongfulness constraint: Conduct must be wrongful before it becomes eligible for criminalization. When formulated as a constraint, the claim is that conduct must be wrong before it may be criminalized, not that the state has a prima facie reason to punish all wrongs (Moore 1997). Perhaps not all wrongs, but only public wrongs, are candidates for criminalization (Duff 2018). A wrongfulness constraint, often described to exemplify legal moralism (Duff 2014), can be motivated by earlier accounts of the nature of criminal law. If criminal law is defined as that body of law that subjects offenders to punishment, it seems unlikely that anyone would believe a punishment is justified when it is imposed for conduct that is permissible. If a criminal conviction carries an expressive or condemnatory message, it is incoherent or at least deceptive to condemn someone for performing an action that is not wrongful (Simester & Von Hirsch 2011). A person who has done nothing wrong is a poor candidate for a just punishment.

Nonetheless, legal philosophers can be contrarians, and the wrongfulness constraint has recently come under fire. Some theorists (Chiao 2019) question the very premise that the criminal law should be concerned with wrongs instead of protecting the social order more generally. Others (e.g., Cornford 2017) are puzzled about how the wrongfulness constraint can be reconciled with mala prohibita offenses (Green 1997). To meet the latter challenge, one must show why the conduct legitimately proscribed by a justified malum prohibitum offense is wrongful rather than show why it may be proscribed notwithstanding its permissibility (Husak 2010). Finally, applications of a wrongfulness constraint require a theory or set of principles to identify what conduct is wrongful. Obviously, philosophers disagree profoundly about the content of such a theory. Abortion is just one example about which reasonable minds differ. Unless progress on these matters can be achieved, the wrongfulness constraint is of little use in curbing overcriminalization. Notwithstanding these enormous difficulties, however, it seems absurd to jettison the constraint; it alone has the potential to serve as what Duff (2018) describes as a "master principle" of criminalization.

The second principle, one that political theorists have long endorsed, is the harm constraint. This principle enjoys enormous intuitive appeal and has an impressive legacy, dating back to John Stuart Mill (1859) and beyond. Its application might curb overcriminalization by providing a normative basis to reject laws that fail to prevent harm. Perhaps surprisingly, however, many prominent contemporary moral and legal philosophers reject the harm constraint, and it is important to understand their several grounds for doing so. In what follows, I briefly recount five reasons to doubt that this constraint should be included among those normative principles to narrow the

scope of the penal sanction. Perhaps these five problems should be construed merely as challenges that should not persuade us to abandon the harm constraint altogether. In combination, however, they warrant strong grounds for skepticism.

In the first place, it is unclear what harm is. Mill himself had virtually nothing helpful to say about this central issue. Joel Feinberg (1984) famously characterized harm as a setback to a legitimate interest. In the absence of a theory of legitimate interests, however, this conception of harm can be expanded to cover most any unwanted state—including those that are merely offensive (Simester & Von Hirsch 2002). It can be invoked to support just about any penal law anyone could possibly favor (Harcourt 1999). For example, some contemporary theorists argue that harms are caused not only by so-called "hate speech" but also by "bigoted speech" that hurts people's feelings (Bell 2021). Are they correct? The concept of harm seems too vague and fluid to resolve such disputes.

Second, how should we specify the baseline by reference to which we decide whether one person A harms another person B (Hanser 2008)? It seems straightforward that a victim suffers a harm when he is made worse off. But worse off relative to what? Is this baseline temporal so that we determine whether B is worse off than he was before the moment A engaged in his conduct? Or is the baseline counterfactual, so that we determine whether B is worse off than he would have been had A not done what he did? Neither alternative is entirely adequate; most notably, they yield different outcomes in cases in which A omits to act. A lifeguard who neglects to rescue a swimmer, for example, is not guilty of harming him according to a temporal baseline. And the parent who neglects to feed his infant is not guilty of harming him according to a counterfactual baseline in overdetermination cases in which some other person would have intervened to ensure the child is fed. Perhaps alternative baselines to determine whether A harms B can be defended, but no one has succeeded in producing such an analysis thus far.

Third, several different versions of the harm principle have been formulated (Edwards 2014) and none is unproblematic. Each of these versions yields different outcomes about which laws turn out to violate it. For example, a harmful-conduct principle requires that the conduct itself must be harmful before it can be criminalized, whereas a harm-prevention principle only requires that harm must somehow be avoided by criminalization (Duff & Marshall 2014). Sometimes harm would occur unless permissible conduct is criminalized—the failure to proscribe the consumption of alcohol, for example, might increase the incidence of domestic violence. The prevention of these latter harms would legitimize a law pursuant to the harm-prevention principle but not pursuant to the harmful-conduct principle. In any event, theorists who invoke something they call a "harm principle" to combat overcriminalization must be more careful about how they formulate it.

Fourth, any respectable harm principle seems vulnerable to counterexamples: offenses found in nearly all criminal codes that are not easily construed to prevent harm but do not seem to be candidates for repeal. For example, most jurisdictions prohibit cruelty to animals (Hurd 2019). Does the harm constraint apply to animals as well as to humans? Laws against the extermination of a species as well as those proscribing the desecration of graves and corpses (Moore 2009) also appear to be unobjectionable uses of the penal sanction. In short, some laws are perfectly good instances of criminalization even though they do not seem to prevent or reduce harm.

Fifth, what is the normative rationale for requiring justifiable laws to reduce or prevent harm? Why, in other words, should we insist that conduct must be harmful or that something called harm must be prevented before a given law is justified and renders offenders eligible for punishment? The most eminent champions of a harm principle, such as John Stuart Mill and Joel Feinberg, have simply presupposed this constraint and did not explicitly defend it (Tomlin 2014). I do not insist that this fundamental question (as well as others) cannot be answered, but only that it has not been answered thus far.

The third and final principle of normative constraint is that the criminal law should proscribe only serious offenses. As we have seen, de minimis or relatively minor offenses, or what are typically categorized as misdemeanors, create many problems of overcriminalization and may be the best candidates for decriminalization. As Natapoff (2018) points out, these are the offenses for which the vast majority of people are investigated, arrested, convicted, and sentenced. They overwhelm state courts, prosecutors, and public defense agencies and give police the power to stop, search, and arrest. They are the basis for many of the racially disproportionate patterns of enforcement that animate many contemporary reformers (Bazelon 2019). Despite their low-level status, misdemeanor criminal records have significant collateral consequences that diminish employment prospects, housing options, rights to drive or travel, and custody of one's children (Hoskins 2019). And misdemeanor charges often result in jail time, either as pretrial detention, punishment, or a consequence of failing to comply with other court-imposed obligations (such as paying fines). Even brief stints in jail can jeopardize offenders' employment and put severe strain on their families. In short, many of the evils of overcriminalization are associated with misdemeanors.

We should applaud the trend to decriminalize many of these misdemeanors because a principle of proportionality disallows punishing persons who commit these offenses with enough severity to deter them. But this conclusion presents at least two problems. First, how do we decide which offenses are insufficiently serious to warrant decriminalization? According to a plausible theory (Von Hirsch & Jareborg 1991), the severity of crime is a function of harm and culpability—and, I might add, wrongdoing. But no one has a clear idea how these two (or three) components interact to produce a single assessment of seriousness overall. In addition, it seems doubtful that states should make no response when persons jump turnstiles, urinate in public, or shoplift. What should be done to petty offenders if their conduct is not to be subject to punitive sanctions? Those who cite the prevalence of misdemeanors as proof of overcriminalization should be pressed to answer these difficult questions.

A good starting point is to investigate what the state actually does to those who perpetrate minor offenses. Unfortunately, jurisdictions differ widely, and reliable data are very difficult to find. Many jurisdictions have established "problem-solving courts" that offer alternatives to punishment (U.S. Sentencing Comm. 2017), although these courts are available only for persons who commit given kinds of offenses, most notably those involving drugs. As a general solution, I suggest that persons who commit minor offenses should be warned. If their records indicate they have committed the offense again and again, they eventually become eligible for a punishment that is consistent with a principle of proportionality (Kohler-Hausmann 2018). Committing three minor offenses, for example, is more serious than committing just one. Implementing this idea, however, requires an accurate means of keeping criminal records (Jacobs 2015) and not all jurisdictions are up to the task.

Legal philosophers face formidable problems identifying and applying normative principles in a theory to limit the scope of the criminal law. Despite these obstacles, a firm theoretical rationale to curb overcriminalization requires that these principles be defended.

6. HOW SERIOUS A PROBLEM IS OVERCRIMINALIZATION?

Sixth and finally, we should ask how serious a problem is overcriminalization? None of the foregoing issues I have surveyed should be construed to suggest that overcriminalization is not a pressing concern. But how serious is it relative to other problems that plague our system of criminal justice? The answer is unclear, and we lack a good metric to gauge the severity of a given problem. In my judgment, reducing the overall severity of punishments is probably a more urgent goal, the achievement of which is not directly tied to progress retarding overcriminalization.

Many theorists would agree that eliminating racial disparities is more important as well. The problem of overcriminalization may well take a back seat to these other concerns and is not, as some have said, "the most pressing problem in criminal law today" (Haugh 2015, p. 1,194).

Moreover, scholars have recently muted their allegations about overcriminalization. As we have seen, the claim that we have too much criminal law has been supplanted by a far more radical critique: that we have any criminal law. In the wake of the George Floyd murder and the rise of the Black Lives Matter movement, calls to abolish the entire criminal justice edifice have gained surprising traction in academic circles (Purnell 2021). By contrast, the charge that we overcriminalize has now become a relatively conservative complaint. The more fundamental challenge is to justify why we have a criminal law at all. Abolitionist demands cohere uneasily with more familiar claims about overcriminalization. Most commentators who aspire to combat overcriminalization presumably believe that some criminalization is justifiable.

In addition, we should ask whether commentators sincerely believe that downsizing the size and scope of criminal law is always wise. Ashworth & Zedner (2010) have emphasized that broad claims about overcriminalization are compatible with admitting that states frequently undercriminalize. A state undercriminalizes when it fails to subject to punishment conduct that satisfies the positive conditions in our best normative theory of criminalization. Many commentators who generally agree that overcriminalization is a grave concern go on to argue that some kinds of conduct should be criminalized and punished more frequently. Five examples are worth mentioning, although partisan divisions make specific illustrations of undercriminalization contentious. These examples indicate that only the most zealously consistent critic of overcriminalization will be unable to find room for further expansions of the criminal law. They also show that appearances may be somewhat deceptive despite the apparent consensus about the problem of overcriminalization (Levin 2018). Many commentators are unprepared to sacrifice their partisan agenda to reduce the size and scope of the criminal sanction.

First, a slim majority of citizens in the United States favor more stringent gun regulations (Brenan 2021). In particular, they would like to reinstate the assault weapon ban and close the gun-show loophole that exempts private sellers from conducting background checks to determine whether prospective buyers are ineligible to purchase a firearm. But many citizens would probably be satisfied by de facto rather than by de jure improvements. Existing gun regulations are "poorly implemented and enforced, sometimes not implemented and enforced at all" (Jacobs & Fuhr 2019, p. 3). Officials in Republican states often thwart the de facto changes urged by majorities. In June 2021, for example, Governor Mike Parson of Missouri signed a bill to penalize any local police agency that enforced given federal gun laws. He claims his policies protect "law-abiding Missourians against government overreach" (Thrush & Bogel-Burroughs 2021). Clearly, reasonable minds disagree.

Second, heated debate continues to surround the scope of abortion rights. Several states, most notably Texas and Mississippi, have recently enacted criminal (or quasi-criminal) laws that restrict the scope of abortion rights far more narrowly than current constitutional law would seem to allow. If *Roe v. Wade* is overturned, one would expect several Republican states to follow these examples and use the criminal law to punish abortion providers and those who assist them. I predict that worries about overcriminalization will be lost in the ensuing partisan battles.

Third, members of the "#MeToo" movement demand that the criminal law be employed more vigorously to punish sexual harassment and various modes of unwanted sex. For instance, the validity of consent to sex procured by deception is an area of recent legislative activity (Kennedy 2021). Green (2020), however, warns of "the potential for overcriminalization" if such changes are implemented. He writes: "Deception of one sort or another seems such a common feature of sexual relations that one might expect to see a massive increase in the number of criminal arrests,

prosecutions, and convictions" (Green 2020, p. 106). Those who caution about the general incidence of overcriminalization must decide whether they are prepared to tolerate this massive increase.

Fourth, permissive attitudes about police brutality and misconduct have come under growing scrutiny in the wake of the George Floyd murder. At the time of this writing, the US Senate has yet to pass reforms such as the George Floyd Justice in Policing Act, the most important part of which would limit the doctrine of qualified immunity that provides a defense from civil liability. In any event, many activists who worry about overcriminalization in other contexts are quick to applaud the recent expansion of accountability when police use excessive force.

Finally, I have not even broached the divisive topic of corporate criminality (Barkow & Barkow 2011). To be sure, proposals to punish corporations have given rise to occasional allegations of overcriminalization (Thomas 2021). In this domain, however, many critics of the phenomenon reverse their stance. As Baer (2021, p. 476) contends, "if 'do less' has become the slogan for the rest of criminal law, 'do more' is the rallying cry where corporate prosecutions are concerned" (see also Coffee 2020).

Clearly, additional examples of undercriminalization can be found. My point, however, is that the achievement of partisan objectives seems more important to both liberals and conservatives than the goal of combatting overcriminalization. If I am correct, we have further evidence that few believe that reducing the size and scope of criminal law is the most crucial problem facing systems of criminal justice today.

CONCLUSION

I have barely scratched the surface of the complex issue of overcriminalization. I have contended that it is not entirely clear what the criminal law is or what it means to say that a given state is guilty of overcriminalization. Nor is it obvious why overcriminalization is bad, what decriminalization can achieve, or whether decriminalization efforts should proceed primarily through statutory changes or through police and prosecutorial initiatives. And the normative criteria that are needed to combat the phenomenon of overcriminalization are highly contested and difficult to apply. I have also suggested that many partisans believe that promoting their agendas is a more pressing concern than reducing the size of the criminal justice system. I hope it is clear that a deep understanding of the general topic depends on how the foregoing six issues are resolved. Surprisingly few of the commentators who have written about overcriminalization seem to have appreciated that each of these topics must be confronted. I believe I have shown that a systematic, comprehensive, normatively satisfying, and theoretically coherent position on the issue of overcriminalization cannot afford to neglect them.

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