NOTES

OVER-CRIMINALIZATION AND THE NEED FOR A CRIME PARADIGM

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Abstract

This Note examines the "issue" of over-criminalization, which is less a singular issue than it is a mountain of problems plaguing the American criminal justice system. The impetus for this note was a Congressional Over-Criminalization Task Force that began in June 2013 and just held its tenth and final hearing in July 2014, and its focus has evolved as the Task Force has delved deeper into the "issue."

With the publication of this note likely preceding or virtually coinciding with the Task Force's issuance of a formal report, its final foci are two: (1) to provide an overview of the plenitude of issues addressed by the Task Force's many witnesses in a manner that highlights their interconnectedness, and (2) to frame that interconnectedness within a brief historical compendium of Anglo-American criminal law. The bulk of the Note will be dedicated to exploring those issues.

Having said that, the overarching goal or theme of this Note is to explain that interconnectedness by illustrating how the "issue" of over-criminalization is very much the byproduct of our lack of any constitutional or statutory definition of "crime." Admittedly, it is an obvious and wholly unspectacular conclusion to draw, just as a lexical exercise, for how can you have too much of something when you do not know what that something is? Oddly, though, the Task Force has heard very little testimony to that effect and it seems highly unlikely it will take up that task.

That aside (for now), what is clear is that there is too much crime and way too much punishment, and so the Task Force has set out to ameliorate these problems by looking at which acts should be criminally punishable and how those who commit those acts should be punished. As this note digs into how these questions may and should be addressed, the reader will probably reach his or her own obvious and unspectacular conclusion: political realities will likely limit that amelioration to incremental improvements rather than the wholesale remediation that the "issue" requires.

That little dose of reality is why the notion of defining "crime" is championed in this Note's conclusion, as successfully doing so could

very well short-circuit the political imbroglio of trying to make piecemeal improvements to the American criminal justice system, simply because the latter course inevitably invites "soft on crime" reprisals that will frustrate meaningful progress. Defining "crime" is—at least in the abstract—politically neutral, and no one with even a passing familiarity with the United States Bill of Rights could legitimately argue against having a definition of "crime."

With a successful definition, redressing over-criminalization could be (as the saying goes) like shooting fish in a barrel. Without it, the task is more akin to hunting bats in the night sky—under the moonlight of a dissonant history of Anglo-American criminal law.

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I. INTRODUCTION

A. Over-Criminalization and Crime

What is over-criminalization? The mundane answers will come in short order, but for purposes of this Note it is appropriate to introduce it as a monster. Think of it as a gargantuan, many-tentacled creature that has rapidly grown and risen from the depths of our criminal jurisprudence. Much has been written about its various arms—i.e., virtually any perceived imperfection in our criminal law and its consequences—and it is unsurprisingly easy to get lost in their tangled clusters when trying to deal with the monster as a whole. It is a sprawling scourge, and it is perhaps so large and so tangled that from our detached vantages, those arms are all we are apt to see of it.

But does that monster have a head, some central fulcrum by whose will (or, perhaps more appropriately, whim) its multifarious tentacles flail? In other words, is there a weak spot that, if attacked, might cause all those tentacles to recoil and the monster to retreat? The answer, however remote, is yes, because the question of "what is over-criminalization?" is slave to a necessarily antecedent question for which we have no clear (i.e., constitutional or statutory) answer; that is, *what is a crime?*[1] The dichotomous definition offered by Blackstone sufficiently crystallizes the issue:

> A crime, or misdemeanor, is an act committed, or omitted, *in violation of a public law*, either forbidding or commanding it. This

1. "[F]ederal law contains no general definition of the term 'crime.' Title 18 of the U.S. Code is designated 'Crimes and Criminal Procedure,' but it is not a comprehensive criminal code. Title 18 is simply a collection of statutes. It does not provide a definition of crime." *The Crimes on the Books and Committee Jurisdiction: Hearing Before the Over-Criminalization Task Force of 2014 of the H. Comm. on the Judiciary*, 113th Cong. (forthcoming 2014) [hereinafter *Hearing 10: The Crimes on the Books and Committee Jurisdiction*] (statement of John S. Baker, Jr., Visiting Professor, Georgetown Law School, Professor Emeritus, LSU Law School, at 4), *available at* http://judiciary.house.gov/_cache/files/44135b93-fe36-43dc-a91b-3412fe15e1f4/baker-testimony.pdf. (Author's note: Here and elsewhere in this note, citation is to Task Force hearings for which the official record is not yet available. For these hearings, the above citation format is used, whereby the direct citation is to the official record and a parallel citation is provided for direct reference. Though it requires an unconventional (to say the least) placement of the pinpoint citation, this format is nonetheless used for ease of understanding and the sake of uniformity.) The United States Supreme Court has also avoided attaching a specific definition to it. *See* Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 404 (1958) ("If one were to judge from the notions apparently underlying many judicial opinions, and the overt language even of some of them, the solution of the puzzle is simply that a crime is anything which is *called* a crime . . . .").

> general definition comprehends both crimes and misdemeanors, which, properly speaking, are mere synonymous terms; though, in common usage, the word "crimes" is made to denote such offences as are of *a deeper and more atrocious dye*; while smaller faults, and omissions of less consequence, are comprised under the gentler names of "misdemeanors" only.[2]

Disarmed of an understanding as to whether a crime is a "violation of a public law" or an "[offence] of a deeper and more atrocious dye,"[3] our attacks against that monster are perhaps doomed to merely wound rather than yield a critical blow. That scourge will swim on.

Coming ashore . . . the mundane answers to the question "what is over-criminalization?" are also of two different types, as there are two different definitions of the root word "criminalize": (1) "to make illegal," and (2) "to turn into a criminal or treat as criminal."[4] Accordingly, the first, more theoretical answer is that we have too many crimes; and as a result, the corpus of acts that constitute crimes is so massive[5] and its constituent parts often so attenuated from our traditional understanding of crime,[6] that any continued credence of the ancient maxim "ignorance of the law is no excuse"[7] is a farce. Therefore, it has become unpalatably possible that those who do not truly deserve punishment will nonetheless be made to suffer.

The second, more pragmatic answer, and that to which the overwhelming bulk of the over-criminalization monster's tentacles correspond, is that we have too many *criminals*. Prisons literally

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2. 4 WILLIAM BLACKSTONE, COMMENTARIES *5 (emphases added). It should also be noted that federal criminal law did away with the "felony" and "misdemeanor" classifications in 1984 when it adopted the Federal Sentencing Guidelines. *Hearing 10: The Crimes on the Books and Committee Jurisdiction*, *supra* note 1 (statement of John S. Baker, Jr., Visiting Professor, Georgetown Law School, Professor Emeritus, LSU Law School, at 4-5).

3. *Id.*

4. *Criminalize Definition*, MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/criminalize (last visited Nov. 2, 2014).

5. By the Congressional Research Service's most recent count, there are nearly 5,000 crimes in the U.S. Code. *See Hearing 10: The Crimes on the Books and Committee Jurisdiction*, *supra* note 1 (statement of John S. Baker, Jr., Visiting Professor, Georgetown Law School, Professor Emeritus, LSU Law School, at 2-3). Worse, long-since-outdated estimates place the number of crimes in the Code of Federal Regulations as high as 300,000. *See* John C. Coffee, Jr., *Does "Unlawful" Mean "Criminal"?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. REV. 193, 216 (1991).

6. *E.g.*, 4 BLACKSTONE, *supra* note 2, at *5 ("offences . . . of a deeper and more atrocious dye"). *See also infra* Part III.A.

7. Like seemingly all ancient maxims, this one has Latin ancestors: "*Ignorantia juris non excusat*" or "*ignorantia juris neminem excusat*," derives from Roman Law. BLACK'S LAW DICTIONARY 815 (9th ed. 2009) Today, this maxim is incorporated in the Model Penal Code. *See* MODEL PENAL CODE § 2.02(9).

overflow[8] and we are not in a position where the problem can be bandaged with more funding and more prisons;[9] it requires uncomfortable changes in policy. As of now, we are pointed towards an America where it is essentially impossible for the judicial system to accommodate the amount of "justice" the legislature deems appropriate. In other words, the pragmatic understanding of over-criminalization is that our criminal law—that is, the means of and way we punish criminals—is unsustainable.

To recapitulate, there are really two different over-criminalizations: too many *crimes* and too many *criminals*. In the interest of clarity, this Note will separately refer to these different aspects of over-criminalization as "over-criminalizing" and "over-incarceration," respectively. And while it stands to reason that over-criminalizing would naturally beget over-incarceration, this does not necessarily follow—at least not to the commensurate degree one might imagine. The former sounds more in *who* gets punished, and the latter more in *how* they are punished.

Moving inwards, the answers to the antecedent question of "what is a crime?" similarly come in different, more literal and more pragmatic flavors. The literal answer, and that which animates our common law understanding of crime, is that a crime is some kind of moral wrongdoing or, in other words, an *evil* act.[10] Under this conception, criminal law is the battleground on which Good fights Evil, and its rules are bottomed on the belief that *only evilness* warrants punishment,[11] for it is the visitations and habitations of

8. The United States' prison population exceeds 2.2 million, equivalent to 716 prisoners per 100,000 people, the highest rate of imprisonment in the world. ROY WALMSLEY, INT'L CTR. FOR PRISON STUDIES, WORLD PRISON POPULATION LIST 1 (10th ed. 2013), *available at* http://www.prisonstudies.org/sites/prisonstudies.org/files/resources/downloads/wppl_10.pdf. Sweden, meanwhile, is *closing prisons for lack of prisoners*! Richard Orange, *Sweden closes four prisons as number of inmates plummets*, THE GUARDIAN (Nov. 11, 2013, 11:33 AM), http://www.theguardian.com/world/2013/nov/11/sweden-closes-prisons-number-inmates-plummets. Sweden's total prison population is currently under 5,000, equivalent to only *51 prisoners per 100,000 people*. *See id.* That is less than one-fourteenth the rate of imprisonment in the United States.

9. Zach Dillon, *Symposium on Overcriminalization: Foreword*, 102 J. CRIM. L. & CRIMINOLOGY 525, 526 (2012) (footnote omitted) ("We have surpassed the maximum capacity of our prisons and cannot financially maintain the growth of our criminal justice system.").

10. *See* John F. Stinneford, *Punishment Without Culpability*, 102 J. CRIM. L. & CRIMINOLOGY 653, 661 (2012) ("Common law thinkers were moral realists. They believed that real moral principles inhered in nature and that such principles could be discerned by reason.").

11. *See id.* at 659 n.28 (alterations in original) (quoting 2 HENRY DE BRACTON, ON THE LAWS AND CUSTOMS OF ENGLAND 384 (Samuel E. Thorne trans. & ed., Harvard Univ. Press 1968) (c. 1300)) ("[A] crime is not committed unless the intention to injure exists[.] It is will and purpose which mark *maleficia* . . . ."); *see also*, 4 BLACKSTONE, *supra* note 2, at *27 ("[P]unishments are . . . only inflicted for the abuse of . . . free will

evil in the souls of men that are the proximate cause of all "true crimes."[12] That criminal law's only interest is in preserving society's moral fabric, and its punishments are manifestations of condemnation meant to restore that fabric after a given crime has torn it.[13] In sum, if crimes are evils then the law's purpose is *retributive*, and it must stop short of punishing non-evils because to do so would itself be an evil and injurious of the moral fabric it exists to preserve.[14]

On the other hand, the pragmatic answer is that a crime is a violation of a positive law that prescribes punishment and those laws need not be proscriptions of transcendently evil acts, but can be anything that the legislature deems necessary, efficient, or of societal value.[15] Under this conception, one can be a criminal without having

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. . . ."); *id.* at *21 ("[A]n unwarrantable act without a vitious will is no crime at all.").

12. I digress here to hopefully dispel the (entirely reasonable) notion that this sentence takes stylistic liberties without due regard for its meaning, as the words are imprecise and could be construed as suggestive of sentiments not intended to be endorsed and, needless to say, for whose consideration this Note will fall well short of approaching. Firstly, "evil" and "soul" are loaded words inasmuch as they tend to conjure religious associations. "Evil" is used only to mean transcendent moral badness, i.e., a wrong everyone agrees is a wrong. Likewise, "soul" is contrived only as an analog to "being" or "mind" or that core part of ourselves that drives us to act as we do, not a spiritual/umbilical thread with which our relationship with a/the divine is sewn. These words are nonetheless deliberately employed to underscore the weightiness of the moral-breach-as-crime end of the spectrum, an end inextricably bound up in religious sentiment.

Secondly, "visitations and habitations" could be construed as antagonistic of the notion of "free will" and/or perhaps to connote a deterministic or even fatalistic worldview, but this is not the case. Rather, it is used in concert with "evil" and "soul" out of respect for the hope that men are not born manifestly evil, but by some deficit of character make for it a nest in themselves wherein they might nurture it to such a health that a given stimulus might cajole it to externalize (an instance of "visitation") or to the point that it metastasizes to infect the conscious will (a "habitation"). This (however dubiously artful) conception is meant to recognize the capacity for evil in all men, while holding them nonetheless morally accountable for their evil acts.

13. *See* Walter Berns, *For Capital Punishment: The Morality of Anger*, HARPER'S, Apr. 1, 1979, at 15-20 ("A moral community, unlike a hive of bees or hill of ants, is one whose members are expected freely to obey the laws, and unlike those in a tyranny, are trusted to obey the laws. The criminal has violated that trust, and in so doing has injured not merely his immediate victim but the community as such. He has called into question the very possibility of that community by suggesting that men cannot be trusted to respect freely the property, the person, and the dignity of those with whom they are associated.")

14. For a more nuanced accounting of retributivism, see, e.g., Adil Ahmad Haque, *Retributivism: The Right and the Good*, 32 LAW & PHIL. 59 (2013) (distinguishing between "evaluative" and "deontic" retributivism).

15. *See* Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457 (1897); s*ee also* Stinneford, *supra* note 10, at 667 ("The primary goal of [*The Path of the Law*] was to delegitimize morality and tradition as bases for law and to replace them with the values of power and efficiency."); *id.* at 668 ("Holmes . . . argu[ed] that the sole focus of the criminal law should be 'the dangerousness of the criminal,' not his

done evil, but merely by failing to comply with some legal requirement; and punishments may be imposed without any retributive purpose, but solely for the more utilitarian benefits of deterrence and incapacitation.[16]

Of course, these two different views of crime are anything but mutually exclusive, as one would hope that the former is wholly swallowed by the latter because it is plainly desirable to deter and incapacitate evil.[17] That is perhaps the best way to visualize the issue: the smaller circle of "true crimes" (i.e., those "of a deeper and more atrocious dye"[18]) circumscribed within the larger circle of "criminal violations." Over-criminalization, then, is some portion of the area between these circles, but its shape and size are a function of how the beholder defines "crime."

That is the abstract foundation upon which this Note is built: there are two over-criminalizations and two crimes.

B. An Ancient Analogy: Plato's "Euthyphro"

The issue of defining "crime" is truly transcendent, and while clearly defining and redressing over-criminalization would logically supervene on such a definition, there is the still more transcendent supervenience of that definition on what may be an unknowable existential reality, i.e., whether or not there is a "natural law," "higher order of things," or however you would like to phrase it.[19]

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culpability.").

16. *See, e.g.*, Francis Bowes Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55, 68 (1933) ("[C]oincident with the swinging of the pendulum in the field of legal administration in this direction modern criminologists are teaching that the objective underlying correctional treatment should change from the barren aim of punishing human beings to the fruitful one of protecting social interests.").

Note that a third pragmatic justification is rehabilitation, but it is an odd duck and its consideration will be limited to this footnote. Rehabilitation is less a justification *for punishment* than it is a justification for *how we punish*. *See generally* Hart, *supra* note 1. In other words, it can be expressive of the sentiment "as long as we are punishing, we might as well punish beneficially." Logically, it would seem to go with the "evil" meaning of crime, for what would true rehabilitation be but the demolition of that nest for evil? *See supra* note 12. However, it is unmistakably a practical, utility-driven consideration because it is innately at odds with the goal of retribution. The difference being that a retributive view holds the criminal accountable, *see supra* text accompanying note 13, whereas the rehabilitative view is more that society has failed the criminal and must endeavor to ameliorate its failure. *See* Hart, *supra* note 1, at 437. Having said that, rehabilitation could be conceptually useful as a negative barometer for what should or should not be a crime; to wit, if there is no rehabilitative reason to punish a given act, then perhaps punishing it is over-criminalization.

17. Deterrence could work to occlude the externalization of a "visiting" evil, but would be ineffectual against the rooted, "inhabiting" evil; whereas, incapacitation protects society from the pervasively and irretrievably evil but may not be a legitimate goal in punishing only the temporarily evil. *See supra* note 12.

18. 4 BLACKSTONE, *supra* note 2, at *5.

19. Obviously, this is well beyond the scope of this Note, but given the aim of

In that vein, let us retreat two millennia to consider Plato's classic *Euthyphro*, a dialogue between Socrates, who is facing a charge of blasphemy and solicitous of wisdom with which he might contest it, and Euthyphro, a man of "the finest religious knowledge" who is prosecuting his own father for murder.[20] Socrates, astounded by Euthyphro's confidence that he is not himself committing an "impiety" by prosecuting his father, seeks his insight into the meaning of "piety" so he can defend his case.[21] Socrates begs:

> [T]each me the form itself by which everything pious is pious[.] For you said it's by one form that impious things are somehow impious and pious things pious. . . . So then tell me whatever this form itself is, so that, by looking at it and using it as a paradigm, I can declare anything of that kind that you or anyone else might do to be pious, and if it is not of that kind, that it is not.[22]

Jumping to the present day, we can recast Socrates's question not in terms of "pious things" and "impious things," and "pious" and "impious," but "legal things" (or "non-crimes") and "illegal things" (or "crimes"), and "right" and "wrong," respectively: "Teach me the form itself by which everything [legal is right]. . . . [S]o that, by looking at it and using it as a paradigm, I can declare anything of that kind . . . [to be legal], and if [wrong], then [a crime]."[23]

Euthyphro's answer is: "[W]hat is beloved by the gods is pious, and what is not beloved by them is impious."[24] The analogy here is obvious, with the present-day "gods" being the legislature, so Euthyphro's first answer suggests the pragmatic definition of crime: what is legal is right, and what is a crime is wrong.

Socrates, however, is unsatisfied, and he begs what has come to be known as the "Euthyphro dilemma": "Is the pious loved by the gods because it's pious, or [is it] pious because it is loved [by the gods]?"[25] Again translating it to this scenario, but now in the opposite light: Is what is wrong a crime because it is wrong, or is it wrong because it is a crime? In other words, is there a "natural law" or "higher order of things" where things are transcendently wrong, or is

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elucidating the fundamental issues underlying over-criminalization, it must at the very least be surrendered that books of law will only take you to the layer of understanding upon which they were premised, and further penetration is only accomplishable with the philosophical, the theological, the metaphysical, and the like.

20. PLATO, EUTHYPHRO 1-14 (Cathal Woods & Ryan Pack trans. 2012), *available at* http://ssrn.com/abstract=1023143. The crime of Euthyphro's father was that, after a laborer had drunkenly slit another man's throat, his father had the man bound and thrown into a ditch, then sent for an interpreter of religious law about what should be done with the man; but before such answer came, the man died of hunger and cold. *Id.*

21. *Id.* at 3.

22. *Id.* at 5 (emphases added).

23. *Id.*

24. *Id.*

25. *Id.* at 8.

it only our man-made law that makes things wrong?

Suffice it to say, an agreeable answer is never reached.[26] An exasperated Socrates begs, "don't you see that our discussion has gone around and arrived back at the same place?"[27] He implores him to start over, but Euthyphro (perhaps taking notice of a nearby sundial) replies, "some other time, then . . . I'm in a hurry to get somewhere and it's time for me to go."[28] Socrates laments that he has learned nothing, and the dialogue ends.[29]

Our problem is like that of Socrates: we are charged of something (over-criminalization) and we lack the fundamental knowledge that would allow us to combat it. The "dilemma" is, we do not know whether there are moral limits to the criminal law, and even if we agree that there are, we do not know *where* they are. This means we have no "paradigm" with which we can declare anything to be a crime or not a crime.

Alas, Euthyphro's demanding schedule has become America's 21st century loss, as—like Socrates—we find ourselves confronted with a problem of our own creation, engendered by our lack of fundamental understanding, and bereft of clear guidance from those of the "finest [legal] knowledge."[30]

C. The House Committee on the Judiciary's Over-Criminalization Task Force

Finally, the present-day force behind this Note. Over-criminalization is not just a theoretical problem worthy of scholarly debate, but the catch-all soubriquet for real-life problems confronting the criminal law—from the punishing of the insufficiently blameworthy to the fact that we literally cannot imprison more criminals.

In May 2013, the House of Representatives Committee on the Judiciary created a bipartisan Over-Criminalization Task Force ("Task Force") to analyze the problem of over-criminalization.[31] The Task Force held four hearings during its initial six-month run, and was continued for another six months (to run through August 2014), during which it held an additional six hearings. After its ten

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26. *See id.* at 13.

27. *Id.*

28. *Id.* at 14.

29. *Id.*

30. *Id.* at 12.

31. *See Defining the Problem and Scope of Over-Criminalization and Over-Federalization: Hearing Before the Over-Criminalization Task Force of 2013 of the H. Comm. on the Judiciary*, 113th Cong. 65-66 (2013) [hereinafter *Hearing 1: Defining the Problem and Scope of Over-Criminalization and Over-Federalization*], *available at* http://judiciary.house.gov/_cache/files/e886416b-82d6-43f9-8d5d-68c44fc590cd/113-44-81464.pdf.

hearings, it is abundantly clear that the Task Force views the issue through both the more theoretical (over-criminalizing) and more pragmatic (over-incarceration) lenses, and the stereoscopic image of the monster they are hunting is a headless, tangled mess of arms. To be sure, the Task Force has not focused on discerning "the form itself" by which all crimes are crimes so that it can be "used as a paradigm" to pare down the criminal code.[32] Instead, it has assumed at least a partial understanding of that form, viz. the wrongness of punishing the truly blameless, and the focus of the majority of its hearings has been informed by that understanding.

During the Task Force's first hearing, a panel of four witnesses unanimously agreed that "mens rea" (specifically, the lack thereof) was the issue most deserving of the Task Force's focus.[33] A month later, the Task Force held its second hearing, subjected: *Mens Rea: The Need for a Meaningful Intent Requirement in Federal Criminal Law*.[34] Its third hearing again dealt with inadequate *Mens Rea* requirements but limited its scope to regulatory crimes.[35] In 2013, the Task Force's fourth and final hearing picked up where the third left off and focused on solutions to the problem of regulatory crime.[36]

On February 5, 2014, the Over-Criminalization Task Force was reauthorized for an additional six-month period.[37] Over those six months, it held six hearings with much more varied topics than those addressed in 2013's four hearings: "Criminal Code Reform,"[38] "Over-

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32. *See* PLATO, *supra* note 20, at 5.

33. *See Hearing 1: Defining the Problem and Scope of Over-Criminalization and Over-Federalization*, *supra* note 31, at 65-66.

34. *Mens Rea: The Need for a Meaningful Intent Requirement in Federal Criminal Law: Hearing Before the Over-Criminalization Task Force of 2013 of the H. Comm. on the Judiciary*, 113th Cong. (2013) [hereinafter *Hearing 2: Mens Rea: The Need for a Meaningful Intent Requirement*], *available at* http://judiciary.house.gov/_cache/files/18b2bd39-ccf7-49e4-8d78-dce3f0b844ce/113-46-81984.pdf.

35. *See Regulatory Crime: Identifying the Scope of the Problem: Hearing Before the Over-Criminalization Task Force of 2013 of the H. Comm. on the Judiciary*, 113th Cong. (2013) [hereinafter *Hearing 3: Regulatory Crime: Identifying the Scope of the Problem*], *available at* http://judiciary.house.gov/_cache/files/1b92d362-abf4-45eb-b154-8a14c913c0ff/113-60-85283.pdf.

36. *See Regulatory Crime: Solutions: Hearing Before the Over-Criminalization Task Force of 2013 of the H. Comm. on the Judiciary*, 113th Cong. (2013) [hereinafter *Hearing 4: Regulatory Crime: Solutions*], *available at* http://judiciary.house.gov/_cache/files/1f22a094-0f62-49d9-9927-21f85174be11/113-61-85566.pdf.

37. *See Ratification of Subcommittee Memberships; Resolution, Reauthorization of the Over-Criminalization Task Force; and, H.R. 2919, The Open Book on Equal Access to Justice Act: Hearing Before the H. Comm. on the Judiciary*, 113th Cong. (2014).

38. *Criminal Code Reform: Hearing Before the Over-Criminalization Task Force of 2014 of the H. Comm. on the Judiciary*, 113th Cong. (2014) [hereinafter *Hearing 5: Criminal Code Reform*], *available at* http://judiciary.house.gov/_cache/files/e941e04f-6b15-47bd-b15f-cfd1a9fc8c1b/113-71-86844.pdf.

Federalization,"[39] "Penalties,"[40] "Collateral Consequences,"[41] "Agency Perspectives,"[42] and "The Crimes on the Books and Committee Jurisdiction."[43]

While the 2013 hearings focused primarily on mens rea, regulatory crimes, and the punishment of the blameless (all of which redound to the morally-rooted definition of crime and the corresponding view of over-criminalizing), the Task Force's 2014 hearings delved into the more pragmatic issues of over-incarceration, such as draconian penalties,[44] collateral consequences to conviction,[45] and the perspectives of those involved in the process of punishing, such as judges and the Sentencing Commission.[46] This reach beyond the problems of insufficient culpability and over-regulation to the pragmatic ones concerning our methods of punishment is because regulatory crimes constitute mere tenths of a percent of the federal prison population.[47] Foremost among these pragmatic concerns are the over-criminalizing of drug offenses (namely marijuana and other minor possessory offenses) and the overly punitive sanctions that attach to many of these crimes (e.g., mandatory minimum sentences). Suffice it to say, it does not take a mathematician to realize that a substantial reduction in the national incarceration rate and prison population[48] would be best achieved by reducing the number of drug crimes (and, thus, persons incarcerated for drug crimes), as drug offenses correlate to an astounding 48.8% of the current federal

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39. *Over-Federalization: Hearing Before the Over-Criminalization Task Force of 2014 of the H. Comm. on the Judiciary*, 113th Cong. (2014) [hereinafter *Hearing 6: Over-Federalization*], *available at* http://judiciary.house.gov/_cache/files/f854ee67-bf1d-4b5c-a70f-a23686703c66/113-79-87332.pdf.

40. *Penalties: Hearing Before the Over-Criminalization Task Force of 2014 of the H. Comm. on the Judiciary*, 113th Cong. (forthcoming 2014) [hereinafter *Hearing 7: Penalties*], *available at* http://judiciary.house.gov/index.cfm/2014/5/hearing-penalties.

41. *Collateral Consequences: Hearing Before the Over-Criminalization Task Force of 2014 of the H. Comm. on the Judiciary*, 113th Cong. (forthcoming 2014) [hereinafter *Hearing 8: Collateral Consequences*], *available at* http://judiciary.house.gov/index.cfm/2014/6/hearing-collateral-consequences.

42. *Agency Perspectives: Hearing Before the Over-Criminalization Task Force of 2014 of the H. Comm. on the Judiciary*, 113th Cong. (forthcoming 2014) [hereinafter *Hearing 9: Agency Perspectives*], *available at* http://judiciary.house.gov/index.cfm/2014/7/hearing-agency-perspectives.

43. *Hearing 10: The Crimes on the Books and Committee Jurisdiction*, *supra* note 1.

44. *See generally Hearing 7: Penalties*, *supra* note 40.

45. *See generally Hearing 8: Collateral Consequences*, *supra* note 41.

46. *See generally Hearing 9: Agency Perspectives*, *supra* note 42.

47. *See Hearing 3: Regulatory Crime: Identifying the Scope of the Problem*, *supra* note 35, at 24 (statement of Rachel E. Barkow, Segal Family Professor of Regulatory Law and Policy, Faculty Director, Center on the Administration of Criminal Law, New York University School of Law).

48. *See* WALMSLEY, *supra* note 8.

inmate population.[49]

And that is the rub. Drugs are (understandably) a very polarizing issue and it is virtually inconceivable to imagine that there will be drastic changes in policy with respect to their legality and/or the severity with which our laws combat them.[50] This begs the question to be considered at this note's conclusion: Does the Task Force's evident regard for the *Mens Rea* requirement and corresponding condemnation of overly-broad regulatory offenses (theoretically) lend itself to drug crime reform? The Task Force will likely recommend a federal *Mens Rea* statute that reads a minimum culpability requirement into those criminal statutes and regulations that lack an adequate one. Additional "attractive" recommendations include codifying the doctrine of lenity[51] and/or the mistake of law defense,[52] as well as introducing a process of legislative review for proposed bills and regulations that include criminal penalties.[53] If the Task Force does adopt these approaches, will it not essentially be presupposing a morally-rooted "form" for crime? What, if any, is that form, and what might it say about drug offenses?

II. OVER-CRIMINALIZATION'S TENTACLES: THE EFFECTS

The harm of overcriminalization exists at every stage of the

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49. *Offenses*, FED. BUREAU OF PRISONS, http://www.bop.gov/about/statistics/statistics_inmate_offenses.jsp (last updated Sept. 27, 2014).

50. *See* Peter Reuter, *Why Has U.S. Drug Policy Changed So Little Over 30 Years?*, 42 CRIME & JUST. 75, 76 (2013).

51. *See, e.g.*, Marie Gryphon, *The Better Part of Lenity*, 7 J.L. ECON. & POL'Y 717, 717 & n.3 (2011); *see also Hearing 2: Mens Rea: The Need for a Meaningful Intent Requirement*, *supra* note 34, at 47-48 (statement of Dr. John S. Baker, Jr., Visiting Professor, Georgetown Law School, Professor Emeritus, LSU Law School) ("[A]s Chief Justice Marshall explained in the *Wiltberger* case, the reason why courts should strictly construe statutes is because it is the obligation of the Congress to write them clearly. What has happened is we have gone to the rule of lenity, and the Court has in many cases actually flipped it, and it is not lenity at all.").

52. *See, e.g.*, Paul Larkin, Jr., *A Mistake of Law Defense as a Remedy for Overcriminalization*, 28 CRIM. JUST. 10 (2013); Edwin Meese III & Paul J. Larkin, Jr., *Reconsidering the Mistake of Law Defense*, 102 J. CRIM. L. & CRIMINOLOGY 725, 737 (2012).

53. *See Hearing 1: Defining the Problem and Scope of Over-Criminalization and Over-Federalization*, *supra* note 31, at 18 (statement of Hon. George J. Terwilliger III, Partner, Morgan, Lewis & Bockius LLP); *id.* at 27 (statement of William N. Shepherd on behalf of the American Bar Association); *id.* at 36 (statement of John G. Malcolm, Rule of Law Programs Policy Director and the Ed Gilbertson and Sherry Linberg Gilbertson Senior Legal Fellow, Heritage Foundation); *id.* at 63 (statement of Steven D. Benjamin, President of the National Association of Criminal Defense Lawyers); *see also*, *Hearing 2: Mens Rea: The Need for a Meaningful Intent Requirement*, *supra* note 34, at 22 (statement of Dr. John S. Baker, Jr., Visiting Professor, Georgetown Law School; Professor Emeritus, LSU Law School); *id.* at 37 (statement of Norman L. Reimer, Executive Director, the National Association of Criminal Defense Lawyers).

> criminal process. While it can take many forms, overcriminalization most frequently occurs through (i) the ambiguous criminalization of conduct without meaningful definition or limitation, (ii) the enactment of criminal statutes that lack a meaningful criminal intent (or mens rea) requirement, (iii) the imposition of vicarious liability for the acts of others with insufficient evidence of personal awareness or neglect, (iv) the expansion of criminal law into areas of the law traditionally reserved for regulatory and civil enforcement agencies, (v) the federalization of crimes traditionally reserved for state jurisdiction, (vi) the creation of mandatory minimum sentences that frequently bear no relation to the wrongfulness or harm of the underlying crime, and (vii) the adoption of duplicative and overlapping statutes. These problems are reflected in federal dockets across the nation.[54]

A. Introduction and Historical Perspective

In Part I, I identified "over-criminalizing" and "over-incarceration" as the blanket terms to which the various arms of over-criminalization belong, and it is to these groups the focus of Part II will turn in sections B and C, respectively. However, I want to first begin with a bit of a history lesson about *federal* criminal law (which, if I have not made perfectly clear, is the only body of criminal law addressed by this Note), as it will help explain its inherent oddness.

The power to define crimes and their corresponding punishments is *not* one of Congress's specifically enumerated powers.[55] Indeed, the establishment of a federal police force to investigate crimes is also nowhere to be found in the Constitution.[56]

Federal law enforcement as we understand it today can be traced back (fittingly enough) to the House Committee on the Judiciary, which generated the original bill ultimately passed as the Act to Establish the Department of Justice, which expanded the Attorney

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54. *Hearing 1: Defining the Problem and Scope of Over-Criminalization and Over-Federalization*, *supra* note 31, at 53 (statement of Steven D. Benjamin, President, National Association of Criminal Defense Lawyers). For a more extensive overview, see also Stephen F. Smith, *Overcoming Overcriminalization*, 102 J. CRIM. L. & CRIMINOLOGY 537 (2012).

55. Notwithstanding certain crimes literally against the nation, on the high seas, and contrary to the Law of Nations. *See* U.S. CONST. art. 1, § 8.

56. *See* U.S. CONST. Though the Judiciary Act of 1789 created the United States Marshals Service, the Marshals were essentially servants of the courts for carrying out their law enforcement functions, as well as conduits of the federal government at the regional level. They did not *investigate* crimes because there were no federal crimes to investigate; rather, they kept the peace in largely lawless areas, served various judicial writs (e.g., summonses and subpoenas), made arrests, handled prisoners, as well as took the national census. *See, e.g.*, *History - Oldest Federal Law Enforcement Agency*, U.S. MARSHALS SERVICE, http://www.usmarshals.gov/history/oldest.htm (last visited Nov. 2, 2014).

General's powers to include, *inter alia*, the prosecution of all federal crimes.[57]

Federal law enforcement did not begin in earnest until the Interstate Commerce Act, passed in 1887.[58] This act created the first independent regulatory agency of the U.S. government, the Interstate Commerce Commission, which was authorized to investigate and prosecute those who violated the act.[59]

After President William McKinley's assassination in 1901, President Theodore Roosevelt insisted on more power to monitor anarchists[60] and, spurred by the inability to adequately investigate land frauds, later instructed then Attorney General Charles Bonaparte to "create an investigative service within the Department of Justice subject to no other department or bureau, which would report to no one except the Attorney General."[61] Bonaparte did as told, and in 1909 the Bureau of Investigation of the Department of Justice was established, what since has come to be known as the Federal Bureau of Investigation, or FBI, and is largely synonymous with federal law enforcement.[62]

This history lesson is all to say that federal law enforcement is not as firmly embedded in the nation's history as one might expect, but rather emerged and grew as a somewhat organic response to societal changes—a theme to be revisited in Part III. Of course, the congressmen who have made the laws that the FBI enforces have not been touched with the prescience to know which laws may one day become fiscally and morally unsustainable, nor have they all been lawyers with a (hopefully) more principled understanding of what should make something a crime.[63] The deterrent effect of making something criminal is a seductively powerful tool available to Congress, and it should come as no great surprise that its use has increased as the FBI's investigative practices have become more sophisticated.

Nonetheless, things have gone woefully awry.

On May 7, 2013, the House passed a resolution creating the House Committee on the Judiciary Over-Criminalization Task Force

57. Act to Establish the Department of Justice, ch. 150, 16 Stat. 162 (1870).

58. Interstate Commerce Act of 1887, ch. 104, 24 Stat. 379.

59. *Id.*

60. *See generally* TIM WEINER, ENEMIES: A HISTORY OF THE FBI 7-12 (2012) (detailing the history of the FBI as a secret intelligence service).

61. Memorandum from James G. Findlay, Special Agent, FBI, to J. Edgar Hoover, Dir. of the FBI (Nov. 19, 1943), *available at* http://www.fbi.gov/about-us/history/brief-history/docs_findlay43.

62. *See id.*

63. To be fair, one not engaged in the study or practice of politics could scarcely hazard a guess as to the number of national problems Congress is tasked with addressing at any given time.

of 2013.[64] In a press release coinciding with its creation, four of the Task Force's members offered their initial thoughts on the work that lay before them:

Chairman Goodlatte:

> Over-criminalization is an issue of liberty. As federal criminal laws and regulations have increased, so has the number of Americans who have found themselves breaking the law with no intent of doing so. Americans who make innocent mistakes should not be charged with criminal offenses. We need to take a closer look at our laws and regulations to make sure that they protect freedom, work as efficiently and fairly as possible, and do not duplicate state efforts.[65]

Ranking Member Conyers:

> Unduly expansive criminal provisions in our law unnecessarily drive up incarceration rates. Almost one-quarter of the world's inmates are locked up in the United States, yet Americans constitute only 5 percent of the world population. In addition, the incarceration rate for African Americans is six times that of the national incarceration average.[66]

Crime Subcommittee Chairman Sensenbrenner:

> Our current criminal code is riddled with outdated provisions, inconsistent with modifications made to reflect America's contemporary approach to criminal law. This bipartisan task force will review federal laws in Title 18 and work to clean it up. Congress must ensure the federal role in criminal prosecutions is properly limited to offenses within federal jurisdiction and within the scope of constitutionally-delegated federal powers.[67]

Crime Subcommittee Ranking Member Scott:

> Although crime is primarily a matter for states and localities to handle, over the last 40 or so years Congress has increasingly sought to address societal problems by adding criminal provisions to the federal code. There are now over 4,000 federal criminal provisions, plus hundreds of thousands of federal regulations which impose criminal penalties, often without requiring that criminal intent be shown to establish guilt. As a result, we are hearing many complaints of overuse and abusive uses of federal criminal laws from a broad-based coalition of organizations ranging from the Heritage Foundation to the National Association of Criminal Defense

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64. *See* Press Release, House Judiciary Committee Creates Bipartisan Task Force on Over-Criminalization (May 5, 2013), *available at* http://judiciary.house.gov/index.cfm/2013/5/housejudiciarycommitteecreatesbipartisantaskforceonovercriminalization.

65. *Id.*

66. *Id.*

67. *Id.*

Lawyers.[68]

Coupled with the above history, these quotes rather aptly tell the story. Federal criminal law is a relatively new beast, borne of societal changes that bespeak its necessity. But we have failed to implement the safeguards and reflexive inquiries necessary to maintain its modernity and usefulness, as well as its fidelity to the Constitution, and what are commonly held to be axiomatic legal principles. As a result, we have a criminal code that is engorged to the point of being unknowable beyond recognition and allows for sundry abuses. Ultimately, what we are left with is the prosecution of the insufficiently blameworthy and even altogether blameless, a supersaturated prison system, and an unacceptable disparate impact amongst races.[69]

Unquestionably, the lion's share of the Task Force's focus has been devoted to the concerns expressed by Chairman Goodlatte in his statement above[70] and touched upon by Crime Subcommittee Members Sensenbrenner[71] and Scott,[72] redounding upon the problems of over-criminalizing. However, the over-incarceration issue raised by Ranking Member Conyers[73] has been a constant undercurrent throughout these hearings, and has been more directly addressed in many of the Task Force's 2014 hearings. Certainly its

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68. *Id.*

69. *See id.* Steven D. Benjamin perhaps ties it all together a little more neatly in his statement before the Task Force during its first hearing:

> [W]e are living with the consequences of a misguided public infatuation with the use of criminal law as a massive tool of social and economic control. That infatuation has left the United States with more prisoners than any other nation on earth, an estimated 65 million Americans marred by a criminal record, and billions of dollars unnecessarily diverted from core functions and responsibilities of government.
>
> The dynamic between overcriminalization and overincarceration cannot be ignored. Each comes at substantial cost—whether directly through expenditures on courts, prosecutors, and prisons, or indirectly as a financial burden on our citizens, businesses, and economy created by the threat of the criminal sanction and the uncertainty such a threat creates. When combined, however, the costs . . . are a tremendous weight on our society as a whole. This weight is unsustainable morally, as well as financially. Therefore, the fundamental question that this Task Force must address is whether the federal criminal law should be an endlessly expansive universe, or whether it is time to return to the fundamental principle that the use of the criminal law is essentially a state function limited to addressing genuinely bad behavior.

Hearing 1: Defining the Problem and Scope of Over-Criminalization and Over-Federalization, *supra* note 31, at 51 (statement of Steven D. Benjamin, President, National Association of Criminal Defense Lawyers).

70. *See supra* note 65 and accompanying text.

71. *See supra* note 67 and accompanying text.

72. *See supra* note 68 and accompanying text.

73. *See supra* note 66 and accompanying text.

practical importance could not be over-emphasized.

It would be nearly impossible to inventory all of the information brought to the Task Force's attention and the opinions expressed by its witnesses. Instead, the remainder of this section will summarize the underlying issues and focus on the interrelatedness of the many causes and effects. Some issues are more clearly causes, which generally sound more in the "over-criminalize" meaning of over-criminalization, and others are more effect-oriented, which sound more in the "over-incarceration" meaning.

B. The Problems of Over-Criminalizing

1. In a Nutshell

> The infirmities of the best among us, the vices, and ungovernable passions of others, the instability of all human affairs, and the numberless unforeseen events, which the compass of a day may bring forth, will teach us (upon a moments [sic] reflection) that *to know with precision what the laws of our country have forbidden, and the deplorable consequences to which a wilful disobedience may expose us, is a matter of universal concern*.
>
> - William Blackstone, circa 1769[74]

> The staff has asked the Congressional Research Service to update the calculation of criminal offenses in the Federal code . . . . CRS' initial response to our request was that *they lack the manpower and resources to accomplish this task*.
>
> - Rep. F. James Sensenbrenner, Jr., Chairman of the Over-Criminalization Task Force of 2013[75]

If the Congressional Research Service lacks the manpower and resources to know the corpus of federal crimes,[76] how could anyone possibly "know with precision"[77] when they might be committing a crime? Certainly, there is no "paradigmatic" definition of crime against which they might compare their conduct. Either our collective reason has acceleratingly ebbed over time to allow us to

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74. 4 BLACKSTONE, *supra* note 2, at *2 (emphasis added).

75. *Hearing 1: Defining the Problem and Scope of Over-Criminalization and Over-Federalization*, *supra* note 31, at 65 (statement of Rep. F. James Sensenbrenner, Jr., Chairman, Over-Criminalization Task Force of 2013 of the H. Comm. on the Judiciary) (emphasis added).

76. Note that by the Task Force's tenth and final hearing, thirteen months later, CRS was able to conclude its review of the federal criminal statutes enacted since 2008 (the last time a calculation was undertaken). *See, e.g.*, *Hearing 10: The Crimes on the Books and Committee Jurisdiction*, *supra* note 1 (statement of John S. Baker, Visiting Professor, Georgetown Law School, Professor Emeritus, LSU Law School, at 2-3). The CRS found that 403 offenses with attaching criminal penalties had been enacted during that time, an average of well over sixty new crimes per year. *Id*.

77. 4 BLACKSTONE, *supra* note 2, at *2.

still hold as fair the notion that "ignorance of the law is no excuse,"[78] or our collective morals and sense of justice have self-similarly ebbed to the point that we simply do not care about an accused's subjective culpability. Either possibility is intolerable and demands immediate remediation.[79]

There are now nearly 5,000 crimes within the U.S. Code and perhaps in the hundreds of thousands in the Code of Federal Regulations.[80] Not only is that too many, because with every aggrandizement the body of criminal law becomes more unknowable and therefore more easily violated in the absence of any kind of (criminally) blameworthy intent, but—as just touched upon in the brief history recounted above—the federal government is one of limited powers, and with every aggrandizement of the federal police power we slide further from the government envisioned by the framers of our Constitution.

The obvious question is: How do we know which criminal laws are appropriately treated as crimes and which should not be? Unfortunately, there is no one way to answer that question without a definition of crime.[81] Instead, the Task Force has identified a number of (hopefully ameliorable) causes that contribute to that over-abundance of criminal laws, as well as several measures that might be taken to either quell their continuing proliferation, or save those who unintentionally run afoul of them from suffering criminal punishment.

The causes of the over-abundance of federal crimes identified by the Over-Criminalization Task Force are over-regulation, over-federalization, and duplicative statutes within the U.S. Code.[82]

2. Over-Regulation

Over-regulation—at least within the context of over-

78. *See supra* note 7 and accompanying text.

79. To co-opt the words of Detective Bunk Moreland: "Makes me sick . . . how far we done fell." *The Wire: Homecoming* (HBO television broadcast Oct. 31, 2004).

80. *See supra* note 5 and accompanying text.

81. The Judicial Conference of the United States has deemed that only five species of criminal offenses are appropriate for federal jurisdiction:

> (1) Offenses against the federal government or its inherent interest; (2) Criminal activity with substantial multistate or international aspects; (3) Criminal activity involving complex commercial or institutional enterprises most effectively prosecuted using federal resources or expertise; (4) Serious, high-level or widespread state or local government corruption; and, (5) Criminal cases raising highly sensitive local issues.

Hearing 9: Agency Perspectives, *supra* note 42 (statement of Irene Keeley, U.S. District J., Judicial Conference of the United States, at 4), *available at* http://judiciary.house.gov/_cache/files/ade342df-6e0b-428f-a3cf-28c46eca8122/keeley-testimony.pdf.

82. *See, e.g.*, *supra* note 4 and accompanying text.

criminalization—can be curtly described as the excessive implementation of criminal sanctions to regulate the American commercial landscape. It is the result of Congress's practice of outsourcing its law-making authority to specialized agencies more familiar with the issues they regulate.[83] The problems are that—though more familiar with a particular issue than would or could be Congress—these agencies are not directly answerable to the citizenry, and they do not have Congress's specialized expertise when it comes to drafting laws. So, while regulatory agencies are better equipped to implement specialized rules than Congress, when it comes to understanding the relevant issues, when it comes to *writing* the rules to account for unwitting violators and guard against abuses of prosecutorial discretion, Congress has a clear experiential advantage.[84] Because of this, innumerable pieces of regulatory law have been enacted by regulators perhaps myopically hoping to achieve some regulatory end, not politicians with allegiances to the big picture.

This raises two important questions: First, whether criminalization is in fact necessary to achieve regulatory compliance, or if civil penalties might suffice; and second, whether it is right for Congress to delegate its power to impose criminal penalties to regulatory agencies.[85]

The practical consequences of facing prosecution for violating a regulation further exacerbate the issue, as those charged often initially find themselves in proceedings run by the prosecuting agency, and federal courts will often require that all "administrative remedies [be exhausted]. . . before coming to court for an independent, fair, and level review," which can be very burdensome in terms of both time and money.[86] What this does is force settlement.[87]

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83. *See, e.g.*, *Hearing 3: Regulatory Crime: Identifying the Scope of the Problem*, *supra* note 35, at 32-33 (statement of Rachel E. Barkow, Segal Family Professor of Regulatory Law and Policy, Faculty Director, Center on the Administration of Criminal Law, New York University School of Law).

84. *Cf. Hearing 1: Defining the Problem and Scope of Over-Criminalization and Over-Federalization*, *supra* note 31, at 11-12 (statement of Hon. George J. Terwilliger III, Partner, Morgan, Lewis & Bockius LLP) ("[Regulators have] . . . create[d] a morass of dense regulations[,] . . . the . . . highly technical, vague standards [of which] can bring prosecutions for crimes of general application . . . .").

85. *Hearing 3: Regulatory Crime: Identifying the Scope of the Problem*, *supra* note 35, at 25 (statement of Rachel E. Barkow, Segal Family Professor of Regulatory Law and Policy, Faculty Director, Center on the Administration of Criminal Law, New York University School of Law).

86. *Id.* at 18 (statement of Reed D. Rubinstein, Partner, Dinsmore & Shohl LLP, for the U.S. Chamber Institute for Legal Reform).

87. *Id.* (statement of Reed D. Rubinstein, Partner, Dinsmore & Shohl LLP, for the U.S. Chamber Institute for Legal Reform) ("Public companies facing charges of

The task force also heard testimony about the adverse effects of over-regulation on the national economy and American businesses—which are astoundingly costly.[88] However, the testimony to that effect was not necessarily limited to the criminalization within the regulatory sphere but rather the "opaque regulatory requirements" in general that cause companies to "forgo opportunities, or at the very least expend valuable resources and delay ventures in order to address the legal risks that underlie entrepreneurial decision-making."[89] Presumably, those compliance and lost opportunity costs would still exist if civil penalties were used instead criminal ones, so they speak to a broader view of over-regulation.

3. Over-Federalization

Over-federalization refers to the practice of making acts more properly treated as state crimes into federal ones.[90] The obvious theoretical concern is the limitation imposed on the federal government by the Tenth Amendment,[91] but the less obvious pragmatic one is those suspected of having committed acts proscribed by both state and federal laws potentially face two prosecutions, which works a considerable unfairness upon defendants for at least two reasons. First, and perhaps most alarming, duplicative federal and state criminal laws allow for a quasi-loophole around the constitutional prohibition against double jeopardy,[92] as defendants may be acquitted of an offense in state court and subsequently

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criminal regulatory violations often settle at least in part because the risk of insolvency associated with a criminal indictment . . . is so great that contesting a charge would amount to a breach of fiduciary duty. Small businesses usually lack the resources to effectively contest regulatory enforcement actions and there is no equivalent of the Federal Public Defender's Office for targets of administrative action. Therefore, only a few rare individuals are capable of standing up and vigorously defending themselves and their rights when facing charges with respect to alleged criminal . . . regulatory violations.").

88. The Competitive Enterprise Institute estimates that American businesses spent $1.806 *trillion* in 2012 to comply with federal regulations. CLYDE WAYNE CREWS, JR., TEN THOUSAND COMMANDMENTS: AN ANNUAL SNAPSHOT OF THE FEDERAL REGULATORY STATE 2 (20th Anniversary ed. 2013), *available at* http://cei.org/sites/default/files/Wayne%20Crews%20-%2010,000%20Commandments%202013.pdf.

89. *Hearing 1: Defining the Problem and Scope of Over-Criminalization and Over-Federalization*, *supra* note 31, at 12 (statement of Hon. George J. Terwilliger III, Partner, Morgan, Lewis & Bockius LLP).

90. *See, e.g.*, *id.* at 25-26 (statement of William N. Shepherd, on the behalf of the American Bar Association).

91. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X. As previously said, the power to define crimes is not one of Congress's specifically enumerated powers. *See id.* at art. 1, § 8.

92. "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . . ." U.S. CONST. amend. V.

subjected to a prosecution for what is essentially the same offense in federal court, or vice versa.[93] Second, by allowing for a choice of jurisdiction, defendants who have committed virtually the same conduct may find themselves subjected to wildly different penalties, judges, juries, prison systems, rules of procedure, and rules of evidence, which flouts the law's general goal of treating similarly situated persons similarly.[94] Essentially, over-federalization is contrary to the spirit of the Constitution and unfairly stacks the odds against criminal defendants by allowing for a choice of jurisdiction that by all logic hinges on which jurisdiction is more likely to produce a conviction.

4. Duplicative Crimes Within the U.S. Code

Duplicative criminal laws within the U.S. Code raise similar fairness concerns, as they allow federal prosecutors to charge a multiplicity of counts for what may be the same underlying criminal conduct, which diminishes the odds of an outright acquittal at trial, thereby coercing guilty pleas.[95] Not only does it coerce a guilty plea, but it can also adversely impact a defendant's bargaining power in those plea negotiations. As instead of negotiating for a lesser charge, he may be negotiating for simply fewer charges, which can have a minimal impact on the final sentence imposed since sentences for multiple convictions often run concurrently and not consecutively.

So not only do all these different over-abundances of crimes contribute to the cumulative effect that the law becomes more and more arcane, sweeping more and more blameless persons into the hands of the FBI and federal prosecutors, but there are serious constitutional concerns about the over-expansion of the federal police power, the circumvention of the prohibition of double jeopardy, and–perhaps most importantly–the effective denial of defendants' jury trial right by virtue of an over-leveraged plea negotiation dynamic.

And there is yet another constitutional consideration when it

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93. *See, e.g.*, Sara Sun Beale, *The Many Faces of Overcriminalization: From Morals and Mattress Tags to Overfederalization*, 54 AM. UNIV. L. REV. 747, 769-70 (2005).

94. *Hearing 6: Over-Federalization*, *supra* note 39, at 11-12 (statement of James A. Strazzella, Professor of Law & James G. Schmidt Chair in Law, Temple University, Beasley School of Law).

95. *Hearing 10: The Crimes on the Books and Committee Jurisdiction*, *supra* note 1 (statement of John S. Baker, Jr., Visiting Professor, Georgetown Law School, Professor Emeritus, LSU Law School, at 5), *available at* http://judiciary.house.gov/_cache/files/44135b93-fe36-43dc-a91b-3412fe15e1f4/baker-testimony.pdf ("The availability of ever more crimes . . . also exaggerates a prosecutor's discretion in charging and leverage in forcing a plea from defendants. Against more counts in an indictment a defendant will have to expend more money defending the case, which can dissuade even innocent defendants from fighting the charges. Against numerous, vague, and sometimes strict liability charges, even innocent defendants can usually be 'clipped' for something.").

comes to the Fourth Amendment impact on federal law enforcement's powers to investigate crimes: every new criminal law gives investigators another basis of probable cause on which to premise a search of one's person, house, papers, or effects.[96]

5. The Erosion of the *Mens Rea* Requirement

While the forgoing are the major issues behind the over-abundance of federal criminal laws and the multitude of significant concerns they raise, there is another significant concern when it comes to the defective writing of so many of the newer criminal laws: many lack adequate *Mens Rea* provisions.

In 2010, the Heritage Foundation and National Association of Criminal Defense Lawyers issued a joint report entitled *Without Intent: How Congress Is Eroding the Criminal Intent Requirement in Federal Law*.[97] The report studied the criminal offenses introduced during the 109th Congress and found that "[o]ver 57 percent of the offenses introduced, and 64 percent of those enacted into law, contained inadequate criminal intent requirements, putting the innocent at risk of criminal [prosecution]."[98] It also concluded that "many . . . are so vague, far-reaching, and imprecise that few lawyers, much less non-lawyers, could determine what specific conduct they prohibit and punish."[99]

The idea of a *Mens Rea* requirement, as touched upon in Part I and to be expounded upon in Part III, is that a person should only be punished if he has a "guilty mind."[100] This is not such a convoluted issue when it comes to crimes like murder and rape,[101] but what does it mean to violate a federal regulation with a guilty mind? Must one be aware of the law broken? Willfully ignorant of it? Must he know

96. U.S. CONST. amend. IV; *see id.* ("[T]he addition of little-used crimes is [not] unimportant. The federal government is supposedly a government of limited powers and, therefore, limited jurisdiction. Each new crime expands the jurisdiction of federal law enforcement and federal courts. Regardless of whether a statute is used to indict, it can be used to establish the necessary probable cause that a crime has been committed and, therefore, to authorize a search and seizure.").

97. BRIAN W. WALSH & TIFFANY M. JOSLYN, WITHOUT INTENT: HOW CONGRESS IS ERODING THE CRIMINAL INTENT REQUIREMENT IN FEDERAL LAW (2010), *available at* http://www.nacdl.org/withoutintent/.

98. *Id.* at X; *see Hearing 1: Defining the Problem and Scope of Over-Criminalization and Over-Federalization*, *supra* note 31, at 55 (statement of Steven D. Benjamin, President, National Association of Criminal Defense Lawyers) (citation omitted).

99. WALSH & JOSLYN, *supra* note 97, at X.

100. *See, e.g.*, *Hearing 1: Defining the Problem and Scope of Over-Criminalization and Over-Federalization*, *supra* note 31, at 34 (statement of John G. Malcolm, Rule of Law Programs Policy Director & Ed Gilbertson and Sherry Linberg Gilbertson Senior Legal Fellow, Heritage Foundation).

101. These are examples of *malum in se* offenses. *See* discussion *infra* Part III.A.

that some harm might come from his conduct? In some cases, these questions are altogether unnecessary because the statute makes an act a strict liability offense, meaning the prosecutor need not demonstrate any degree of culpability.[102]

6. Ameliorative Measures

The Task Force has heard so much testimony about the need to revitalize the *Mens Rea* requirement that it seems a foregone conclusion that it will be chief among the recommendations in its report to the full committee.[103] More stringent observance of the traditional requirement that there be a guilty mind in order to punish is essentially uncontroversial—punishing the innocent is

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102. *See, e.g.*, *Hearing 1: Defining the Problem and Scope of Over-Criminalization and Over-Federalization*, *supra* note 31, at 1-2 (statement of Rep. F. James Sensenbrenner, Jr., Chairman, Over-Criminalization Task Force of 2013 of the H. Comm. on the Judiciary) ("[M]any of the regulatory crimes in the code lack any *mens rea*, the attempt to commit a crime. That means that an American citizen may not only be unaware that he is committing a crime, but he may be held strictly liable for his conduct.").

103. *E.g.*, *Hearing 2: Mens Rea: The Need for a Meaningful Intent Requirement*, *supra* note 34, at 22 (statement of Dr. John S. Baker, Jr., Visiting Professor, Georgetown Law School; Professor Emeritus, LSU Law School) ("Federal law could require federal prosecutions to prove a statutorily-specified mental state with respect to the elements of a criminal offense."); *id.* at 37 (statement of Norman L. Reimer, Executive Director, the National Association of Criminal Defense Lawyers) ("Congress should . . . enact statutory law establishing a default criminal intent requirement to be read into any criminal offense that lacks one."); *Hearing 1: Defining the Problem and Scope of Over-Criminalization and Over-Federalization*, *supra* note 31, at 63 (statement of Steven D. Benjamin, President of the National Association of Criminal Defense Lawyers) ("NADCL urges the Task Force to consider. . . . the enactment of legislation that would apply a meaningful criminal intent requirement by default to laws lacking such a requirement . . . ."); *id.* at 36 (statement of John G. Malcolm, Rule of Law Programs Policy Director and the Ed Gilbertson and Sherry Linberg Gilbertson Senior Legal Fellow, Heritage Foundation) ("[W]e are anxious to discuss . . . having Congress pass a default *mens rea* provision for crimes in which no *mens rea* has been provided unless Congress manifests its clear intent to enact a strict liability offense . . . ."); *id.* at 27 (statement of William N. Shepherd on behalf of the American Bar Association) ("The ABA Criminal Justice Section recently developed draft policy to urge governments to . . . prescribe specific *mens rea* elements for all crimes other than strict liability offenses, and . . . assure that no strict liability crimes permit a convicted individual to be incarcerated."); *id.* at 18 (statement of Hon. George J. Terwilliger III, Partner, Morgan, Lewis & Bockius LLP) ("[W]e could assure ourselves that no person is ever convicted of a criminal offense unless a jury has determined that he or she, or it, acted with criminal intent. . . . by writing an overriding provision of law that requires, as an element of any offense where a showing of intent is not expressly required, it be proven beyond a reasonable doubt that the defendant acted with the intent to disobey or disregard the law."); *see also* Geraldine Szott Moohr, *Playing with the Rules: An Effort to Strengthen the* Mens Rea *Standards of Federal Criminal Laws*, 7 J.L. ECON. & POL'Y 685 (2011); Harvey Silverglate, *Remarks on Restoring the* Mens Rea *Requirement*, 7 J.L. ECON. & POL'Y 711 (2011).

manifestly wrong,[104] and so the question then becomes how best to achieve that. Something along the lines of a default *Mens Rea* statute is an obvious answer, and secondary considerations like a codified doctrine of lenity and mistake of law defense have also been discussed.[105]

While starting over and writing a new criminal code that would not have the failings outlined above would certainly allow for the most thorough remediation of those problems,[106] the Task Force has primarily considered the far less extreme approach of requiring review of proposed criminal statutes and regulations before they are enacted into law; e.g., the House Committee on the Judiciary would review all such potential criminal laws for, presumably, adequate mens rea, whether duplicative of other federal laws, whether more appropriately the province of state law enforcement, and whether the threat of criminal prosecution is necessary to achieve a regulatory end.[107]

And that would be a great start, but minimizing the innocents subjected to federal criminal penalties will by no means have a significant impact on the country's prison populations. The issues underlying that over-incarceration are decidedly thornier.

C. The Problems of Over-Incarceration

1. In a Nutshell

Since 1980, our federal prison population has increased one

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104. *Cf.* Steven S. Nemerson, Note, *Criminal Liability Without Fault: A Philosophical Perspective*, 75 COLUM. L. REV. 1517 (1975) (providing a philosophical accounting of criminal strict liability).

105. *See, e.g.*, *Hearing 5: Criminal Code Reform*, *supra* note 38, at 57-58 (statement of John D. Cline, Esquire) (discussing the importance of enacting uniform rules of construction including the rule of lenity); *Hearing 3: Regulatory Crime: Identifying the Scope of the Problem*, *supra* note 35, at 74 (statement of Rachel E. Barkow, Segal Family Professor of Regulatory Law and Policy, Faculty Director, Center on the Administration of Criminal Law, New York University School of Law, and Reed D. Rubinstein, Partner, Dinsmore & Shohl LLP) (suggesting the adoption of a general mistake of law defense).

106. *See, e.g.*, *Hearing 5: Criminal Code Reform*, *supra* note 38, at 41-42 (statement of John D. Cline, Esquire) (listing five goals for a revised criminal code: "reducing the number of . . . crimes . . . strik[ing] a proper balance between Federal and State law enforcement, clearly defining the . . . levels of mens rea, establishing uniform rules of construction, and revising overly harsh punishment[s]" that have bloated the federal prisons).

107. *See, e.g.*, *id.* at 70 (statement of Rep. Gohmert, Vice-Chairman, Over-Criminalization Task Force of 2013 of the H. Comm. on the Judiciary) ("[I]f we make it a requirement that any bill that has a criminal penalty has to come through [the House Committee on the] Judiciary, I think that would help a lot. A bipartisan problem has been both sides of the aisle, when we want to show we are really tough on something, then throw a criminal penalty. And it has resulted in vast injustice. And I appreciate all of you [witnesses] bringing that forward.").

> thousand percent, the average federal sentence has doubled, and drug sentences have actually tripled. Drug convictions alone make up for more than two-thirds of the increase of the prison population. The so-called "war on drugs" has been waged almost exclusively in poor communities of color, even though data shows that minorities are no more likely to use or sell illegal drugs or commit crime. These excessive and discriminatory sentences are driven up by mandatory minimums, enhancements, and consecutive counts. In fiscal year 2012, sixty percent of convicted federal drug defendants were convicted of offenses carrying a mandatory minimum penalty. These defendants are not the ones for whom the harsh penalties were intended. They're not the kingpins, they're not the leaders, and they're not organizers of criminal syndicates. Rather, data from the U.S. Sentencing Commission tells us that the vast majority are couriers, street-level dealers, and addicts. More than half of them have the lowest criminal history category and as a result, ninety-three percent of federal inmates are non-violent offenders. Mandatory minimums are the worst of the worst sound bites masquerading as crime policy. They sentence people before they're even charged or convicted based solely on the name or the code section of the crime. No consideration is given to the seriousness of the crime or how minor a role one may have played in the crime or whether one is a first-offender, a young person, or an abused girlfriend under the control of a boyfriend. . . . [M]andatory minimums often require judges to impose sentences that violate common sense. The United States already locks up a higher portion of its population than any country on earth. The Pew Center on [the] States estimates that any ratio of over 350 per 100,000 in jail today- anything above that, the crime reduction value of increased incarceration begins to diminish. They also tell us that any ratio above 500 [per 100,000] becomes actually counter-productive; that you've got so many people locked up that you're actually adding to crime rather than diminishing crime because you've messed up so many families, you've wasted so much money, you've got so many felons wandering around that can't find jobs, that you're actually adding to crime. The data shows that in the United States our ratio is not only above 500 but above 700, leading the world. Some minority communities have incarceration rates over 4,000 per 100,000, creating what the Children's Defense Fund calls the "cradle to prison pipeline." Since 1992, the annual prison costs have gone from nine billion dollars to over sixty-five billion dollars [per] year, and the rate of increase for prison costs was six times greater than the increased spending for higher education.[108]

As that litany of horribles suggests, over-incarceration is a staggering morass of problems occurring at every stage of the

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108. *Hearing 7: Penalties*, *supra* note 40 (statement of Rep. Robert "Bobby" Scott), *available at* http://www.c-span.org/video/?319651-1/overhauling-federal-criminal-code (beginning at 23:18).

criminal process. Sentences are overlong; the collateral consequences to conviction are barriers to reintegration, frustrate rehabilitation, and ultimately engender recidivism; and the collateral damage of "effective" crime fighting in high-crime areas tends to create more criminals than it takes off the streets. In large part, each of these issues was hatched from the same nest: the war on drugs.

Drugs are dangerous. They can physically and psychologically destroy their users, emotionally cripple its users' families and friends, and have a tendency to promote other criminality and put others' lives at risk.[109] As such, it is more than understandable that the government takes a strong moral stance against them.

But combating drug *use* is not the province of the federal government; it is for the states. The federal government does not war against drug use; it wars against the drug trade[110] and the horrific violence that attends to it,[111] which is even more understandable.

But it begs a question evocative of a familiar existential conundrum: Which came first, the illegality or the violence?

2. Mandatory Minimums

The big problem with combatting the drug trade is that the "kingpins," the ones whose incarceration would theoretically constitute a "battle won" in the war on drugs,[112] insulate themselves from the criminality of their enterprises, and the best way for law enforcement and prosecutors to earn their convictions is by coercing

109. *See Hearing 7: Penalties*, *supra* note 40 (statement of William G. Otis, Adjunct Professor of Law, Georgetown Univ. Law Center, at 6), *available at* http://judiciary.house.gov/_cache/files/6ed51da8-f2b4-4ee1-bbd9-950a909c8e6a/otis-testimony.pdf ("The trafficking and consumption of hard drugs is one of the most harmful and socially destructive enterprises going on in America today. Even if a particular drug defendant does not engage in violence, his participation in the drug business creates the conditions in which history tells us that violence is certain to occur. The crack wars were not a myth, and neither is the gunplay that is still a commonplace feature of drug conspiracies from the organizers to the street dealers.").

110. *See id.* (statement of Eric Evenson, Retired Assistant United States Attorney, on behalf of the National Association of Assistant United States Attorneys, at 2), *available at* http://judiciary.house.gov/_cache/files/63b3e445-b347-4432-930b-25bdefa5e23a/evenson-testimony.pdf ("[F]ederal law enforcement and prosecutorial efforts target[] a different set of drug defendants [than that of the states], ones involved in selling significant quantities of narcotics, typically larger than those sold by state defendants . . . .").

111. "Drug organizations set up strongholds in neighborhoods within communities. With drug gangs come guns and violence. Show me a city with a violence problem, and you will find an underlying drug trafficking problem." *Id.* at 5. Evenson goes on to note some of the consequences: "When neighborhood property values plummet, the poorer families are stuck in their homes, unable to sell and move away. Their only choice is to hunker down and put bars on their windows." *Id.*

112. Albeit a pyrrhic one. *See infra* at II.C.3-4 (discussing the collateral consequences of the "War on Drugs" on both individuals and society as a whole).

the lower-level "employees" in their enterprises to cooperate against them to build a conspiracy case.[113] Unsurprisingly, that is no easy task given the strictly observed omertà within drug trafficking enterprises.[114]

The tool most effective at breaking that code of silence is the threat of draconian punishment.[115] Enter mandatory minimum sentences: "Strong mandatory minimums alter [the] dynamic [between prosecutors and lower-level drug dealers] and cause [them] to reflect on the choice of cooperating, plea bargaining and receiving a relatively shorter sentence, or facing the prospect of a guilty verdict and a substantially longer sentence."[116] Mandatory minimums restrict a judge from entering a sentence below a statutorily-provided minimum for certain offenses, irrespective of any mitigating factors that might make subjective level of culpability far different from that of another convicted of the same crime.[117] This means that, assuming guilt of the offense charged and no available affirmative defense, one accused of a crime with a mandatory minimum sentence may at once be faced with the ultimatum that he cooperate or get, for example, ten years in prison.[118]

The problem—from an over-incarceration perspective—is that policy of using extreme sentences as threats to coerce cooperation against the real targets becomes grossly over-inclusive inasmuch as it fails to inspire cooperation, or worse, when there is no one to cooperate against, and the sentence *must* nonetheless be meted out

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113. *See Hearing 7: Penalties*, *supra* note 40 (statement of Eric Evenson, Retired Assistant United States Attorney, on behalf of the National Association of Assistant United States Attorneys, at 2-4), *available at* http://judiciary.house.gov/_cache/files/63b3e445-b347-4432-930b-25bdefa5e23a/evenson-testimony.pdf ("What is needed to charge the leader of a drug organization . . . with a conspiracy charge? Cooperating defendants are needed as trial witnesses. To go after the big fish, prosecutors need the cooperation of the little fish. Every federal drug prosecutor worth his salt knows that he has to induce the cooperation of the lower-level dealers to testify against the kingpins and their source of drug supply. . . . Without the cooperation of the lower-level dealers, federal authorities simply will be unable to ever charge, arrest and convict the major sources of illegal drugs in our country.").

114. An omertà often with a horrific insurance policy: "The foremost reason for [defendants'] restraint lies in their personal safety and that of their loved ones, whose lives can be snuffed out in a flash by higher-level drug dealers in reprisal for cooperation. This is a mean business." *Id.* at 3.

115. *See id.* at 4-5.

116. *Id.* at 3.

117. *See id.* (statement of Bryan Stevenson, Professor of Clinical Law, New York University School of Law, at 4), *available at* http://judiciary.house.gov/_cache/files/1258c9fe-f706-4d09-9672-7a3b489ebf9c/stevenson-testimony.pdf.

118. *See, e.g.*, *id.* at 7-8 (citing HUMAN RIGHTS WATCH, AN OFFER YOU CAN'T REFUSE: HOW US FEDERAL PROSECUTORS FORCE DRUG DEFENDANTS TO PLEAD GUILTY (2013)).

as a matter of law.[119] The result is swaths of persons end up in federal prisons (when they probably should be in the states' justice systems) for excessive periods of time that have nothing to do with their subjective culpability.

Some who support mandatory minimums suggest that they assure consistency in sentencing by removing judicial discretion,[120] but the meaningfulness in the consistency in sentencing is wholly dependent upon the extent to which there is consistency in charging, as prosecutors have unfettered discretion when it comes to how to charge defendants and what leniency may be offered in plea bargaining.[121] Inasmuch as persons guilty of committing the same conduct may be charged with different offenses carrying different mandatory penalties, that discretion is simply shifted from a member of the judiciary "tasked with being an impartial adjudicator" whose decisions may be appealed to a "member of the executive branch that does not have the same accountability."[122]

3. Societal Collateral Consequences[123]

The necessity of using mandatory minimums to fight the war on drugs and the corresponding strain that puts on the prison system by keeping people in prison longer than they deserve to be is the front-end of over-incarceration, but the back-end of it is just as pernicious an evil. First, there is the issue that the "battlegrounds" in the war on drugs are primarily urban communities in which large populations of persons of color tend to be concentrated. The unsurprising result is that the war on drugs has a palpable disparate impact on persons of color—seventy-five percent of all persons incarcerated in America for drug crimes are either Black or Hispanic.[124]

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119. *See id.* (statement of Marc Levin, Policy Director, Right on Crime Initiative at the Texas Public Policy Foundation, at 4), *available at* http://judiciary.house.gov/_cache/files/bb692f60-bfbd-4cb0-b649-d09d856de7e4/levin-testimony.pdf.

120. *See, e.g.*, *id.* (statement of Bryan Stevenson, Professor of Clinical Law, New York University School of Law, at 4), *available at* http://judiciary.house.gov/_cache/files/1258c9fe-f706-4d09-9672-7a3b489ebf9c/stevenson-testimony.pdf.

121. *See id.* at 6-7.

122. *Id*.

123. This is one issue that absolutely cannot be separated from the impacts of state law enforcement. The war on drugs is certainly fought on both fronts simultaneously, and the ravaging of the communities in which it is fought is neither attributable to one or the other, it is both.

124. *Hearing 7: Penalties*, *supra* note 40 (statement of Bryan Stevenson, Professor of Clinical Law, New York University School of Law, at 2) (citing MICHELLE ALEXANDER, THE NEW JIM CROW 98 (2010)), *available at* http://judiciary.house.gov/_cache/files/1258c9fe-f706-4d09-9672-7a3b489ebf9c/stevenson-testimony.pdf.

Proponents of the war on drugs say that they are not fighting a war against Blacks and Hispanics, but a war against the violence attendant to the drug trade that destroys their communities, and each gun that comes off the streets by way of an arrest and conviction is a win for them.[125] In other words, they are fighting the "bad" Blacks and Hispanics to help the "good" ones. Empirical studies, however, suggest that the collateral consequence of this crusade against the "bad" is that it inspires more "badness," as incarceration rates in excess of 325 to 430 inmates per 100,000 citizens do not reduce crime rates and may even increase them.[126]

4. Individual Collateral Consequences

And speaking of collateral consequences, there are a myriad of potential ones that attach to a given conviction, including the loss of basic liberties like the right to vote.[127] What these consequences do, in effect, is frustrate released convicts from re-entering and "becom[ing]. . . law-abiding and productive member[s] of society."[128]

The gravest consequence is the invariable loss of employment opportunities, which affects those with even the most minor of records, such as merely an arrest without conviction.[129] This is because we live in the digital age and the records exist not just on paper but also on easily accessible electronic databases.[130] The accessibility of these records allows employers to perform background checks on prospective employees, and there is even a market for private data companies to *buy* arrest records from law enforcement

125. *See, e.g.*, *id.* (statement of William G. Otis, Adjunct Professor of Law, Georgetown University Law Center, at 4), *available at* http://judiciary.house.gov/_cache/files/6ed51da8-f2b4-4ee1-bbd9-950a909c8e6a/otis-testimony.pdf ("Crime reduction has given a more secure life to every American, but has especially helped the disadvantaged. The hundreds, if not thousands, of people who were being gunned down in the streets of our big cities were mostly members of minority groups. Just as they were disproportionately victims of crime in those days, they have been disproportionately the beneficiaries of the drop in crime as stiff sentencing has taken hold.").

126. PEW CENTER ON THE STATES, ONE IN 31: THE LONG REACH OF AMERICAN CORRECTIONS 19 (2009) (citing Raymond V. Liedka, et al., *The Crime-Control Effect of Incarceration: Does Scale Matter?*, 5 CRIMINOLOGY & PUB. POL'Y 245 (2006)).

127. *See generally Hearing 8: Collateral Consequences*, *supra* note 41 (statement of Mathias H. Heck, Jr., Chair, Criminal Justice Section, American Bar Association, at 1-3), *available at* http://judiciary.house.gov/_cache/files/8d74a3cf-1df8-4c94-ab7d-76d5b5117fcd/heck-witness-testimony.pdf (discussing the pervasive and often indiscriminate manner in which collateral consequences are imposed).

128. *Id.* at 4.

129. *See id.* (statement of Rick Jones, Executive Director, Neighborhood Defender Service of Harlem, at 4), *available at* http://judiciary.house.gov/_cache/files/4cb02b68-bbc8-4d0d-b109-77023dc36b1d/nacdl-statement-hcj-otf-hearing-6-26-14.pdf.

130. *See id.*

agencies.[131] This practice can impact entirely innocent persons if the data these companies share in background checks are incomplete or inaccurate, and as of now, there are insufficient safeguards against that possibility.[132]

But beyond that possibility, there is still the commonplace practice of asking whether someone has *ever* been convicted of a crime on an employment application. The effect of that question is that the applications of ex-convicts get disregarded without being able to make any other kind of impression on a prospective employer, even when the nature of the crime would have no relation to the nature of the employment or a considerable amount of time had since passed. This problem is particularly severe with federal convictions, as there is no federal equivalent to having one's record expunged or sealed, short of a pardon from the President.[133]

Unquestionably, a criminal record is a *major* obstacle to reestablishing oneself as a self-sufficient, law-abiding member of society. But, for reasons I will not deign to explain, that same problem does not attach to earning a living criminally–such as by dealing drugs–and in that respect, the justice system unintentionally encourages recidivism.[134]

With as many as 65 million Americans with a criminal record (roughly 25 percent of all American adults),[135] the consequences are more than just dire for each individual, they threaten society as a whole.[136] If the trend of over-incarceration continues unabatedly, that ever-growing prison population will make for an ever-growing future population of essentially second-class citizens as these persons are

131. *Id.*

132. *See id.* at 9-10. Presently, there are two bills before Congress to "reform how the FBI collects and shares criminal record information," and to "require the FBI to find missing information on past arrests for individuals applying for work in the federal government." *Id.* (referencing the Fairness and Accuracy in Employment Background Checks Act, H.R. 2865, 113th Cong. (2013), and the Accurate Background Check Act, H.R. 2999, 113th Cong. (2013), respectively).

133. *See id.* at 7-8.

134. *See id.* (statement of Mathias H. Heck, Chair, Criminal Justice Section, American Bar Association, at 6) (citing COMM'N ON EFFECTIVE CRIMINAL SANCTIONS, AM. BAR ASS'N, SECOND CHANCES IN THE CRIMINAL JUSTICE SYSTEM: ALTERNATIVES TO INCARCERATION AND REENTRY STRATEGIES 13 (2007)), *available at* http://judiciary.house.gov/_cache/files/8d74a3cf-1df8-4c94-ab7d-76d5b5117fcd/heck-witness-testimony.pdf ("[E]x-offenders who [are] jobless after reentry [are] three times more likely to return to prison, . . . [and] 60% of former prisoners [are] unemployed a year after release from prison.").

135. *Id.* (statement of Rick Jones, Executive Director, Neighborhood Defender Service of Harlem, at 2), *available at* http://judiciary.house.gov/_cache/files/4cb02b68-bbc8-4d0d-b109-77023dc36b1d/nacdl-statement-hcj-otf-hearing-6-26-14.pdf.

136. "Consistent research shows that the ability to earn a living is the best way to keep someone from committing another crime. Setting up never ending barriers for those with convictions undermines public safety and hurts the economy." *Id.* at 11.

(belatedly) released from prison.

These are probably the biggest contributing factors to the problem of over-incarceration, and the simple fact of it is that the war on drugs—as presently fought—is a self-defeating endeavor. But because these are sensitive issues that inspire polarized responses, the likelihood that the Task Force will embrace any initiative that would make a meaningful impact to the over-incarceration problem is, by all logic, minimal. Certainly not when the other "attractive" initiatives regarding *Mens Rea* and legislative review are still on the table.

In light of what likely will be recommended and what probably will not be recommended (at least not unanimously), this Note will next turn to some of the historical background on which the Task Force and criminal scholars rely in support of the "attractive" reforms to the intent requirement and the power to criminalize.

III. OVER-CRIMINALIZATION'S HEAD: WHAT IS CRIME?

> In proportion to the importance of the criminal law, ought also to be the care and attention of the legislature in properly forming and enforcing it. It should be founded upon principles that are *permanent, uniform, and universal; and always conformable to the dictates of truth and justice, the feelings of humanity, and the indelible rights of mankind*: though it sometimes (*provided there be no transgression of these eternal boundaries*) may be modified, narrowed, or enlarged, according to the local or occasional necessities of the state which it is meant to govern.[137]

That about sums it up, no? The laws must be unfailingly principled. And it is the legislature's duty to carefully attend to both the laws' continuing usefulness and their adherence to those principles.

But how is a legislature, confronted with an issue of social concern inconceivable in the time of Blackstone and our nation's founding,[138] to know just which enlargements of the criminal law breach its fidelity to those "eternal boundaries?" By what transcendent guidepost is it to know the "dictates of truth and justice, the feelings of humanity, and the indelible rights of mankind?"[139]

As this section will go on to suggest, the more time that passes since Blackstone's writing, the less "care and attention" is invested in respecting those boundaries. But why? Is it merely the philosophical evolution of our law, which has seen the subordination of moral

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137. 4 BLACKSTONE, *supra* note 2, at *2-3 (emphases added).

138. *See, e.g.*, Sayre, *supra* note 16, at 68.

139. 4 BLACKSTONE, *supra* note 2, at *2.

principles to effect-based pragmatism?[140] Or have these boundaries been lost in the shadows of an ever-growing society lit by the twin suns of industry and technology? Whatever the cause, the unfortunate yet predictable result, of course, is over-criminalization and her bloated brother over-incarceration.

A. Wrong Is a Crime Because It Is Wrong: Common Law Concepts of the Criminal Law

1. The Distinctions Between Public Wrongs and Private Wrongs, *Malum In Se* Offenses and *Malum Prohibitum* Offenses

Criminal actions are unique because they are "Society v. Defendant," and the redress sought is not monetary or equitable, but "a formal and solemn pronouncement of the *moral* condemnation of the community."[141] Such is what it means to be prosecuted criminally—that you have harmed society in a way that threatens its viability,[142] and as punishment, the society has sanctioned the forfeiture of your rights, the very things it otherwise exists to preserve.

What underlies the Society v. Defendant action—indeed, what makes it possible—is the conception of a crime as a public wrong, as opposed to the private wrongs that give rise to civil actions.[143] "[P]ublic wrongs," wrote Blackstone, "are a breach and violation of the public rights and duties, due to the whole community, considered as a community, in its social aggregate capacity."[144] What does that mean? If private wrongs are "immaterial to the public,"[145] whereas public wrongs "strike at the very being of society, which cannot possibly subsist, where actions of [that] sort are suffered to escape with impunity,"[146] to which side do the wrongs lying somewhere in between belong? Things material to the public, but whose criminalization is not *essential* to society's continuing viability.

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140. *See also* Sayre, *supra* note 16, at 68 ("During the nineteenth century it was the individual interest which held the stage . . . . In the twentieth century came reaction. We are thinking today more of the protection of social and public interests . . . . As a direct result of this new emphasis upon public and social, as contrasted with individual, interests, courts have naturally tended to concentrate more upon the injurious conduct of the defendant than upon the problem of his individual guilt.").

141. Hart, *supra* note 1, at 405 (emphasis added).

142. *See* Berns, *supra* note 13.

143. *See* 4 BLACKSTONE, *supra* note 2, at *5.

144. *Id.*

145. *Id.* The example Blackstone provides is the "detain[ing] [of] a field from another man, to which the law has given him a right . . . for [there] only the right of an individual is concerned." *Id.*

146. *Id.* Blackstone's examples of these public wrongs are "treason, murder, and robbery." *Id.*

The difference between these two extremes can be conceptualized by imagining a society with no criminal law, meaning acts of treason, murder, robbery, and the like could be redressed only in civil suits for money damages. All moral decisions could be reduced to a risk/reward calculus. The penniless, with nothing to lose, would have only the allowances of their conscience to weigh before stealing, threatening, or attacking for what they want. The very wealthy might well kill for sport if indeed they were morally bankrupt enough to do so. Your rights would mean little and life would be horrifically unpredictable.

No civilized society treats treason, murder, or robbery as a private wrong.[147] They are what are known as *malum in se* offenses, which Black's Law Dictionary defines as:

> A wrong in itself; an act or case involving illegality from the very nature of the transaction, upon principles of natural, moral, and public law. An act is said to be *malum in se* when it is inherently and essentially evil, that is, immoral in its nature and injurious in its consequences, without any regard to the fact of its being noticed or punished by the law of the state. Such are most of the offenses cognizable at common law, (without the denouncement of a statute;) as murder, larceny, etc.[148]

Other *malum in se* offenses include "rape, arson, burglary, . . . forgery,"[149] and perjury,[150] which is by no means an exhaustive list.[151] These "inherently wicked [and]. . . naturally evil"[152] offenses are Blackstone's public wrongs that "strike at the very being of society."[153]

What lies between them and the private wrongs that are "immaterial to the public"[154] are *malum prohibitum* offenses, defined as "a thing which is wrong *because* prohibited; an act which is not inherently immoral, but becomes so because its commission is expressly forbidden by positive law."[155] Presumably, a legislature would only decide to forbid an act if it was material to the public it

147. 4 BLACKSTONE, *supra* note 2, at *5.

148. BLACK'S LAW DICTIONARY 752 (2d ed. 1910) (internal citation omitted).

149. 22 C.J.S. *Criminal Law* § 17 (2013).

150. 1 BLACKSTONE, *supra* note 2, at *54.

151. A more expansive definition: "'[N]atural crimes' throughout the ages are offenses 'against the fundamental altruistic sentiments of *pity* and *probity* in the average measure possessed by a given social group.'" Francis Bowes Sayre, *Mens Rea*, 45 HARV. L. REV. 974, 989 n.54 (1932) (quoting RAFFEALE GAROFALO, CRIMINOLOGY (1885)).

152. 21 AM. JUR. 2D *Criminal Law* § 25 (2014).

153. 4 BLACKSTONE, *supra* note 2, at *5.

154. *Id.*

155. BLACK'S LAW DICTIONARY, *supra note* 148.

governs.[156] That makes sense enough. But it also further reasons that part of the impetus for that decision is precisely the fact that there is no fairly assumed consensus as to the act's wickedness or immorality.[157] What that means is that if it were not forbidden, it would occur at an unacceptable rate because the public does not know better.[158]

And so the distinction blurs, as the sanctioning of criminal punishment for *malum in se* and *malum prohibitum* offenses alike is in furtherance of society's interest.[159] *Malum in se* offenses, we say, *must* be punished as precondition for there to be a society, whereas *malum prohibitum* offenses merely *should* be punished to preserve or improve society's health.[160] Definitionally, the distinction between *malum in se* and *malum prohibitum* is clear; the former has natural or moral law[161] as its source, and the latter positive law.[162]

For purposes of this note, there is little need to belabor the subject much beyond that, as others have done so at length.[163] However, one question is worth asking before moving on: Is the societal interest in *preventing* the commission of acts *malum prohibitum* important enough to warrant the Society v. Defendant criminal procedure?[164]

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156. *See id.*

157. *See* Sanford H. Kadish, *Legal Norm and Discretion in the Police and Sentencing Process*, 75 HARV. L. REV. 904, 910 (1962).

158. *See id.* at 906-11.

159. *See* 4 BLACKSTONE, *supra* note 2, at *5.

160. *See id.*

161. No distinction between the two is here suggested; they are used interchangeably.

162. *See* 4 BLACKSTONE, *supra* note 2, at *5.

163. *E.g.*, Note, *The Distinction Between* Mala Prohibita *and* Mala in se *in Criminal Law*, 30 COLUM. L. REV. 74 (1930); Richard L. Gray, Note, *Eliminating the (Absurd) Distinction Between* Malum in se *and* Malum Prohibitum *Crimes*, 73 WASH. U. L. Q. 1369 (1995).

164. Blackstone had no qualms:

> As to offences merely against the laws of society, which are only *mala prohibita*, and not *mala in se*; the temporal magistrate is also empowered to inflict coercive penalties for such transgressions: and this by the consent of individuals; who in forming societies, did either tacitly or expressly invest the sovereign power with a right of making laws, and of enforcing obedience to them when made, by exercising, upon their non-observance, severities adequate to the evil. The lawfulness therefore of punishing such criminals is founded upon this principle, that the law by which they suffer was made by their own consent; it is a part of the original contract into which they entered, when first they engaged in society; it was calculated for, and has long contributed to, their own security.

4 BLACKSTONE, *supra* note 2, at *8. He even went so far as to say that capital punishments could be prescribed for *mala prohibita* offenses, so long as the destructiveness of the act warranted it. *See id.* at *9-10.

2.The *Mens Rea* Requirement

Mens rea needs little explanation—it is the guilty mind, vicious will, or bad intent the criminal law requires.[165] Nothing more needs to be said on that end. The interest here is *why*.

The requirement is not timeless, as records of the early twelfth century suggest criminal liability was not limited to those with blameworthy intent.[166] In the thirteenth century, Henry de Bracton, drawing from Roman law, significantly incorporated the element of intent in his analysis of the law, which scholarship was likely the genesis for the more firmly rooted requirement that would follow.[167]

And follow it did:

> Under the pervasive influence of the Church, the teaching of the penitential books that punishment should be dependent upon *moral* guilt gave powerful impetus to this growth, for the very essence of *moral* guilt is a mental element. Henceforth, the criminal law of England, developing in the general direction of *moral* blameworthiness, begins to insist upon a *mens rea* as an essential [element] of criminality.[168]

Why, then, is clear: criminality is *moral* wrongdoing,[169] and morality is a matter of the individual will;[170] if a criminal conviction is a manifestation of *moral* condemnation,[171] then it must only issue as a response to an *immoral* act.

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165. Sayre, *supra* note 151, at 974.

166. *See generally id.* at 975-82 (discussing, *inter alia*, "old Westgothic Law" and the *Leges Henrici Primi*, a compilation of English law circa 1118). Nonetheless, it "appears that even in the very earliest times the intent element could not be entirely disregarded, and, at least with respect to some crimes, was of importance in determining criminality as well as in fixing the punishment." *Id.* at 982.

167. *See generally id.* at 982-87. Bracton wrote:

> [B]ut without an intent to kill, [one] ought to be acquitted, because a crime is not committed unless the intent to injure (*voluntas nocendi*) intervene; and the desire and purpose distinguish evil-doing, and no theft is committed without an intent to steal. And this is in accordance with what might be said of the infant or the madman, since the innocence of design protects the one and the lack of reason in committing the act excuses the other. But in evil-doing it is the intent (*voluntas*) which is regarded and not the event, and it makes no difference who does the actual killing or furnishes the cause of death.

Id. at 985-86 (quoting HENRY DE BRACTON, DE LEGIBUS ET CONSUETUDINIBUS ANGLIAE 136b).

168. *Id.* at 988 (emphases added).

169. *Id.*

170. *See* 4 BLACKSTONE, *supra* note 2, at *27 ("[P]unishments are. . . only inflicted for the abuse of . . . free will.").

171. *See supra* note 11 and accompanying text.

3. *Mens Rea* and *Malum Prohibitum* Offenses

Here's the catch: the *Mens Rea* requirement hearkens to a time when crimes were largely if not entirely those against Natural law, i.e., those crimes that are *malum in se*.

> [M]ost of the thirteenth century felonies from their very nature involved an intentional element. Robbery and rape necessitate a design; they can not possibly be committed through mischance. Burglary had not yet developed the requirement of an accompanying felonious intent, but a breaking into a house was of itself an act necessitating a design. Although the appeal of larceny might be brought against one in possession of stolen goods not himself a thief, the penal element of the action was based upon an original theft, a taking by design. Arson was not felonious unless intentional. Homicide included negligent and accidental, as well as intentional, killings; but already by the thirteenth century, the killer in self-defense or by misadventure, though strictly a felon and liable to forfeiture of goods, was being relieved from the ordinary felon's punishment of death.
>
> . . . The early felonies were roughly the external manifestations of the heinous sins of the day. The point is not that morality first began to make its appearance in the law, but that an increasing and now conscious emphasis upon morality necessitated a new insistence upon psychical elements in determining criminality.[172]

Some modicum of intent is at least implicit in all the common law *malum in se* offenses. But what about *malum prohibitum* offenses? They are not inherently *immoral* acts and thus may be done without any *immoral* intent.[173] Does a *Mens Rea* requirement for them even make sense when all it would necessarily determine is whether something was an accident, not whether it was done with any evil intent or even the knowledge that the conduct was itself illegal?[174]

What this leads to is criminal convictions for conduct that is not inherently immoral, *and* where the violator's state of mind is not itself in issue. In many cases, this means the *malum prohibitum* convict has a twice-reduced culpability vis-à-vis the *malum in se* convict. And yet they experience the same Society v. Defendant procedure that bears out the community's moral condemnation,[175]

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172. *Sayre*, *supra* note 151, at 988-89 (footnote omitted).

173. *See* Kadish, *supra* note 157 and accompanying text.

174. *Cf.* Herbert Wechsler, *A Thoughtful Code of Substantive Law*, 45 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 524, 527-28 (1955) ("Unless the actor realized or should have realized that his behavior threatened such unjustifiable injury; unless he knew or should have known the facts that gave his conduct its offensive quality or tendency, it was an accident.").

175. *See supra* note 124 and accompanying text.

may wear forever the same albatross that is the mark of felon,[176] and, indeed, be each other's neighbors within the confines of the same federal prison.

B. A Crime Is Wrong Because It Is a Crime: The Rise of Legal Pragmatism and the Proliferation of Regulatory Offenses

In 1877, the Supreme Court decided *Felton v. United States*, a case in which the defendants knowingly violated a statute regulating liquor production in order to mitigate what would otherwise have been a tremendous loss for their business.[177] The Court refused to characterize their conduct as a "willful" violation of the statute: "All punitive legislation contemplates some relation between guilt and punishment. To inflict the latter where the former does not exist would shock the sense of justice of every one."[178]

But that was 1877. Then, the Department of Justice was still in its infancy,[179] the Interstate Commerce Commission would not be created for another ten years,[180] the FBI not for another thirty,[181] and there would not be a Federal Register and Code of Federal Regulations for nearly another *sixty* years.[182] The polity's "sense of justice"[183] has since been greatly marginalized as a consideration, and, with that, so too has the "requirement" of culpability in order to sanction punishment.[184]

1. Changes in Legal Theory

On the eve of the twentieth century, the notion that morals inhered in nature and must be attended to by the law came under terse and articulate attack in the voice of not-yet-Justice Oliver Wendell Holmes, Jr.:

> One of the many evil effects of the confusion between legal and moral ideas . . . is that theory is apt to get the cart before the horse, and to consider the right or the duty as something existing apart from and independent of the consequences of its breach, to which certain sanctions are added afterward. But . . . a legal duty so called is nothing but a prediction that if a man does or omits

176. *See supra* Part II.C.3.

177. Felton v. United States, 96 U.S. 699 (1877).

178. *Id.* at 703.

179. *See supra* note 57 and accompanying text.

180. *See supra* note 58 and accompanying text.

181. *See supra* note 60 and accompanying text.

182. *See* OFFICE OF THE FEDERAL REGISTER, NAT'L ARCHIVES & RECORDS ADMIN., A BRIEF HISTORY COMMEMORATING THE 70TH ANNIVERSARY OF THE PUBLICATION OF THE FIRST ISSUE OF THE FEDERAL REGISTER 2-4 (2006), *available at* http://www.archives.gov/federal-register/the-federal-register/history.pdf.

183. *Felton*, 96 U.S. at 703.

184. *See generally* Nemerson, *supra* note 104; Sayre, *supra* note 16.

> certain things he will be made to suffer in this or that way by judgment of the court;— [sic] and so of a legal right.[185]

What Justice Holmes was getting at there is that the law need not be conformable to the dictates of morality; morality is subjective and therefore liable to yield inconsistent results when used as a guiding principle in judicial decision-making.[186] The law, he argued, should be above-all predictable in its results, because it is the certainty of consequence that will deter the "bad man" from acting injuriously.[187]

This view of law as a force and result-yielding tool would be echoed again and again during the first half of the twentieth century.[188] Law, it was contended, could be divorced from morality, for even Blackstone recognized it was socially beneficial to criminally proscribe *malum in se* offenses[189]—we need to in order for society to subsist. This realization greatly undermined the distinction between *malum in se* and *malum prohibitum*: both are socially undesirable.

The lynchpin of Holmes's essay, at least with respect to the criminal law, is that the focus should be on dangerousness, not culpability.[190] The extremism of his perspective is reflected in his description of the "typical criminal":

> If the typical criminal is a degenerate, bound to swindle or to murder by as deep seated an organic necessity as that which makes the rattlesnake bite, it is idle to talk of deterring him by the classical method of imprisonment. He must be got rid of; he cannot be improved, or frightened out of his structural reaction.[191]

Square this with Blackstone's quote about "[t]he infirmities of the best among us,"[192] and the enormity of the schism between their two perspectives becomes clear. Holmes's criminal is a "bad man" through and through, he courts danger and delights in harm, and if the threat of criminal punishment is insufficient to deter his evil,

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185. Holmes, *supra* note 15, at 458.

186. *See id.*

187. *Id.* at 459-60.

188. *See, e.g.*, Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935); John Dewey, *Logical Method and Law*, 10 CORNELL L. Q. 17 (1925); Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923); Wesley Newcolm Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913); Karl N. Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222 (1931).

189. *See* 4 BLACKSTONE, *supra* note 2, at *5.

190. Holmes, *supra* note 15, at 471 ("[T]here is weighty authority . . . 'not the nature of the crime, but the dangerousness of the criminal, constitutes the only reasonable legal criterion to guide the inevitable social reaction against the criminal.'" (quoting HAVELOCK ELLIS, THE CRIMINAL 41 (1890))).

191. *Id.* at 470.

192. 4 BLACKSTONE, *supra* note 2, at *2.

why should society make allowances and invite further harm by insisting upon observing moral safeguards before rendering punishment?[193] In other words, Holmes's conception of the criminal law has no "external boundaries;" a legislature may proscribe whatever it sees fit, and so too it may set the standards for conviction as low as desired.[194]

With Holmes's ideas reverberating in legal minds, himself seated on the Supreme Court, a newly minted federal police force,[195] and the advent of, among other things, wire communications and the automobile, and the societal changes they invited, the pieces for an explosion of federal criminal law were squarely in place.

2. The Supreme Court and *Mens Rea*

In 1922, the Supreme Court struck its first significant blow against *Mens Rea* with its decision in *United States v. Balint*.[196] There, the charging statute and indictment were silent as to the defendants' knowledge, and the defendants argued that the statute should be interpreted to require culpability ("scienter") and that it would violate the Due Process Clause to convict them without demonstrating culpability.[197] The Court was unmoved, and predicated its decision on the fact that the statute, the Narcotic Act of 1914, was regulatory in purpose, not penal:

> Its manifest purpose is to require every person dealing in drugs to ascertain at his peril whether that which he sells comes within the inhibition of the statute, and if he sells the inhibited drug in ignorance of its character, to penalize him. *Congress weighed the possible injustice of subjecting an innocent seller to a penalty against the evil of exposing innocent purchasers to danger from the drug, and concluded that the latter was the result preferably to be avoided.*[198]

There it is, plain as day: Crime is whatever Congress says it is. Eternal boundaries be damned.

Twenty-one years later, *United States v. Dotterweich* advanced the ball to its extreme, finding that a company president may be *strictly* vicariously liable for a public welfare offense of his company.[199] That means that he, merely by virtue of his office within the company and not as a result of any conduct of his own, could be held criminally liable for a public welfare offense.[200] Again, it was

193. *See* Holmes, *supra* note 15, at 460, 470.
194. *See id.* at 470.
195. *See supra* note 52 and accompanying text.
196. 258 U.S. 250 (1922).
197. *Id.* at 251-52.
198. *Id.* at 254 (emphasis added).
199. United States v. Dotterweich, 320 U.S. 277 (1943).
200. *See id.* at 284-85.

legislative intent that ruled the day:

> Balancing relative hardships, Congress has preferred to place it upon those who have at least the opportunity of informing themselves of the existence of conditions imposed for the protection of consumers before sharing in illicit commerce, rather than to throw the hazard on the innocent public who are wholly helpless.[201]

Dotterweich involves the quintessential example of activity that *has* to be regulated, the sale of prescription drugs.[202] The ills that might come from their being mislabeled and sold, as was the case, are eminently clear—a company's carelessness could potentially lead to innocent deaths. Thus, it is the need to ensure *carefulness* that makes allowable "legislation [that] dispenses with the conventional requirement for criminal conduct—awareness of some wrongdoing. In the interest of the larger good it puts the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger."[203] In other words, "public welfare offenses" are special.[204]

Dotterweich made clear that the instrumentality of criminal prosecution could and would accommodate all purposes, by all means, including strictly vicarious liability. But this would not last.

The Supreme Court subsequently backed away from this extreme position, beginning in 1952 with *Morissette v. United States*, where the defendant was charged with having stolen government property he believed to be abandoned.[205] In *Morissette*, the Court found the prosecution's zeal in seeking to obtain punishment for an innocent vexing and doted on the fact that a conviction entailed serious consequences.[206] Unanimously (Holmes was now deceased), the Court held that a statute's silence as to criminal intent did not make it a strict liability offense, but explicitly excepted public welfare offenses.[207] For non-public welfare offenses, the message was clear and hearkened back to a more Blackstonian than Holmesian criminal law:

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201. *Id.* at 285.

202. *See id.*

203. *Id.* at 281.

204. *See* Sayre, *supra* note 16.

205. 342 U.S. 246 (1952).

206. *See id.* at 248, 260, 276.

207. *See id.* at 255-56 ("[Public welfare offenses] do not fit neatly into any of [the] accepted classifications of common-law offenses, such as those against the state, the person, property, or public morals. Many of these offenses are not in the nature of positive aggressions or invasions, with which the common law so often dealt, but are in the nature of neglect where the law requires care, or inaction where it requires a duty. Many violations of such regulations result in no direct or immediate injury to person or property but merely create the danger or probability of it which the law seeks to minimize.").

> The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil. A relation between some mental element and punishment for a harmful act is almost as instinctive as the child's familiar exculpatory "But I didn't mean to," and has afforded the rational basis for a tardy and unfinished substitution of deterrence and reformation in place of retaliation and vengeance as the motivation for public prosecution. . . .
>
> Crime, as a compound concept, generally constituted only from concurrence of an evil-meaning mind with an evil-doing hand, was congenial to an intense individualism and took deep and early root in American soil.[208]

Grandiose as that sounds, it did not make *Mens Rea* constitutionally required, but merely proclaimed that non-public welfare offense statutes would be interpreted to have a *Mens Rea* component if they lacked one.[209]

Obviously, in light of what has been said about over-criminalization,[210] the Supreme Court still has not recognized an affirmative *Mens Rea* requirement. However, since *Morissette* the Court has repeatedly affirmed that culpability has an indelible place in the context of the criminal law, such as with recent Eighth Amendment jurisprudence in which reduced culpability has rendered certain punishments inapposite to certain species of crimes and certain classes of offenders;[211] and, more on point, outlining the limits of strict liability.[212]

Ultimately, the Supreme Court has seemed to renounce Justice Holmes's vision of a criminal law unbounded by morality, but, like Blackstone, it has stopped at merely suggesting that there are "external boundaries" to criminal law without endeavoring to say

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208. *Id.* at 250-52 (citations omitted).

209. *See id.* at 250.

210. *See supra* Part II.B.2; *see also* WALSH & JOSLYN, *supra* note 97.

211. *See, e.g.*, Graham v. Florida, 560 U.S. 48 (2010) (holding that juvenile non-homicide offenders are ineligible for life without parole); Roper v. Simmons, 543 U.S. 551 (2005) (holding that juveniles are ineligible for the death penalty); Atkins v. Virginia, 536 U.S. 304 (2002) (holding that the mentally retarded are ineligible for the death penalty); Coker v. Georgia, 433 U.S. 584 (1977) (holding that rape cannot by itself warrant the death penalty—"death is different"). The reasoning in each of these cases boils down to the disproportionality of the punishment vis-à-vis the culpability of the offender. *See generally* Stinneford, *supra* note 10, at 712-23 (providing a more in depth accounting of "the culpability principle" in proportionality in punishment).

212. *See generally* Herbert L. Packer, *Mens Rea and the Supreme Court*, 1962 SUP. CT. REV. 107, 109 (1962); Stinneford, *supra* note 10, at 687-702 (discussing the Supreme Court's efforts to cabin the applicability of strict liability in *Morissette* and its progeny).

with any particularity what those limits are.

But how could it? There is no authority articulating those limits in any certain terms. The Constitution seems to take it for granted that there are limits, but can it be inferred what the Framers had in mind? This is why there has been no solution, and why the Supreme Court has been remiss to curtail the availability of the criminal law to legislators who need to respond to problems of social concern, particularly with respect to public welfare offenses.

IV. PUTTING IT ALL TOGETHER

A quick recap. The problems of over-criminalization are many, but generally fall within the two categories outlined in Part II, viz., over-criminalizing (too many crimes), and over-incarceration (too many criminals). The species of crime are two: offenses *malum in se* ("of a deeper and more atrocious dye"[213]) and offenses *malum prohibitum* (not innately evil but prohibited by positive law). Unsurprisingly, the Task Force has not at all entertained the notion that the way we punish *malum in se* offenses needs to be corrected (unless duplicative of state efforts). Why would they? Those are the offenses that *need* to be criminally punished for a society to subsist; were they not punished, or punished too leniently, the problem would be *under*-criminalization. Ipso facto, over-criminalization, in all its forms (other than over-federalization), appertains to offenses *malum prohibitum.*

The immediate questions that remain are also two: (1) Should there be a demarcating threshold between what may be made an offense *malum prohibitum* subject to criminal prosecution and what may not?[214] And (2) should we require a minimal showing of culpability to convict someone of such an offense?[215] Yes, over-incarceration begs further questions about the mechanisms by which we punish and how severe those punishments should be (among others), but these are more policy-driven issues not easily answered given the wide divergences in personal values. And while it is a serious issue that the thresher of criminal justice seems not to care about the point at which it cleaves a man's freedom from his life, the more philosophically compelling issue is to ensure that it *is even on the right field*.

So the Task Force is right to dote on *Mens Rea* and the seemingly boundless arabesque of criminal provisions within the U.S. Code and the Code of Federal Regulation. They are questions that

213. 4 BLACKSTONE, *supra* note 2, at *5.

214. Recall Blackstone's quote, *supra* note 137 and accompanying text, regarding the "eternal boundaries" of, *inter alia*, "justice . . . and the indelible rights of mankind" that the criminal law must not transgress. 4 BLACKSTONE, *supra* note 2, at *2.

215. *Id.*

can be understood with an unvarnished sense of justice: it is wrong to punish in the absence of guilt.

But instead of answering those questions with separate, specific answers as to how to save the blameless from punishment and how to pare down the corpus of crimes, as will be recommended, it should be considered whether both could be remedied in a single, more permanent stroke.

During the Task Force's first hearing in June 2013, Steven D. Benjamin beseeched the Task Force to "*act boldly* on solutions that will tackle this problem once and for all."[216] Nothing could be bolder than to "tackle that problem" (and kill that monster) with one flurry of the pen.

The way that might be done is to find a solution that appeals to an "unvarnished sense of justice," but could potentially entail far-reaching effects that would lower the national incarceration rate.

Define crime.[217] Define it in a way that puts a meaningful limit on the *malum prohibitum* acts that can be criminally punished, and define it in a way that disambiguates the *Mens Rea* requirement as applied to those surviving *malum prohibitum* crimes.

Doing so could accomplish all that the suggested rules of construction and legislative or extra-legislative review might more profoundly, more expediently, and more permanently. For one, the hard, politically-charged work of getting rid of criminal statutes and regulations would at least in part take care of itself, as courts would find unconstitutional the statutes under which criminals were charged that fell short of that standard. Second, prosecutors (hopefully) would stop charging crimes that they knew would not yield convictions, so scores of could-be defendants would not have to endure the financial hardship and debilitating psychological stress of defending themselves against potential prison time.

Consider the Task Force's recommendations of a default *Mens Rea* statute and creating a commission to review and revise criminal statutes and regulations. Don't these "solutions" essentially presuppose a definition for crime? What says there has to be a mens rea? Not the Constitution. Just our "idea" of what crime *should be*. What "paradigm" would the reviewing commission be using to see

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216. *Hearing 1: Defining the Problem and Scope of Over-Criminalization and Over-Federalization*, *supra* note 31, at 63 (statement of Steven D. Benjamin, President, National Association of Criminal Defense Lawyers) (emphasis added).

217. Dr. Baker recommended defining crime in the Task Force's fourth hearing: "The Task Force may wish to consider first defining the term 'crime,' and doing so in a way that clearly distinguishes felonies, misdemeanors, and non-criminal offenses, which could [be] labeled as 'infractions,' or 'violations.' The definition of 'crime' . . . should include the requirement of a *mens rea*." *Hearing 4: Regulatory Crime: Solutions*, *supra* note 36, at 13 (statement of Dr. John S. Baker, Jr., Visiting Professor, Georgetown Law School and Professor Emeritus at LSU Law School).

whether any given statute "is of that form" or not? None. Just that same idea of what a crime *should be*.

Let's flesh that out so there is no more "should be," only *is*.

Let us acknowledge the fact that the Founders, whose Bill of Rights is utterly dripping with the intent that government abuses not produce criminal convictions of the innocent,[218] could not possibly have augured the societal changes that would come more than a century later that made "public welfare offenses"[219] possible. They did not have industry as we know it today, they did not have finance and securities as we know them today, and they certainly did not have technology as we know it today. The criminal law in their minds scarcely rose to the point of *national* importance (e.g., treason). Crimes then were discrete acts of a decidedly more local character.

Times have changed. But if you could summon the Founders and seat them in the Over-Criminalization Task Force, just imagine their outrage! They would not be satisfied to band-aid the problem with the low-hanging fruit of solutions. They would see that the tree of criminal law had itself become poisoned and it was time to rip it out and plant a new one; a new tree whose roots would draw always from the reservoir of a fundamental definition of crime.[220]

> It is easy out of laziness, out of weakness, to throw oneself into the lap of deity, saying, 'I couldn't help it; the way was set.' But think of the glory of the choice! That makes a man a man.
>
> - Lee, on the grandeur of "*Thou mayest*."[221]

We are, after all, men (broadly speaking). We may create a "crime paradigm" if we so choose, and we should if we are to seriously combat the monster of over-criminalization.[222]

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218. *See also* Stinneford, *supra* note 10, at 665-66 ("Defendants were given the rights to be indicted by a grand jury, to be tried by a petit jury, to confront witnesses, to subpoena witnesses, and to have the assistance of counsel. Defendants were also given the right not to be subjected to ex post facto laws, to double jeopardy, or to cruel and unusual punishments. These provisions made it harder to convict the innocent, forbade punishment for conduct that was legal when committed, and prohibited multiple or excessive punishments. Taken together, they were supposed to ensure that punishment is not imposed in the absence or in excess of culpability.") (citations omitted).

219. *Id.* at 690.

220. "The Constitution imposes a wide variety of limits on government power that only apply in criminal cases . . . . These limits presuppose a substantive constitutional definition of crime; otherwise they would be meaningless." Stinneford, *supra* note 10, at 657.

221. JOHN STEINBECK, EAST OF EDEN 302 (Centennial ed., Penguin Books 2002) (1952).

222. And over-incarceration? A thought . . . If "crime" were defined in a way that stopped short of including drug use and possession—which are merely *malum prohibitum* offenses unless universally held as immoral (which obviously is not the case)—not only would prison populations be significantly thinned, but the collateral

effects of the war on drugs might be greatly ameliorated. This would not mean that drugs would be "legal"—drug users could still be subject to civil penalties if the legislature deems appropriate. It would just mean that drug users could not be prosecuted and subjected to the Society v. Defendant process whereby the condemnation of the entire polity is made manifest, which makes sense because our society does not universally condemn drug use (quite the contrary, it seems).
That would be bold.