

## Quantifying Overcriminalization in Federal Law

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Overreach: An Examination of Federal Statutory and Regulatory Crimes

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Chair Biggs, Ranking Member Lee, and members of the committee:

I am Patrick McLaughlin, a senior research fellow and director of the policy analytics program at the Mercatus Center at George Mason University. The Mercatus Center is a non-profit, non-partisan research center dedicated to bridging the gap between academic ideas and real-world problems. Thank you for inviting me to testify.

For more than a decade, I have specialized in using computer algorithms to quantify various aspects of accumulated laws and regulations in the United States. I learned early on in my career that it would be impossible for any human to read the entirety of federal laws and regulations, so I devised computational solutions instead. Much of my work has been aimed at federal regulations, because the sheer quantity of federal regulations on the books today would require about three years to read—if reading was your full-time job and you were somehow able to read regulations at the same pace as the average adult reads a novel.<sup>1</sup> Some of my work on regulatory accumulation has demonstrated how the buildup of rules over time significantly slows economic growth.<sup>2</sup>

But I also have studied the accumulation of federal statutes as formalized in the *United States Code* and the crimes defined therein. In this testimony, I make the following three main points:

1. There has been a significant increase in the number of federal criminal statutes and regulations over the past three decades.

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<sup>1</sup> Patrick McLaughlin, “The Code of Federal Regulations: The Ultimate Longread,” (website), Mercatus Center Data Visualization, last updated April 1, 2015, <https://www.mercatus.org/research/data-visualizations/code-federal-regulations-ultimate-longread>.

<sup>2</sup> See: Bentley Coffey, Patrick A. McLaughlin, and Pietro Peretto, “The Cumulative Cost of Regulations,” *Review of Economic Dynamics* 38 (2020), 1–21. See also: Bentley Coffey and Patrick A. McLaughlin, “Regulation and Economic Growth: Evidence from British Columbia’s Experiment in Regulatory Budgeting” (Mercatus Working Paper, Mercatus Center at George Mason University, Arlington, VA, June 2021).

2. The expansion of federal criminal laws over the past few decades has been linked to an increase in federal incarceration rates.
3. The haphazard expansion of federal crimes may duplicate state laws or existing federal laws, resulting in redundant crimes.

A few years ago, I worked with my colleagues Liya Palagashvili and Jonathan Nelson, along with Heritage Foundation scholar GianCarlo Canaporo, to use advanced algorithms to create an inventory of criminal laws within the *U.S. Code*.<sup>3</sup> Using a carefully cultivated set of search terms—such as the phrases “imprisoned for not more than” or “shall be guilty of”—we were able to estimate not only how many crimes Congress had written into the *U.S. Code* as of 2019 but also how that number changed over time.

Our work revealed a significant increase in the number of federal criminal statutes over the past three decades. The search results that appeared when we entered our search terms to inventory crimes in the *U.S. Code* were, on average, accompanied by three to four unique crimes—although often the number of crimes defined is much higher.<sup>4</sup> Using this ratio of search terms to actual crimes defined, we estimated that 3,825 federal crimes were on the books as of 1994. By the year 2019, that number had increased by more than a third, to 5,199. On average, that is an increase of about 1.27 percent per year. However, the growth in Congress-defined crimes is not evenly dispersed across all years: More than half of the total growth in the entire 22-year period we studied occurred between 1994 and 1996. This matched our expectations, because a tough-on-crime agenda played a significant part in politics in the 1980s through the mid-1990s.

In preparation for this hearing, I ran the same algorithm on the *Code of Federal Regulations* to estimate the crimes that are defined not only in statutes but also in federal regulations. I found the search terms—indicating that a crime has been defined—719 different times in the 2023 *Code of Federal Regulations*. That is more than double the 320 occurrences I found in the 1970 *Code of Federal Regulations*. Assuming the ratio of search terms to actual crimes defined holds for regulations, an additional 2,157 to 2,876 crimes are defined in federal regulations as of 2023. That means the total number of crimes defined across federal laws, including both statutes and regulations, likely falls in the 7,000 to 8,000 range.

The expansion of federal criminal laws over the past few decades has been linked to an increase in federal incarceration rates, especially for drug-related offenses, reflecting broader trends towards more extensive criminalization and harsher penalties. This growth in the number of crimes—I think we could call it “overcriminalization”—also creates scenarios where individuals might unwittingly violate obscure laws, even daily.

For example, a long-standing criticism of the haphazard expansion of federal crimes is that new federal criminal laws may duplicate state laws or existing federal laws, resulting in a patchwork of redundant crimes. This duplication has a number of downsides:

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<sup>3</sup> GianCarlo Canaporo et al., *Count the Code: Quantifying Federalization of Criminal Statutes* (Heritage Foundation Special Report, Washington, DC, January 7, 2022).

<sup>4</sup> For example, 18 U.S.C. § 32 paragraph (a) lists eight distinct crimes, followed by a single occurrence of one of our search terms, the phrase “shall be fined under this title or imprisoned. . . .”

- It erodes principles of federalism by having federal authorities police conduct that has traditionally been viewed as better left to state and local governments.
- At the same time, duplication dilutes political accountability because the public is not able to discern who has primary authority for addressing a particular crime or who to blame if a particular crime is not addressed.
- Duplicative laws also waste limited federal resources on problems better left to the states or already addressed by other departments of the federal government.
- Duplicative laws also expose offenders to multiple prosecutions arising out of the same underlying conduct.
- Finally, duplicative federal crimes give prosecutors wide latitude to charge different people committing the same offenses with different crimes, opening the door for bias to factor into charging decisions.

The United States has the highest incarceration rate of any country in the world, and that rate seems obviously linked to the number crimes defined in law. The number of federal prison inmates alone has risen by more than 500 percent since 1980. Any action by Congress to reduce the number of duplicative or otherwise undesirable crimes could only serve to also reduce the incarceration rate.

The accumulation of laws and regulations, and the crimes that are defined within them, should not be assumed to be harmless. The United States needs legislative reforms to simplify federal laws and regulations, period. Such reforms could involve reducing the number of federal crimes, clarifying the language of statutes, and considering decriminalization or the use of civil penalties for certain offenses to alleviate the burden on the criminal justice system. Such reforms are crucial to ensuring that laws are fair, just, and proportionate to the behaviors they aim to regulate, safeguarding against the negative consequences of an overly expansive criminal code.