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SOUTH CAROLINA OVERCRIMINALIZATION

UPDATE 2017

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What Is Overcriminalization?

“Overcriminalization” describes the rapid growth in the number of criminally enforceable rules and regulations. Overcriminalization has drawn increasing scrutiny by politicians,¹ judges,² scholars,³ and policy analysts.⁴ Critics of overcriminalization have often focused on how modern regulatory crimes govern putatively innocent conduct but can ensnare those who have little reason to know that they are breaking the law. Critics have also examined how regulations with criminal penalties are often promulgated by unelected, politically unaccountable administrative agencies and other bodies to which legislatures have delegated powers to create new crimes.

Introduction

In a classic episode of the television sitcom *Seinfeld*, Jerry wrestled with a hard-nosed library cop, Mr. Bookman, who had tracked him down for a book checked out and never returned 20 years earlier.⁵ In 2014, a South Carolina woman, Kayla Michelle Finley, found that life can sometimes be stranger than fiction: she went to jail for failing to return a video she had rented almost 10 years earlier.⁶ Although the charges were eventually dropped, the experience of being jailed for forgetting to return a movie is likely closer to a scene from Kafka—or a horror movie—than a sitcom.

Unfortunately, Finley’s experience was not an isolated one, and residents of the Palmetto State are increasingly in jeopardy of facing criminal charges for seemingly innocuous activities.

In January 2016, the Manhattan Institute published a paper, *Overcriminalizing the Palmetto State: A Primer and Possible Reforms for South Carolina*.⁷ It showed that South Carolina had a criminal code that contained 557 sections—more than six times as many as in the Model Penal Code.⁸ During 2009–14, South Carolina lawmakers created more than 60 new crimes annually, of which 86% fell *outside* the state’s criminal code. Many of these new crimes did not explicitly require the state to make a showing of criminal intent (*mens rea*) on the part of the accused.

The paper also identified a number of old, duplicative, or outmoded criminal statutes that the authors suggested were (and remain) ripe for repeal. In addition to suggesting the repeal of such laws, the authors outlined other reforms that lawmakers in South Carolina should consider adopting, including creating a bipartisan task force or commission to review and revise the criminal law; and enacting a default criminal-intent standard that would protect citizens who unknowingly violate criminally enforceable statutes or regulations governing conduct that is not intuitively criminal in nature.

This paper offers an update on related actions taken by South Carolina lawmakers during the 2015–16 legislative session.

New Crimes Created in 2015–16

In 2015–16, South Carolina lawmakers created 49 new criminal offenses: nine in 2015 and 40 in 2016. These offenses were contained in five legislative acts in 2015 and 11 in 2016.

Although the rate of new crime creation slowed, compared with that in the period studied in our previous paper, more felonies were created in the last legislative session than in any of the three previous legislative sessions studied (**Figure 1**). The new felony crimes related to money laundering and the counterfeiting of airbags. Fortunately, these felony offenses contained strong criminal-intent requirements.



FIGURE 1.

New Crimes in South Carolina, Felonies and Misdemeanors



*2015–16 was the state’s 121st legislative session; 2013–14 was its 120th session; 2011–12 was its 119th session; and 2009–10 was its 118th session.

Source: Authors’ count

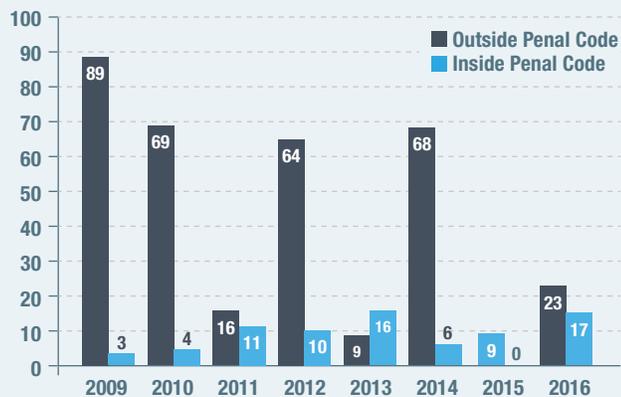
Nearly two-thirds of the new crimes created in South Carolina’s last legislative session fell outside the state’s criminal code (**Figure 2**)—which actually represents something of a shift compared with the three previous sessions, when 86% of newly enacted crimes fell in regulatory statutes outside the code.⁹ Among those crimes falling outside the criminal code, however, were the new felony offenses for money laundering. When lawmakers place crimes outside the criminal code, they raise the transaction costs of legal compliance such that citizens now have to parse through a much bigger body of law to figure out what conduct is required or prohibited on pain of criminal prosecution.

Unfortunately, many of the new crimes created in 2015–16 are either duplicative of preexisting offenses;¹⁰ restrictions on ordinary recreational activities, such as fishing and hunting;¹¹ or lacking in adequate criminal-intent requirements.¹² Still other new crimes involve conduct that is not intuitively criminal, such as the improper display of license plates.¹³

When combined with the state’s bloated criminal code and the numerous crimes sprinkled throughout the broader statutory code (not including the many criminally enforceable regulations promulgated over the years), the addition of more than 400 new crimes to South Carolina’s books since 2009 puts citizens of the Palmetto State in serious legal jeopardy.

FIGURE 2.

New Crimes in South Carolina—Inside Penal Code and Outside Penal Code



Source: Authors’ count

Conclusion

In January 2017, a bill was introduced in the South Carolina Senate that would repeal a number of outmoded and outdated criminal laws—including some of those highlighted in our 2016 paper. Among the crimes targeted for repeal are prohibitions on minors playing pinball and accepting a challenge to a duel.¹⁴ Such laws are rarely, if ever, enforced, so their repeal will have a limited impact. Nevertheless, the continued presence of such provisions in the statutory code highlights how South Carolina’s body of criminal law is too big and too poorly organized to be understood by the average citizen.

To tackle its overcriminalization problem more systematically, the Palmetto State should consider larger-scale repeal efforts, such as Minnesota’s 2014 “unsession,” which led to the striking of 1,175 crimes from the statute books.¹⁵ The state might also wish to create a “recodification commission” to streamline and better organize all crimes in the state, including those inside and outside its criminal code. Indeed, legislators in neighboring North Carolina are considering such an effort.¹⁶

Finally, South Carolina lawmakers should give serious consideration to adopting a default criminal-intent provision—as has been done by more than 15 states—to offer a layer of protection to those who might run afoul of the state’s many criminally enforceable rules and regulations that relate to conduct that is not intuitively criminal in nature.

Endnotes

The authors thank former Manhattan Institute interns Ross Friscia and Regan Johnson for their research assistance.

- ¹ See, e.g., *Reining in Overcriminalization: Assessing the Problem, Proposing Solutions: Hearing Before the H. Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 111th Cong. (2010).
- ² See, e.g., Alex Kozinski & Misha Tseytlin, *You’re (Probably) a Federal Criminal*, IN THE NAME OF JUSTICE, 43–56 (Timothy Lynch, ed., 2009).
- ³ Stephen F. Smith, *Overcoming Overcriminalization*, 102 J. CRIM. L. & CRIMINOLOGY 537, 537 (2012).
- ⁴ See, e.g., Marie Gryphon, *It’s a Crime?: Flaws in Federal Statutes That Punish Standard Business Practice*, Civ. Justice Rpt. 12 (Manh. Inst. for Pol’y Res., 2009); James R. Copland, *Regulation by Prosecution: The Problem with Treating Corporations as Criminals*, Civ. Justice Rpt. 13 (Manh. Inst. for Pol’y Res., 2010); Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703 (2005).
- ⁵ Larry David & Jerry Seinfeld, *The Library*, Seinfeld (S. 3, Ep. 5) (1991).
- ⁶ Doug Gross, *Woman Jailed for Not Returning 2005 Video Rental*, CNN (Feb. 17, 2014). The 1995 statute under which Finley was charged can be found here: http://www.scstatehouse.gov/sess111_1995-1996/bills/1147.htm.
- ⁷ James R. Copland & Isaac Gorodetski, *Overcriminalizing the Palmetto State: A Primer and Possible Reforms for South Carolina*, Issue Brief 44 (Manh. Inst. for Pol’y Res., Jan. 2016).
- ⁸ Model Penal Code (1962).
- ⁹ In passing a criminal law, the legislature specifies where and how the law will be codified. The trend of codifying crimes outside the criminal code (which is a specific subpart of the broader South Carolina statutes) makes it more difficult for citizens to identify the acts and omissions for which they can be imprisoned.
- ¹⁰ See, e.g., S.C. Code § 4-23-1290.
- ¹¹ See, e.g., S.C. Code §§ 50-11-710, 935.
- ¹² See *id.*
- ¹³ See, e.g., S.C. Code § 56-3-13700.
- ¹⁴ See S. 280 S.C. Gen. Assemb. 122nd Session (2017).
- ¹⁵ Bill Salisbury, *Minnesota “Unsession” Dumps 1,175 Obsolete, Silly Laws*, ST. PAUL PIONEER PRESS (May 26, 2014).
- ¹⁶ See HB 482 N.C. Gen. Assemb. (2017); see also SB 114 N.C. Gen. Assemb. (2017).