

## FOREWARD

*Ellen S. Podgor\**

On October 21, 2010 scholars, practitioners, and policy advocates congregated at the Georgetown University Conference Center in Washington, D.C. to map out consensus solutions to the problem of overcriminalization.<sup>1</sup> This was the second academic symposium in a trilogy that explored overcriminalization. The first was at American University's Washington College of Law, taking place on October 19, 2004,<sup>2</sup> and it discussed the topic of overcriminalization and the "grave implications of a criminal justice system that fails to consider increased federalization, the diminished recognition of a *mens rea* element in criminal statutes, and a growing prosecution of conduct that could be addressed via civil sanctions."<sup>3</sup> The heart of the first gathering was to understand the problem. The second symposium recognized the issues faced and provided suggestions that can resolve this overcriminalization crisis. The third symposium, yet to be formulated, will focus on an action plan to bring the consensus solutions discussed in this symposium to a reality.

With the guidance of Professor Jeffrey Parker and myself, George Mason's *Journal of Law, Economics & Policy* invited an array of folks to explore ideas to alleviate difficult restraints on our legal system caused by overcriminalization. As with other initiatives pertaining to overcriminalization, the partners that joined together did not necessarily agree on policies and practices, yet all agreed that overcriminalization is a problem of immense proportions. At the helm of this symposium were the National Association of Criminal Defense Lawyers (NACDL) and the Foundation of Criminal Justice, who have long been key players in the fight against overcriminalization. Joining this time with NACDL and the Foundation for Criminal Justice was the Law & Economics Center at George Mason University and the *Journal of Law, Economics & Policy*. Samuel Adelman, Editor in Chief of the *Journal of Law, Economics & Policy* provided incredible organization and skill that allowed for a day, and this later law

---

\* Gary R. Trombley, Family White Collar-Crime Research Professor & Professor of Law, Stetson University College of Law.

<sup>1</sup> "Overcriminalization is the term that captures the normative claim that governments create too many crimes and criminalize things that properly should not be crimes." Darryl K. Brown, *Criminal Law's Unfortunate Triumph Over Administrative Law*, 7 J.L. ECON. & POL'Y 657, 657 (2011).

<sup>2</sup> Symposium, *Overcriminalization: The Politics of Crime*, 54 AM. U. L. REV. 541 (2005).

<sup>3</sup> Ellen S. Podgor, *Overcriminalization: The Politics of Crime: Foreword*, 54 AM. U. L. REV. 541, 541 (2005).

review issue, that captures the difficulties in resolving the overcriminalization issue.

The stage was set with the opening remarks of NACDL Executive Director, Norman Reimer, who noted the House Judiciary Committee's recent recognition of the problem of overcriminalization.<sup>4</sup> He told how the Heritage Foundation and NACDL highlighted overcriminalization to the congressional committee in a recent report titled, *Without Intent—How Congress is Eroding the Criminal Intent Requirement*. Reimer's opening comments served as the backdrop for a day that quickly moved to examine consensus solutions to this problem.

The keynote speaker for the Symposium was Larry Thompson, former Deputy Attorney General of the United States, and presently the Senior Vice-President in Government Affairs and General Counsel and Secretary at PepsiCo. Thompson focused on the problem of overcriminalization from a corporate context. He questioned the value of charging a corporation with criminal conduct and emphasized the need to protect innocent shareholders.<sup>5</sup> The answer is not overregulation, he said, offering critical remarks on the passage of the Dodd-Frank financial reform legislation.<sup>6</sup> Rather, "the ability of prosecutors to exercise power does not mean that such power should always be exercised."<sup>7</sup>

With the stage set, the four substantive panels of the day began: 1) The Potential of Smart on Crime Reform Initiatives; 2) Monitoring Prosecutors; 3) Regulation or Criminalization; and 4) Restoring the *Mens Rea* Requirement. They were followed by a closing session of judicial perspectives from three district court judges: the Honorable Frederic Block (Eastern District of New York); the Honorable Cormac J. Carney (Central District of California); and the Honorable Jed S. Rakoff (Southern District of New York).

The first session opened with a historical review of criminal law reform in the United States, including the failed efforts to correct problems in the federal code. Ron Gainer, a Washington D.C. attorney, and former Associate Deputy Attorney General and former ex officio member of the U.S. Sentencing Commission, noted the complexity, sheer number, and absurd location of many of our federal criminal laws.<sup>8</sup> He emphasized the need to think long-term when thinking about federal criminal law reform efforts.<sup>9</sup>

---

<sup>4</sup> *Overcriminalization 2.0 Symposium: Norman Reimer* (Oct. 21, 2010), <http://vimeo.com/19355538>.

<sup>5</sup> *Overcriminalization 2.0 Symposium: Larry Thompson* (Oct. 21, 2010), <http://vimeo.com/19354742>.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Overcriminalization 2.0 Symposium: Ron Gainer* (Oct. 21, 2010), <http://vimeo.com/19356138>.

<sup>9</sup> *Id.*

His overview of criminal law reform was the lead into the main presentation for the first panel, a presentation by Professor Roger A. Fairfax of George Washington University School of Law, who spoke about “smart on crime” reform initiatives. Professor Fairfax walked the audience through a philosophical and historical overview of criminalization and ended by enlightening the audience on different smart on crime initiatives in the United States.<sup>10</sup> He noted that smart on crime initiatives have included grand jury reform. Three commentators followed:<sup>11</sup> Cynthia Orr,<sup>12</sup> Ilya Somin,<sup>13</sup> and Solomon L. Wisenberg.<sup>14</sup> Professor Ilya Somin discussed public opinion on crime and criminal justice reform, including politics and the war on drugs. He stressed that public opinion is less of an obstacle now than in the past. Cynthia Orr, spoke about many of the NACDL initiatives including its report on misdemeanors<sup>15</sup> and how money used for incarceration could be better spent on educating those who are being incarcerated.<sup>16</sup> Solomon L. Wisenberg, spoke about the need for grand jury reform and specifically the reforms related to overcriminalization such as the presentation of exculpatory evidence to preclude unnecessary indictments.<sup>17</sup>

The second session had Larry Ribstein, Mildred Van Voohis Jones Chair in Law and Associate Dean of Research at the University of Illinois College of Law, as the main presenter. His article, *Agents Prosecuting Agents*,<sup>18</sup> looks at the efficiency of criminalizing agency costs and the problems of excessive prosecution of crimes committed by corporate agents. Responding to his piece<sup>19</sup> were Glenn Lammi,<sup>20</sup> Professor Lucian E. Dervan,<sup>21</sup> Paul Rosenzweig,<sup>22</sup> and Professor Sara Sun Beale.<sup>23</sup> Glenn Lam-

---

<sup>10</sup> *Overcriminalization 2.0 Symposium: Roger Fairfax* (Oct. 21, 2010), <http://vimeo.com/19357155>.

<sup>11</sup> This panel was moderated by Jim E. Lavine, President of the National Association of Criminal Lawyers and a partner with the law firm of Zimmermann, Lavine, Zimmermann & Sampson, P.C.

<sup>12</sup> Attorney, Goldstein, Goldstein & Hilley and Immediate Past President of the National Association of Criminal Defense Lawyers.

<sup>13</sup> Associate Professor of Law, George Mason University School of Law.

<sup>14</sup> Partner and Co-Chair of the White Collar Crime Defense Practice Group, Barnes & Thornburg, LLP.

<sup>15</sup> *Overcriminalization 2.0 Symposium: Cynthia Orr, Part 1* (Oct. 21, 2010), <http://vimeo.com/19357956>; *Overcriminalization 2.0 Symposium: Cynthia Orr, Part 2* (Oct. 21, 2010), <http://vimeo.com/19358523>.

<sup>16</sup> *Overcriminalization 2.0 Symposium: Ilya Somin* (Oct. 21, 2010), <http://vimeo.com/19357731>.

<sup>17</sup> *Overcriminalization 2.0 Symposium: Solomon Wisenberg* (Oct. 21, 2010), <http://vimeo.com/19359367>.

<sup>18</sup> See Larry Ribstein, *Agents Prosecuting Agents*, 7 J.L. ECON. & POL'Y 617 (2011).

<sup>19</sup> This panel was moderated by Craig Lerner, Associate Dean for Academic Affairs and Professor, George Mason University School of Law.

<sup>20</sup> Chief Counsel Legal Studies Division, Washington Legal Foundation.

<sup>21</sup> Assistant Professor of Law, Southern Illinois University School of Law.

<sup>22</sup> Principal, Red Branch Consulting, PLLC.

<sup>23</sup> Charles L.B. Lowndes Professor of Law, Duke University School of Law.

mi focused on the responsible corporate officer doctrine, what he called a “status crime.” Paul Rosenzweig looked at the role of the electoral process, providing justice statistics on those with prosecutorial responsibility.<sup>24</sup> Professor Lucian E. Dervan argued that “a symbiotic relationship exists between plea bargaining and overcriminalization because these legal phenomena do not merely occupy the same space in our justice system, but rely on each other for their very existence.”<sup>25</sup> Finally, Professor Sara Sun Beale said that if we look only at corporate agents we miss so much of the overcriminalization problem.<sup>26</sup> The bulk of the cases are gun, immigration and drug cases, and she looked at the effect of extending Professor Ribstein’s analysis to these contexts. She also argued that entity behavior is something that does need to be examined in a “smart fashion.”<sup>27</sup>

Professor Darryl Brown, O.M. Vicars Professor of Law, University of Virginia School of Law, presented the centerpiece for the third session on administrative and regulatory concerns.<sup>28</sup> He noted the broad base of different constituents joining together on the issue of overcriminalization, while also noting that prosecutors and the public are less accepting of this problem. He noted the move from regulatory remedies for improper conduct to it now being criminal law sanctions that “duplicate and supplement administrative law.”<sup>29</sup> He is critical of the excessive use of criminal law as regulation and offers an array of different solutions including “culpability terms, lenity, and priority for specific offenses.” He examines remedies of “limiting regulatory offenses to substantial harms and repeat offenders” as well as procedural reforms such as having a “law commission and legislative protocols” to monitor legislation.<sup>30</sup> Two other suggestions he proposes are “substantive judicial review of criminal law” and “desuetude rule and expiration dates for criminal statutes.”<sup>31</sup> With each of these suggestions he offers pros and cons of its acceptance. As a final compliment to his reform scheme, Professor Brown looks at “embarrassing the administrative state.”<sup>32</sup>

---

<sup>24</sup> *Overcriminalization* 2.0 *Symposium: Paul Rosenzweig* (Oct. 21, 2010), <http://vimeo.com/19362737>.

<sup>25</sup> *Overcriminalization* 2.0 *Symposium: Lucian Dervan* (Oct. 21, 2010), <http://vimeo.com/19363791>.

<sup>26</sup> *Overcriminalization* 2.0 *Symposium: Sara Sun Beale* (Oct. 21, 2010), <http://vimeo.com/19364355>.

<sup>27</sup> *Id.*

<sup>28</sup> This panel was moderated by Shana-Tara Regon, Director, White Collar Crime Policy, National Association of Criminal Defense Lawyers.

<sup>29</sup> *Overcriminalization* 2.0 *Symposium: Darryl Brown* (Oct. 21, 2010), <http://vimeo.com/19375287>.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

Several individuals responded to Professor Brown's work, including Professor Kate Stith,<sup>33</sup> Carmen D. Hernandez,<sup>34</sup> Paul Kamenar,<sup>35</sup> and Tim Lynch.<sup>36</sup> Professor Stith argued that merely inserting a *mens rea* requirement will not resolve the overcriminalization problem.<sup>37</sup> She also noted that many of the overcriminalization issues come in the sentencing phase. She questioned whether we would really want to give powers, such as investigatory powers, to regulatory agencies dealing with civil matters. Perhaps the problem, she said, is the growth of the administrative state with reduced constitutional rights.<sup>38</sup> Carmen Hernandez argued that the antidote to overcriminalization is not overregulation, and that you will end up with many of the same problems that we now find in the criminal law process if we move to a regulatory model.<sup>39</sup> Paul Kamenar looked at the problem of overcriminalization in the environmental context.<sup>40</sup> He disagreed with Professor Brown's remedy of using a repeat offender criteria. He suggested that judges need to show the deficiencies in the federal sentencing guidelines. Finally, Tim Lynch looked at whether the proposed solution fits with the police powers of the federal government.<sup>41</sup> He emphasized that the debate is likely to get louder on the role of the federal government.

The final centerpiece presentation was Professor Geraldine Moohr, a professor of law at Houston Law Center. Setting the stage for this presentation were two moderators, Tiffany Joslyn<sup>42</sup> and Brian Walsh,<sup>43</sup> who authored the Heritage–NACDL report on *mens rea*. Professor Moohr's paper, *Playing With the Rules: An Effort to Strengthen the Mens Rea Standards of Federal Criminal Laws*,<sup>44</sup> commented on this report. Panelists then commenting on her paper were Lawrence S. Goldman,<sup>45</sup> Harvey Silverglate,<sup>46</sup> Marie Gryphon,<sup>47</sup> and Professor Julie Rose O'Sullivan.<sup>48</sup> Lawrence S. Goldman looked at the practicalities of having a change in how we ap-

---

<sup>33</sup> Lafayette S. Foster Professor of Law, Yale Law School.

<sup>34</sup> Attorney and Past President of the National Association of Criminal Defense Lawyers.

<sup>35</sup> Senior Executive Counsel, Washington Legal Foundation.

<sup>36</sup> Director, Project on Criminal Justice, Cato Institute.

<sup>37</sup> *Overcriminalization 2.0 Symposium: Kate Stith* (Oct. 21, 2010), <http://vimeo.com/19390973>.

<sup>38</sup> *Id.*

<sup>39</sup> *Overcriminalization 2.0 Symposium: Hernandez* (Oct. 21, 2010), <http://vimeo.com/19391498>.

<sup>40</sup> *Overcriminalization 2.0 Symposium: Paul Kamenar* (Oct. 21, 2010), <http://vimeo.com/19390382>.

<sup>41</sup> *Overcriminalization 2.0 Symposium: Tim Lynch* (Oct. 21, 2010), <http://vimeo.com/19392203>.

<sup>42</sup> Counsel, White Collar Crime Policy, National Association of Criminal Defense Lawyers.

<sup>43</sup> Senior Legal Research Fellow, The Heritage Foundation.

<sup>44</sup> *Overcriminalization 2.0 Symposium: Geraldine Moohr* (Oct. 21, 2010), <http://vimeo.com/19415222>.

<sup>45</sup> Law Offices of Lawrence S. Goldman and Past President National Association of Criminal Defense Lawyers.

<sup>46</sup> Author and Of Counsel, Zalkind, Rodriguez, Lunt & Duncan, LLP.

<sup>47</sup> Senior Fellow, Center for Legal Policy, Manhattan Institute for Policy Research.

<sup>48</sup> Professor of Law, Georgetown University Law Center.

proach *mens rea* analysis.<sup>49</sup> Harvey Silverglate emphasized the need to look at overcriminalization by also looking at a “distinct problem of vagueness.”<sup>50</sup> Marie Gryphon looked at the pros and cons of accepting a codified lenity rule, as proposed by the Heritage–NACDL report.<sup>51</sup> She advocated for this doctrine being left with the judiciary, as opposed to being congressionally mandated.<sup>52</sup> Professor O’Sullivan noted how criminal law is different and why the delegation doctrine should be different in criminal law matters.<sup>53</sup> She said Congress needs to provide the notice of what is the criminal law.

Summing up the proceedings of the day, and offering a judicial perspective, were three district court judges.<sup>54</sup> The Honorable Frederic Block looked at whether there should be more uniformity between the federal and state system.<sup>55</sup> Later in the panel discussion, he noted how prosecutorial discretion may be different in different parts of the country.<sup>56</sup> The Honorable Cormac J. Carney accepted the concept of overcriminalization in the non-violent sphere, but was not as accepting in the drug area. He expressed concern on the strain to the jury system and the cost of the trial in a case that failed to result in a conviction.<sup>57</sup> The Honorable Jed S. Rakoff remarked that overcriminalization is not widely accepted by the general public, and in the great majority of cases, these problems do not exist.<sup>58</sup> He used tax cases as an example. But he said one area that has faced overcriminalization is in the sentencing area.

The day and this journal issue offers differing views of overcriminalization, different perspectives on when and where it occurs in the judicial process, and different remedies of how to resolve the problem. As suspected, there was no one resolution that was forthcoming from this discussion. But many thoughts were presented to move the discussion to a new level. It

---

<sup>49</sup> *Overcriminalization 2.0 Symposium: Lawrence Goldman* (Oct. 21, 2010), <http://vimeo.com/19415841>.

<sup>50</sup> *Overcriminalization 2.0 Symposium: Harvey Silverglate* (Oct. 21, 2010), <http://vimeo.com/19416326>.

<sup>51</sup> *Overcriminalization 2.0 Symposium: Marie Gryphon* (Oct. 21, 2010), <http://vimeo.com/19416546>.

<sup>52</sup> *Id.*

<sup>53</sup> *Overcriminalization 2.0 Symposium: Julie O’Sullivan* (Oct. 21, 2010), <http://vimeo.com/19420218>.

<sup>54</sup> This panel was moderated by Professor Ellen S. Podgor, Gary R. Trombley Family White Collar-Crime Research Professor & Professor of Law, Stetson University College of Law, and Jeff Parker, Professor of Law, George Mason University School of Law.

<sup>55</sup> *Overcriminalization 2.0 Symposium: Hon. Fredrick Block* (Oct. 21, 2010), <http://vimeo.com/19420763>.

<sup>56</sup> *Overcriminalization 2.0 Symposium: Judges Panel* (Oct. 21, 2010), <http://vimeo.com/19421282>.

<sup>57</sup> *Overcriminalization 2.0 Symposium: Hon. Cormac J. Carney* (Oct. 21, 2010), <http://vimeo.com/19420977>.

<sup>58</sup> *Overcriminalization 2.0 Symposium: Untitled*, (Oct. 21, 2010), <http://vimeo.com/19435480>.

is now for the next symposium to provide an action plan to resolve the existing problems of overcriminalization.