

CENTER ON
**NATIONAL
SECURITY**
AT FORDHAM LAW

REPORT #1

AMERICAN INCARCERATION

**THE HIDDEN
FACTS OF
CRIMINALIZATION**

AUGUST 2022

**THE
ARKIN JUSTICE
INITIATIVE**

**THE
CENTER ON NATIONAL SECURITY
AT FORDHAM LAW**

CONTRIBUTORS

Francesca Laguardia

Project Manager

Peter Conlin

Lead Researcher & Writer

Lindsey Sullivan

Editorial Assistant

We would also like to thank **Andrew Bortey, Parker R. Lewin, Gabriel Lipker, Kevin Ruane, Julia Tedesco, Xue Zhang,** and **Matthew Vaughan** for their invaluable research on this report. Special thanks to **Alyssa Macaluso** for her editorial assistance.

The Center would like to extend a special thanks to **Stanley Arkin** for his generous support for this project and for his guidance throughout.

NOTE FROM THE DIRECTOR

Karen J. Greenberg

The Arkin Justice Initiative at the Center on National Security is pleased to present its series on criminal justice in the United States.

The flaws of the U.S. criminal justice system have received increased public attention in recent years. At times, however, that attention has focused so intensely on certain areas that it diverted attention away from many of the realities, often buried, that threaten the public. In this series, our goal has been to shed light on some of those hidden attributes of the criminal justice system.

The series includes three reports.

This first report, *The Hidden Facts of Criminalization*, focuses on an area of criminal law that is predominately hidden from analyses of criminal justice; namely, criminal penalties for administrative violations. This report highlights the extent to which low-level regulations subject the public to criminal penalties—separate from the criminal statutes of criminal codes. As a result, oversight has proven elusive as well.

The second report, *Incarceration: Conditions in America's Prisons*, focuses on conditions of detention and incarceration in U.S. public prisons. The use, conditions, and prevalence of private prisons in the U.S. have been a primary focus in public critiques of incarceration. This focus has obfuscated a deeper crisis in America's public prisons, which house the vast majority of persons incarcerated in this country. This report seeks to bring attention back to the crisis in our public prisons.

The project's third report, *Criminal Justice Reform: Substance and Shadows*, examines recent efforts to reform the criminal justice system. Looking specifically at restorative justice programs as well as at reform efforts within New York's discovery process, this project opens a window into the mechanisms and structures that impede those reforms. Our intent here is to illuminate these hidden bureaucratic hurdles and loopholes and, in so doing, enhance the prospects for successful reform.

Our three-part study is intended to provide a useful starting point for adding new information to the study of criminal justice reform in hopes of revealing some of the hidden—and impactful—factors that require attention. Revealing these hidden facts is the first step toward remedying the inequities and unjust punishments embedded in our criminal justice system.

INTRODUCTION

Over-criminalization as a dominant feature of American criminal justice is widespread and well-known. Inadequate access to defense attorneys, mass incarceration and its attendant problems, post-incarceration penalties and deprivations of rights, and more have been well documented in recent years. But even with the attention that many think tanks and scholars have given to this problem—including The Marshall Project, the NACDL, William Stuntz, Katherine Beckett, and Andrew Ashworth—there are still elements of overcriminalization that remain unrecognized, unacknowledged, and hidden.

In the fall of 2021, The Center on National Security (CNS)'s Arkin Justice Initiative launched a project devoted to highlighting those elements of the criminal justice system which remain largely hidden from public scrutiny, each of which warrants the attention of legislative and policy reforms. These hidden elements include the creep of criminal penalties into the regulatory realm, the perpetual complexity of criminal structure and the way this hides the threat of criminal law enforcement, the everyday brutality of state-run detention facilities, and the inadequate reach of reform efforts thus far.

These elements do not exist in isolation but feed upon each other. It is impossible to understand the brutality of the system without seeing the myriad, unchecked ways that the system can reach into citizens' lives. It is impossible to realize the threat of unchecked, ignored, and ubiquitous use of criminal penalties unless one faces the true burden of even a brief time of incarceration.

The first report, contained herein, is an introduction to the scope of the problem of overcriminalization. The second report reminds readers of the repercussions of criminalization, namely incarceration, in a purposeful attempt to refocus the criminal reform conversation on the conditions in public rather than private prisons. The third report looks at two efforts at reforming the criminal justice system in an effort to reveal some of the hidden barriers preventing the implementation of the reform movement's ideals.

This first report introduces the extent of criminalization by exposing the criminalization of regulatory violations. The use of criminal punishment for regulatory violations has vastly expanded the reach of criminal punishment, in a manner that operates with little to no oversight from traditional criminal justice processes. Administrative agencies regulate commercial

and public activity through administrative regulations. These are rules, written by administrative agencies rather than legislative bodies, assumed to have lesser moral implications than crime and lesser punishment than crime, and therefore created with less democratic input and less democratic oversight. But even these small, administrative rules can result in incarceration, and most of the public is unaware of how prevalent this opportunity for incarceration is. Indeed, the structure of the regulatory system actively hides the use of criminal punishments—punishments that are harsh and rife with violence and abuse, as is suggested in the second report in this series.

Many regulatory violations can be associated with criminal liability through regulatory statutes independent of the various criminal codes of states and the federal government. Therefore, analyses of increasing criminalization omit these statutes. CNS has undertaken this research to highlight these hidden criminal statutes. To approach this issue, the reports focus on New York agencies and their associated statutes that carry the possibility of incarceration at the level of violations, misdemeanors, or felonies. The criminal penalties discovered are *outside* of the 578 crimes included in Chapter 40 of the New York Penal Code. In other words, these are all provisions and penalties not contained in the New York Penal Code that can result in an individual's incarceration. As this report details, each instance may apply criminal penalties and collateral consequences to dozens of regulatory provisions, creating a structure so complicated that it aids in obscuring this corner of increasing criminalization.

I. THE PREVALENCE OF HIDDEN REGULATORY CRIMES

CNS's preliminary and exploratory investigation into regulatory crimes revealed that New York statutes allowing criminal punishment outside the criminal code are regular, if not universal. Center researchers were able to identify 101 New York State agencies, of which 57 (56.4 percent) included at least one regulation or governing law that could result in incarceration. Penalties range from violations to misdemeanors to felonies, but even violations (not rising to the level of criminal convictions) resulted in incarceration for over two weeks.

To make matters worse, these hidden criminal statutes can apply to dozens of regulations at a time, increasing not only the number of opportunities available to turn a rule-breaker into a criminal but also the difficulty for attorneys and relevant (affected) actors to find out what the penalty is. Our research discovered numerous areas where criminal penalties may

apply through general provisions within chapters. One notable example, among many, is Chapter 3B of New York's Consolidated Laws, which comprises the Alcoholic Beverage Control Law [ABC], and is made up of over 150 provisions, many of which have extensive sub-provisions. Some of these provisions explicitly provide for misdemeanor or felony punishments or, more rarely, an explicit statement that the regulation carries only a civil penalty.¹ But many provisions contain no such stated penalty. These provisions become criminal misdemeanors via Section 130 of the ABC, which states "any violation by any person of any provision of this chapter for which no punishment or penalty is otherwise provided shall be a misdemeanor."² With this statement, the number of potential criminal violations increases dramatically, but the consequences are often hidden because, as in the foregoing examples, the criminal penalties that are applied come from far attenuated sections rather than the specific section that describes the conduct prohibited. Individuals cannot become aware of these criminal penalties by looking at criminal codes because they are not in the criminal codes. They cannot become aware of the penalties by looking at rules prohibiting the action because the penalties are written in entirely separate chapters, no reference is made to them in the provisions that prohibit the conduct, and the penalties are so general, applying to many different provisions, that it is difficult to associate them with the proscribed conduct. The transformation of these regulatory violations into crimes carrying criminal punishments is buried in the complexity of the code.

II. THE MISSION CREEP OF CRIMINAL RESPONSES

Additionally, the regulatory framework hides the increasing severity of punishment for traditionally minor regulatory offenses. The activities proscribed often look like activities that would be classified more appropriately as civil violations yet have been given criminal status. For instance, transporting any alcoholic beverages without a bill of lading results not in a civil penalty nor a license revocation but is treated as a criminal misdemeanor that provides no specific penalty and falls within Section 130's Chapter (as described in the prior section, Section 130 criminalizes any violations that have no criminal penalty already assigned).³ Similarly, failing to have a sign "visible from a reasonable

¹ See, e.g., N.Y. ALCO. BEV. CONT. LAW § 105-b.

² N.Y. ALCO. BEV. CONT. LAW § 130.

³ N.Y. ALCO. BEV. CONT. LAW § 117.

distance” that shows the license of the person transporting the alcohol results in a misdemeanor, rather than a civil penalty or even license revocation,⁴ turning a failure to display a license into a crime that can result in incarceration.

A similar structure exists in Article 4 of the New York State Labor Law [LAB],⁵ providing a misdemeanor penalty of up to two months of incarceration (60 days) for “any violations of this Article.”⁶ Article 4 comprises restrictions on child labor and includes provisions such as requiring that employers make a schedule and conspicuously post it.⁷

III. THE DEVIL’S IN THE DETAILS: INCOMPREHENSIBLE COMPLEXITY AND UNTETHERED OVERLAP

A key finding throughout this research project has been the fact that the applicable laws and regulations are so complex as to be impenetrable and therefore remain rife for abuses of interpretation that bring criminal penalties. The complexity arises from (1) the sheer number of laws and regulations available and (2) the consistent cross-application of various New York State laws, chapters and sections to each agency, subdivision, and sub-office. Section I described how criminal penalties might be hidden in a complicated framework of general provisions, applying criminal penalties in circumstances where the provision does not explicitly state a penalty. Complicating the issue further, multiple codes essentially proscribe the same conduct. This lack of clarity means that reading the specifically relevant statutes promulgated by a state agency cannot guide affected individuals to adjust their behavior to legal requirements (proscribed in state laws or some other agency’s provisions), nor can it forewarn them of their possible punishment. Instead, people (or attorneys) must comb through every possible statute to find those that might conceivably be implicated by their actions.

An example of this is the Battery Park City Authority. The Battery Park City Authority in NYCRR Title 21, Chapter LXXI § 9003.53 provides:

“Any violation of these rules, provided such violation would also violate any of the provisions of the Administrative Code of the City of New York or the rules and regulations in effect for the parks of the City of New York, shall be a misdemeanor triable in a court with competent jurisdiction and ***punishable by***

⁴ N.Y. ALCO. BEV. CONT. LAW § 116.

⁵ Found in Chapter 31 of the Consolidated Laws of New York.

⁶ N.Y. LAB. LAW § 145.

⁷ N.Y. LAB. LAW § 144.

not more than 90 days imprisonment or by a fine of not more than \$1,000, or by both in accordance with section 533(a)(9) of chapter 21 of the New York City Charter, ***and the violator of these rules shall also be subject to criminal prosecution and civil penalties as permitted by law and the penalties imposed pursuant to section 202(d) and (e) of the New York Not-for-Profit Corporation Law*** [emphasis added].”

Section 202(e) of the New York Not-for-Profit Corporation Law provides a misdemeanor punishment for willful trespass and any “willful disturbance of the peace” regarding any grounds or property pertaining to, in this example, the Battery Park City Authority. Thus, there appears to be a layering of criminal penalties within certain rules and regulations.

The regulations promulgated by the Department of Health also incorporate this overlap feature. For example, Title 10, Chapter 5, Subchapter A, Article 3, Part 414 provides the penalty provisions for residential care facilities, specifically nursing home violations. Part 414 highlights that the penalties provided are ***additional*** and that Article 28 of NYS Public Health Law, including its sections and provisions, contains more misdemeanor penalties, which will also apply.⁸

The system makes it impossible to gauge the sheer numbers and types of criminal penalties accurately. If this is not on purpose, it is undoubtedly a happy accident that conveniently obscures the nature and extent of the potential for incarceration.

⁸ See e.g., *N.Y. PUB. HEALTH LAW § 2897-b*. For an additional example outside of the Department of Health, the Department of Agriculture and Markets [a preeminent New York Agency] incorporates this overlap feature as well. For example, Title 1, Chapter 2 [Animal Industry], Subchapter A [Diseases of Domestic Animals; Garbage Feeding], Part 52 [Diseases of Domestic Animals], Section 52.4 [hereinafter Section 52.4] provides the disciplinary provision for garbage feeding domestic animals utilized in the agricultural processes. In this provision, Section 52.4 cites Section 72-a of the NYS Agriculture and Markets Law and references that Section 72-a governs violations for garbage feeding domestic animals utilized in the agricultural processes. Section 72-a provides that any violation of the section is a Class-A misdemeanor.

CONCLUSION

KEY FINDING: CRIMINALIZATION VIA ADMINISTRATIVE RULES AND REGULATORY STATUTES

This introductory report uncovered the reality of hidden criminalization and its consequences, focusing on the use of administrative rules and regulatory statutes. Administrative rules promulgated by Agencies (in this case, New York agencies) and regulatory statutes can result in criminal penalties and incarceration, outside the crimes included in Chapter 40 of the New York Penal Code. Suggested reforms to address overcriminalization often neglect this reality. This report has shown that even public misbehavior that does not rise to the level of criminal legislation has the real potential to result in incarceration.

KEY FINDING: OVERBROAD

The hidden criminal statutes can apply to dozens of regulations at a time—a catch-all approach to criminalization—increasing the number of opportunities available to turn a violation into a criminal offense. This catch-all approach directly contributes to the problem of overcriminalization. Additionally, this approach and structure make it difficult for attorneys and relevant affected actors to determine the penalty for their violation.

KEY FINDING: DISPROPORTIONATE

The research shows a disproportionate relationship between certain violations and the penalty provided for those violations. Certain minor conduct violations—that traditionally are not associated with the penalty of incarceration—do in fact result in incarceration for wrongdoers, which is seemingly an excessive punishment given the nature of the violations, contributing to the problem of overcriminalization. Individuals and society in general likely do not know the extent to which minor conduct violations can result in incarceration.

KEY FINDING: COMPLEX

Applicable laws and regulations are complex and confusing, as a result, both the scope of their penalty provisions and the abundance of cross-references. This complexity prohibits the possibility of gauging the sheer numbers and types of criminal penalties accurately, obscuring the nature and extent of the potential for incarceration. Accurate numbers would

require combing through every possible statute to find those that might implicate their actions—a virtually insurmountable task. As a result, it is improbable, and likely impossible, for an individual or an attorney to be fully informed on what conduct or violations can result in incarceration for their client.

FURTHER IMPLICATIONS

The recent focus on private prisons has served to divert attention from conditions in America’s publicly administered prisons. While the private prison phenomenon is certainly concerning, private prisons still hold less than eight percent of all incarcerated U.S. citizens. Conditions in public prisons are all too often harsh and excessively violent and should not be ignored. Given the countless ways an individual can be incarcerated, the poor conditions that exist within prisons are an increasingly concerning and important issue as Report #2 will show. This report has shown that even public misbehavior that does not rise to the level of criminal legislation can lead to severe criminal penalties. Reforming the procedures, often hidden, that lead to these punishments is essential to addressing injustices within the criminal justice system.