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Traps for the innocent

By BRIAN W. WALSH / The Heritage Foundation

What do former Indianapolis 500 champion Bobby Unser and small-businessman Abbie Schoenwetter have in common? Both are victims of "overcriminalization," a trend that has caused the number of federal laws to spike dramatically in recent decades. And both of these otherwise law-abiding Americans recently told Congress about their experiences.

Unser and Schoenwetter spoke at a special hearing held by the House Subcommittee on Crime, Terrorism, and Homeland Security. It was a rare Washington event - a truly bipartisan gathering, convened by Chairman Bobby Scott, D-Va., and Louie Gohmert, R-Texas.

The term "overcriminalization" may be unfamiliar, but the problem it describes is not. Vague and overbroad laws have become a prevalent part of our legal fabric. In fact, research shows that a single Congress introduces hundreds - and enacts dozens - of non-violent criminal offenses that are poorly drafted, redundant, and lack guilty-mind ("criminal-intent") safeguards adequate to protect the innocent.

Equally as disturbing has been the growth of criminal law in areas typically reserved for civil fines and administrative sanctions. Actions not otherwise morally blameworthy have increasingly become the source of criminal sanction.

The cases of Unser and Schoenwetter are prime examples of such unbridled growth in the criminal law. Unser was convicted of a federal crime for allegedly operating a snowmobile in a national wilderness. If he did indeed enter it, he did so unknowingly while he and a friend were lost for two days and two nights in a ground blizzard.

Schoenwetter spent five years in prison for "smuggling" lobsters into the U.S. in violation of Honduran fishing regulations, despite the fact that none of the regulations were valid at the time. Until last June, the federal "honest services" fraud statute was also another prime example of overcriminalization. The law criminalizes depriving "another of the intangible right of honest services," whatever that means. Violations could be punished by up to 20 years in prison. It had been used to charge thousands of individuals across the socioeconomic spectrum until all nine justices of the Supreme Court ruled in a set of three cases in June that the statute was unconstitutionally vague.

Georgia Thompson, a Wisconsin civil servant, was one such victim. Thompson was charged with "honest services" fraud after she awarded a state contract for travel services to the bidder with the best prices and second-best service rating. Because the "honest services" statute was so flawed, federal prosecutors were able to build their theory of Thompson's guilt on allegations that she "made her supervisors look good" and thus "improved her job security."

Not only did a jury convict Thompson under this preposterous theory, a federal judge denied her motion to overturn the jury's verdict and sentenced her to four years in federal prison. A federal court of appeals eventually reversed her conviction, but by then Thompson had lost her job, her house, and her good name. She had been driven into bankruptcy and served four months in a federal penitentiary. Most federal officials have never met an overbroad law they didn't like.

They don't see any problem with the "honest services" statute or, for that matter, any other examples of overcriminalization. You can't blame them for trying; broad, vague laws give them discretion to act as they see fit.

But if that's what we want, why not draft a federal statute stating, "All wrongful conduct shall be punished by up to 20 years in prison."? Such a law would be extremely useful for putting away bad actors. But only those who think that government can do no wrong or who have unlimited confidence in the ethics and good judgment of government officials can fail to see how that statute would be extremely dangerous.

Fortunately, a wide array of individuals and organizations do understand the dangers of overcriminalization and are promoting sensible, non-partisan ideas for criminal justice reform. The Heritage Foundation, National Association of Criminal Defense Lawyers, American Bar Association, American Civil Liberties Union, Cato Institute, Constitution Project, Families Against Mandatory Minimums, Manhattan Institute, National Federation of Independent Businesses, and Washington Legal Foundation are all part of this coalition.

Several members of this alliance supported the first House Crime Subcommittee hearing in July 2009 on overcriminalization of conduct and the over-federalization of criminal law. A front-page New York Times story late last fall noted that the political Left and Right are coming together to pursue principled criminal-law reform. A recent cover story and editorial in *The Economist* focused attention on the same problems that are the subject of the upcoming hearing. Americans are learning what criminal-law experts have known for some time: We have far too many criminal laws that serve as traps for the innocent but unwary. It's high time for the sort of meaningful, across-the-aisle reforms that Reps. Scott and Gohmert will be considering.

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