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U.S. too extreme in prison sentencing, UVa law professor says

By Tasha Kates

America's focus on stiff prison sentences is costing it big bucks.

As an assistant public defender in Georgia, Darryl Brown occasionally handled cases where he thought an offender's sentence was extreme for the crime committed, especially for younger defendants.

Brown, now the O.M. Vicars Professor of Law at the University of Virginia, said he has continued to hear of cases where the punishment didn't seem appropriate. For example, he said a youthful offender might get an enhanced sentence for committing a petty crime, such as graffiti writing, because he was part of a gang.

"We shouldn't try to solve the gang problem by increasing punishments for petty offenses when we find out someone was part of a gang," Brown said.

Brown is researching overcriminalization — the idea that the country has too many laws and punishments that are too harsh. Brown is advocating for a legislative method that resists creating crimes and repeals older crimes, although he said he's not optimistic that it will happen soon.

Overcriminalization is getting national notice as people on both sides of the political spectrum have acknowledged that the reach of criminal law may be too expansive, Brown said. For example, The Cato Institute, the American Civil Liberties Union, the American Bar Association and other groups formed a coalition last year for a hearing before the House of Representatives' Subcommittee on Crime, Terrorism and Homeland Security called "Over-Criminalization of Conduct and Over-Federalization of Criminal Law."

Q. Is overcriminalization a recent trend?

A. The interest in it is recent. The U.S., for the first 175 years, had incarceration rates that were exactly

in line with the rest of the civilized world. In the last 30 years, we've just started punishing way more than everyone else. We now have by far the highest incarceration rate of any nation in the world even though crime rates have been going down for the last 10 to 20 years.

We have a long American tradition from legislatures of the early 19th century and founding era of criminalizing people's personal and private lives. It was a crime to have any kind of adult consensual sexual activity outside of marriage. It was a crime not to have a job. It was a crime to work on Sundays. All sorts of things that now look to us like very intrusive government regulation are actually long American traditions.

Q. How do criminal laws change over time?

A. Over time, people may agree things shouldn't be crimes. It may seem crazy that we once had [laws against] interracial marriage.

Another way is for interest groups to start to lobby heavily to legalize or decriminalize the activity they're especially interested in. The NRA has a heavy lobby for eliminating some gun crimes, like carrying a concealed weapon. Since the early 1800s, that was a crime in a lot of states, but it has been repealed.

The third [way would be] budget pressure on legislatures to reduce the costs of prisons. The biggest incentive for capping and reducing punishment is probably the cost of prisons. Prisons are incredibly expensive and they've long been the fastest growing item in state budgets, oftentimes after Medicare and education.

Oddly, state budget difficulties of the last couple years have been the most effective basis for reducing sentences a little bit. States, in order to cut their budgets or not have them grow anymore, are finally finding ways to keep their sentencing rates from increasing. Sometimes, they're decreasing.

Q. Does decriminalization mean legalization?

A. Something can be illegal, but it doesn't mean it has to be a crime. There are all sorts of civil regulations about workplace safety and environmental laws that punish companies with civil fines and civil sanctions that are not criminal offenses. Part of what the corporate interest groups would like to see is a lot of the regulations become strictly civil offenses rather than civil and criminal offenses.

Imagine the same thing with drug laws. There are a few American jurisdictions that have small amounts of marijuana [possession] illegal only as a civil offense. You're subject to a civil fine, but it's not a crime. There are a lot of traffic laws that are like that. It's possible to regulate things and prohibit things without making them crimes. That's one solution to how to reduce the use of criminal law more broadly.

Q. What happens if overcriminalization in the legal system isn't addressed?

A. It will just keep getting more expensive. It's not clear what the stopping point will be. ... So far we've just been increasing sentences for the last 30 years.