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The Urge to Over-Legislate: Criminal Law and Public Opinion in the United Kingdom

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May I first say how delighted I am to be speaking to you today at the prestigious Heritage Foundation. This is my fourth visit to the United States, but only my first to Washington. I first came to your country over 40 years ago when I was an English-Speaking Union student debater in colleges in the Midwest and West Coast debating with students on many campuses. I returned for holidays in 1972 and then in 1999, and now I am in Washington, which is the place where my wife, Judith, was at school.

It is also a real pleasure to be here with Ed Feulner. Ed and I became friends through our Club, the Reform Club in Pall Mall, and I had the pleasure of listening to Ed give a very fine and thought-provoking talk to our Political Committee not long ago. It was on that occasion that this event was conceived. We agreed that a perspective from the United Kingdom on the general theme of “overcriminalization” would be an appropriate and topical one. I hope very much that this will be the first of many lectures from members of our Club to the Heritage Foundation on subjects of mutual interest to radical thinkers on both sides of the Atlantic.

My title for today is “The Urge to Over-Legislate: Criminal Law and Public Opinion in the U.K.” I want to suggest to you that there is a noticeable and concerning trend in Britain to fill the statute book full of new criminal laws, that such a trend is inconsistent with modern liberal values, that this trend has had a deleterious influence on the delivery of criminal justice, and that such overcriminalization is actually

Talking Points

- There is a concerning trend in Britain to fill the statute book full of new criminal laws, which has had a deleterious influence on the delivery of criminal justice and is adversely affecting some traditional concepts of justice.
- In the 10 years in which Tony Blair was Prime Minister in Britain a total of 3,023 new offenses were legislated—roughly two new crimes created for every day Parliament was in session.
- Many of these new laws are trivial and unnecessary. Many of the offenses are addressed appropriately in civil law. But lawmakers bowed to the public’s clamor to “do something” with results that are unjust and destructive.
- Too much legislation in criminal law and sentencing undermines the authority of the law. It can be a facile and superficial response to deep-seated social problems, and it can be over-complex and susceptible to misinterpretation by judges. This last feature can undermine public confidence in the administration of justice.

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adversely affecting some traditional concepts of justice. In endeavoring to answer the question why there is such an appetite for over-legislation in the field of criminal law I will suggest it is, in many cases, a short-sighted and ill-thought-out way of responding to transient public opinion on particular topics.

First Principles

I think the starting point for any discussion is to go back to first principles. We can probably agree on the purposes of criminal law, and nobody in the U.K. would disagree with the famous definition given in the 1950s by the great American academic Herbert Weschler: “The purpose of the penal law is to express a formal condemnation of forbidden conduct, buttressed by sanctions calculated to prevent it.”

Thus the criminal law, by having punishment in its armory, declares that social values, such as honesty or the need to refrain from violence towards one another, are in need of protection, and those who depart from those values deserve punishment. As punishment is administered by the state, criminal law is potentially immensely powerful, and historically, in the U.K. at least, the criminal law developed through the common law.

It seems to me, therefore, that we must have in mind the clear common law principles of criminal law when considering the need to legislate for more and more crimes and more and more punishments. The first principle is parsimony—that is, the criminal law should not be used unless the need for a social value to be upheld, meriting punishment for those who breach it, is plain and obvious. The second principle is culpability. A person only offends against a criminal law if he has the requisite state of mind—usually intention to commit the offense or at the very least recklessness as to whether or not the offense is committed, or the offender is dishonest; honesty being a social value which is legitimate to protect. Harmful consequences ought not, in themselves, be a crime attracting punishment unless the wrongdoer is culpable and the degree of culpability, in terms of intention or recklessness, is proportionate to the harm which results. Many

harmful consequences are, in law, *civil* wrongs, but the intervention of the state in creating the crime and imposing the punishment for harmful consequences ought to be limited.

Thousands of New Crimes

Measured against those principles, what are the recent developments in the United Kingdom? The bare facts are astonishing. In the 10 years in which Tony Blair was Prime Minister in Britain a total of 3,023 new offenses were added to the statute book in primary or secondary legislation. In this period Parliament was in session for 1,528 days (a diligent researcher has informed me), which means that for every day Parliament was in session two new crimes were created, many of them tucked away in obscure and unnecessary regulations. Lawyers only need to look to their overloaded library shelves to observe what has been happening. We have had the Crime and Disorder and Data Protection Acts in 1998, the Immigration and Asylum and Football Offenses Acts in 1999, the Terrorism Act and the Political Parties, Elections and Referendum Act in 2000 all creating completely new offenses. You may say, “What on earth can a statute about elections have to do with criminal law?” Well, quite a lot, because 69 new criminal offenses were created in that one Act of Parliament alone. In the year 2001, 56 new offenses were created; in 2002, 75; and in 2003, under the Sexual Offenses Act alone, 61 sexual crimes were enacted by Parliament.

Some of the new offenses are utterly trivial and unnecessary. Others, in sexual legislation, provide for a separate offense in relation to each act of sexual misconduct depending upon whether the accused was in a position of trust in relation to the victim, a family member of the victim or having the care for the victim in a home or institution, or a complete stranger to the victim. All completely unnecessary.

Why does all this matter? In my humble opinion there are three main reasons why we should be concerned about the obsession with legislating for conduct to be unlawful.

First, the scattergun approach that sprays the statute book with offenses diminishes the moral authority of the criminal law in upholding values necessary to a liberal society. Why should the

observance of a criminal code be respected if members of society feel bamboozled and overborne by a huge number of crimes? The criminal law should be a reliable statement of what society regards as being worthy of condemnation, and if there are too many laws distributed too widely then the moral authority of the criminal law is greatly reduced.

Secondly, such enthusiasm for legislation is inconsistent with modern and sophisticated liberal-democratic values, which on the whole have abandoned the big-state, monolithic concentration of power in the government characterized by the worst excesses of the Communist state. The twin principles of economic liberalism and the priority of individual autonomy and human rights, which are vital to economic prosperity, sit uneasily in a society which is simultaneously creating new criminal laws. Criminal law is by its nature authoritarian, and overcriminalization is more consistent with an authoritarian state than a liberal-democratic one.

Thirdly, over-legislation in criminal law has a deleterious influence on the delivery of criminal justice.

Let me explain what I mean. Every crime has, by definition, also to have a punishment, and recently in the U.K. there has been a corresponding growth in criminal sentencing. In the last 13 years we have had the:

- Sexual Offenses Act (1993)
- Drug Trafficking Act (1994)
- Proceeds of Crime Act (1995)
- Crime (Sentences) Act (1997)
- Crime and Disorder Act (1998)
- Powers of Criminal Courts (Sentencing) Act (2000)
- Sexual Offenses Amendment Act (2000)
- Proceeds of Crime Act (2002)
- Criminal Justice Act (2003)
- Domestic Violence Crime and Victims Act (2004)
- Violent Crime and Reduction Act (2006)

These Acts have introduced:

- Anti-Social Behavior Orders
- Banning Orders
- Confiscation Orders
- Curfew Orders
- Deprivation Orders
- Drink Banning Orders
- Drug Abstinence Orders
- Drug Treatment and Testing Orders
- Financial Reporting Orders
- Parenting Orders
- Imprisonment for Public Protection
- Restraining Orders
- Referral Orders
- Sexual Offenses Prevention Orders
- Travel Restriction Orders
- Youth Community Orders

All these are in addition to probation, supervision, imprisonment, detention in a young offender institution, extended sentences, disqualification orders, football banning orders, hospital orders, long-term detention for young offenders, and disqualification from driving, which judges knew about—or were supposed to know about—already.

It is sometimes said that a nation's character can be summed up by its approach to criminal law. One such commentator made the following terse and amusing observation in the late 1960s.

In Germany, under the law everything is prohibited except that which is permitted. In France, under the law everything is permitted except that which is prohibited. In the Soviet Union, everything is prohibited, including that which is permitted, and in Italy, everything is permitted, especially if it is prohibited.

Perhaps we could now add: “In the United Kingdom everything used to be permitted and now it is prohibited.”

Deleterious Effects on Law and Justice

I want to give you just two examples of how the overuse of the criminal law has diminished the mor-

al authority of the law and has had a deleterious effect on the administration of justice.

The first example has to do with what to do about petty crime in urban areas. Here is what the distinguished academic and social scientist Professor Anthony Giddens, the Director of the London School of Economics, has to say. He is important to our topic because he is an academic most closely allied to Tony Blair and that Prime Minister's vision for Britain. This is what Professor Giddens has written:

Disorderly behaviour unchecked signals to citizens that their area is unsafe. Fearful citizens stay off the streets, avoid certain neighbourhoods and curtail their normal activities.

The implications of this thesis should be clearly understood.

What must be clearly understood, says the professor, is this:

Solving these urban problems does not mean increasing the powers of the police to sweep undesirables off the streets. Almost to the contrary, it means that police should work closely with citizens to improve local community standards and civil behaviour, using education, persuasion and counselling instead of arraignment.

Anti-Social Behavior Orders. What is remarkable about this is that a government which claims to admire the work of Professor Giddens has done almost the opposite of what the learned professor has advised. The policy of which the government is most proud in dealing with disorderly behavior in troubled neighborhoods is the Anti-Social Behavior Order, or ASBO as everybody now calls it. An Anti-Social Behavior Order is an order which the police, in consultation with local councils, can ask the courts to impose on an individual to prohibit that person congregating in a particular place or doing a particular activity. It is a civil order, although made in a criminal court, but if the order is breached, then a criminal offense is committed punishable with five years in prison.

It is very noticeable that when government ministers talk about urban decay, petty crime, and fearful communities the one statement which is always

trotted out, with obvious satisfaction, is the one which says, "The Government has tackled these issues by introducing Anti-Social Behavior Orders."

There is, actually, very little evidence that civil society is being helped by Anti-Social Behavior Orders. Yet it is the one single policy of which the government is most proud—the policy made by a criminal sanction.

Micromanaging Judges. My second example concerns the effect the increasing use of legislation is having on the administration of criminal justice. The opposite end of the spectrum from anti-social behavior is violent and sexual offending by dangerous criminals. Judges do not have to be told by government that such offenders should be confined for long periods, but the temptation to pick up the legislative pen has proved too great for the U.K government to resist. In 2003 the government passed the Criminal Justice Act. This contained no less than 356 sections and 38 schedules, and buried away in this morass Parliament prescribed the exact approach which the courts should take if an offender was or might be dangerous. The approach of the court should be one thing if he was not dangerous, according to criteria set down in the Act, but another thing if he had committed one of a large number of offenses specified and set down in the Act deeming him to be dangerous. And yet a third thing if the offender had been previously convicted of a serious specified offense and had now committed a further serious specified offense. And yet a fourth thing if he has previously been convicted of a specified offense and has committed a further offense which is specified but not serious. In some cases, but not all, there is an assumption he is dangerous unless it would be unreasonable to make the assumption. Needless to say, judges became bewildered about the complexities of these parameters and much head-scratching beneath wigs went on as judges did their best to interpret and apply the convoluted prescriptions written down by Parliament. There were a large number of appeals, and this is what the Vice President of the Court of Appeal (Criminal Division) said at the end of a number of them:

It would be inappropriate to conclude these proceedings without expressing our sympathy with all those sentencers whose decisions have

been the subject of appeal to this Court. The fact, that in many cases, the sentencers were unsuccessful in finding their way through the provisions of this Act, which we have already described as labyrinthine, is a criticism not of them but those who produced these astonishingly complex provisions. Whether now or in the fullness of time the public will benefit from sentencing provisions of such complexity is not for us to say. But it does seem to us that there is much to be said for a sentencing system which is intelligible to the general public as well as decipherable, with difficulty, by the judiciary.

Ouch!

Such trenchant and outspoken criticism of the legislature by the judiciary is rare in the United Kingdom, and the fact that it was said at all speaks volumes.

So that is the second real problem about over-legislation in the criminal field: complexity, difficulty with interpretation, and a prescription which fetters judicial discretion and requires conformity with a legislative straitjacket.

So far, I have tried to identify demonstrable ways in which too much legislation in criminal law and sentencing can be criticized. It undermines the authority of the law, it can be a facile and superficial response to deep-seated social problems, and it can be over-complex and susceptible to misinterpretation by judges. This last feature can undermine public confidence in the administration of justice.

The obvious question, therefore, is: If it can be shown that the urge to legislate has harmful consequences, why is the U.K. government so keen on it? It is a paradox because in many other ways—certainly in the field of economic policy and macro-economic management—the government has reduced state interference and restored citizens' autonomy from the bad old days of state controls, nationalization, and government interference which was the case when Britain did not have a vibrant and successful economy. Greater liberalization on the one hand has been accompanied by greater legislation in criminal law on the other.

It is a complex issue and I do not claim to be able to provide the whole answer, but one feature which has struck me is the influence of public opinion and the great desire by politicians to be seen to respond to it. Although politicians often complain about the influence of the media—"reducing the discussion of any complex issue into a chunky headline," as Tony Blair once memorably said—the media is the fuel on which politicians burn and are energized. The media gives them exposure and therefore politicians ignore public opinion at their peril. What easier way is there to satisfy the public that "something is being done" than to pass a law against whatever it is the public are—at that moment—steamed up about?

Turning Civil Offenses into Crimes

The more serious point is the effect public opinion can have on the fabric of the law itself. I want to discuss two instances where public opinion is vocal, and that is when death results from a person's unlawful conduct—in particular death on the roads and death on the railways. In these instances basic concepts of the law itself are being changed as a result of public clamor.

We all know that when death results from the fault of an individual or a corporation, then in civil law the families of the innocent deceased should be, and in the U.K. are, compensated in damages. The issue for today's discussion is whether *criminal* liability should follow from these heart-rending tragedies. There are two parts to this: death on the roads where the alleged culprit is the driver, and death on the railways where the culprit is alleged to be the train company.

Let us take individual, personal liability first.

Most countries have a law prohibiting dangerous driving on a public road. Certainly, the U.K. does. If death occurs as a result of an offender's dangerous driving, then the offense of causing death by dangerous driving or indeed careless driving if the driver is drunk is committed. So far, so good, because such laws comply with the general principle that the culpability of the offender should be proportionate to the harmful consequences caused. But what if death is caused *only* by the *careless* driving of the offender?

Here the scenario is more problematic because while the consequences are the same, the culpability of the offender is much lower. Should such activity be a crime in addition to a civil wrong? Most judges and academic commentators would think not, but politicians must be responsive to public opinion.

Let me give you a clearly documented example where public opinion has played its part.

In June 2005 a young female student called Alexine Rushden was killed in a car crash on her way home from a pop concert. A tragic and horrifying event for her loved ones and family, though hardly the stuff of national news. But it made the news because the driver was prosecuted and convicted of careless driving, as the manner of the driving was not, on the facts of that case, dangerous. There was no offense on the books for causing death by careless driving. Alexine's father started a campaign to get the law changed, enlisted the support of his local Member of Parliament, and before you knew it the Labour Party (then in the midst of a General Election) stated officially that it wanted to toughen the laws relating to death on the roads.

In October 2005 the government announced a new offense, carrying five years imprisonment, of causing death by careless driving. This is how a junior minister with responsibility for criminal justice put it in a press release:

What we're doing—we're on the side of the victim, we're making sure people who kill on the road can get proper sentences. We're making sure that if someone kills when they're driving carelessly—even if they didn't mean to—then they can be sent to prison.

Heady, populist stuff, but is it good for criminal justice? It deceives the public about the present law because the driver who drives dangerously does not have to intend to kill, but the present law at least maintains proportionality between culpability and consequences.

The other area which the government proposes to change by legislation is the law on corporate manslaughter, that is to say, where death results from the gross negligence of a company or public body. Now the law on manslaughter by gross negli-

gence—which is an offense in common law—has fortunately been stated with admirable clarity by the House of Lords (the U.K.'s highest appeal court) 13 years ago.

For an individual to be guilty of manslaughter by gross negligence he must have owed a duty of care to the deceased, the duty of care must have been breached, and the breach must be a substantial cause of the death.

“The essence of the matter” said the House of Lords, “which is supremely a jury question is whether having regard to the risk of death involved the conduct of the defendant was so bad that in all the circumstances as to amount in their judgment to a criminal act or omission.”

If a *corporation* is to be prosecuted for manslaughter, however, the prosecution must establish that an individual or individuals can be *identified* as directing the mind and will of the corporation, so that his or their acts are the acts of the corporation, before the corporation can be found guilty of corporate manslaughter. This is known in English law as the identification principle.

Now there is an obvious problem, is there not, with large public companies. Suppose there is a disaster on the railways. A grossly negligent train driver goes over a red light, crosses a set of points, and his train collides with a fast-moving train coming in the opposite direction. There was plainly a duty of care owed by the company to ensure the safety of its passengers, the duty was plainly breached, such a breach was the cause of death—but who is the directing mind of the train company in those circumstances?

The answer to this question is extremely difficult. Of 34 prosecutions for corporate manslaughter brought against companies, only seven have been successful. Some of the most high-profile failures have involved the tragic circumstances of fatalities on the railway.

In 1997 there was a horrific crash in which seven people died and 150 were injured when a high-speed train went through a red light and collided with a slow-moving goods train. A prosecution against the operating company of the high-speed train failed and there was little, if any, public contro-

versy. But in 2000 there was another disaster when a fault on the track caused a high-speed train to derail and four passengers were killed and 170 injured. There was a prosecution for corporate manslaughter against the companies responsible both for national rail infrastructure and for track maintenance. By now, there were impassioned pleas for “someone to be accountable.” After a very lengthy trial, the judge found there was no case to answer on these charges of corporate manslaughter against both companies.

There was general dismay that the prosecution was unsuccessful, but the public’s disquiet had to do with the state of the law—principally the application of the identification principle when the defendant is a corporation. In a direct response to this the government announced in 2000 that it proposed to do something and issued a Consultation Document in which the following is stated:

The government considers that while there may prove to be difficulties in proving a management failure there is a need to restore public confidence that companies responsible for loss of life can be properly held accountable in law. The government believes the creation of a new offence of corporate killing would give useful emphasis to the seriousness of health and safety.

There is in this document an unashamed admission that public opinion has been the engine of reform coupled with a tendentious declaration that it is the companies who are responsible for the loss of life, and difficulties in identifying management failure should somehow be swept aside.

There is currently before Parliament the Corporate Manslaughter Bill. The essence of the new offense is that if the prosecution can prove a management failure in maintaining proper standards of health and safety, and such a failure is a cause (not *the* cause) of death, the offense of corporate manslaughter is made out. But is widening the law in

this way the most effective way of ensuring corporate compliance with health and safety issues? Why has the government abandoned any concept of prosecuting individual managers with responsibility for health and safety in large corporations? Would not an advance requirement of declaring publicly a corporation’s responsibilities for health and safety and incremental improvements through regulations be preferable to the occasional high-profile trial to satisfy the public’s desire for retribution? Would not considerations of extending the doctrine of vicarious liability with a corporate defense of due diligence be a more satisfactory alternative?

These are real issues which are engaging academics and business people in the U.K. The need to legislate for yet another new crime is only one of a number of options available but the government has chosen the penal option.

Dangerous Consequence

I conclude by emphasizing that public opinion in these instances can have a real effect on the rigor in which the criminal law should be applied. If we value the wisdom of the evolving and developing common law then legislative intervention to water down cherished principles should be resisted. For me this is the most dangerous consequence of over-legislation in the U.K. I hope I have illustrated with enough examples that over-legislation is a real problem and is having real consequences for our justice system in the United Kingdom.

There are real dangers that respect of the criminal process will be diminished, that judicial discretion will be fettered, that over-complication will lengthen the trial and sentencing process, and that politicians will regard it as the norm to resort to penal solutions to solve complex problems. These are worrying trends indeed.

—Judge Inigo Bing is a Circuit Judge in Snaresbrook Crown Court, one of the United Kingdom’s largest criminal courts.