

# ISSUE BRIEF

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## “The Best of Disinfectants”: Using Publicity to Fight Overcriminalization

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Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.

—Louis Brandeis<sup>1</sup>

In a representative democracy, the public must become attuned to and troubled by a problem before a political solution is possible. The Heritage Foundation’s overcriminalization work is designed to change the minds of members of the public and government policymakers so that they will ultimately make changes in the legislative and law enforcement processes.<sup>2</sup> Publicity can also discourage the overzealous enforcement of bad laws while they remain on the books and the unreasonable application of good laws to the morally blameless.

Authorities dropped many charges arising from overcriminalization incidents in 2013 after we and others publicized those incidents. While it is impossible to quantify the impact that this publicity had on the relevant criminal justice actors, there is reason to believe that publicizing overcriminalization incidents can positively influence their resolution.

**Having an Impact?** In 2013, we wrote about 11 cases in which authorities charged individuals with crimes but had not yet decided whether to prosecute. In nine of those cases, authorities ultimately dropped the charges:

1. Police arrested and charged 17-year-old Cody Chitwood with a felony for bringing weapons into a school zone because he had fishing knives locked in a tackle box inside his truck.<sup>3</sup> He faced two to 10 years in prison and a \$10,000 fine.
2. After 16-year-old Keara Wilmot inadvertently caused an explosion by mixing household chemicals at school, police arrested and charged her with “possession and discharge of a weapon on school property” and “discharging a destructive device.”<sup>4</sup> Both charges carried a punishment of up to five years in prison.
3. Police arrested and charged a 10-year-old boy as a juvenile for “brandishing a weapon”—even though that “weapon” was a plastic toy gun with a bright orange cap on the end of the barrel, and he did not point it at anyone or threaten to shoot it.<sup>5</sup>
4. Jeff Counciller and his wife Jennifer spotted an injured baby deer on their neighbor’s porch, took it in, and nursed it back to health. Following this act of charity, the Indiana Department of Natural Resources charged them with “unlawful possession of a deer,” a misdemeanor offense that could have landed them in jail for up to 60 days and cost them \$2,000 in fines.<sup>6</sup>

This paper, in its entirety, can be found at  
<http://report.heritage.org/ib4120>

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5. When Alison Capo's 11-year-old daughter rescued an endangered woodpecker from the family cat, U.S. Fish and Wildlife issued Alison a \$535 fine and threatened her with jail time for violating the Federal Migratory Bird Act.<sup>7</sup>
6. Las Vegas police arrested and charged four protestors with gross misdemeanor vandalism—charges that could have put them behind bars—for writing statements critical of the police on a public sidewalk with washable chalk.<sup>8</sup>
7. After Florida Gators linebacker Antonio Morrison made the admittedly stupid decision to bark at a police dog, police arrested Morrison for interfering with a police dog “in the performance of his duties” despite the fact that at the time the dog was locked in an officer’s car.<sup>9</sup>
8. While at his son’s school, Kaveh Kamooneh drained an estimated five cents’ worth of electricity from one of the school’s exterior outlets to recharge his electric car without asking permission.<sup>10</sup> Eleven days later, police arrested him, locked him up for 15 hours, and charged him with “theft of services.”

9. Police issued Robert Schiavelli two tickets for “disturbing the peace” after he dared to laugh out the window of his home at an obnoxious neighbor who was taunting him.<sup>11</sup> Those citations were no laughing matter—Robert was looking at 30 days in jail.

**Why Publicity Might Influence Criminal Justice Actors.** It would be impossible to precisely quantify the impact of publicity on criminal justice actors in overcriminalization cases—or in any other case, for that matter. Criminal justice actors must prioritize, and they might choose not to arrest or prosecute someone for reasons that have nothing to do with publicity, including resource limitations, the needs or wishes of victims, or their perceptions of the public interest.<sup>12</sup>

But there is reason to believe that publicizing overcriminalization cases has at least *some* impact on criminal justice actors. Overcriminalization cases can generate a tremendous amount of adverse publicity. The plight of morally innocent people who inadvertently violate criminal laws resonates with people and drives them to take action. For example, the Facebook page dedicated to getting charges against the Councillers dropped eclipsed 40,000

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1. Louis Brandeis, “What Publicity Can Do,” *Harper’s Weekly*, December 13, 1913, p. 8.
2. For a discussion of why and how that works, see, e.g., Paul J. Larkin, Jr., “John Kingdon’s ‘Three Streams’ Theory and the Antiterrorism and Effective Death Penalty Act of 1996,” *Journal of Law and Policy*, Vol. 28, No. 25 (2012).
3. Evan Bernick, “Fishing as a Felony: Teen Faces Prison Time for Leaving Fishing Equipment in High School Parking Lot,” The Heritage Foundation, The Foundry, October 7, 2013, <http://blog.heritage.org/2013/10/07/fishing-as-a-felony-teen-faces-prison-time-for-leaving-fishing-equipment-in-high-school-parking-lot/>.
4. Daniel Dew, “16-Year-Old Girl Faces Felony Charges for ‘Science Experiment Gone Wrong,’” The Heritage Foundation, The Foundry, May 8, 2013, <http://blog.heritage.org/2013/05/08/16-year-old-girl-faces-felony-charges-for-science-experiment-gone-wrong/>.
5. Daniel Dew, “Ten-Year-Old Arrested for Bringing Toy Gun to School,” The Heritage Foundation, The Foundry, February 11, 2013, <http://blog.heritage.org/2013/02/11/ten-year-old-arrested-for-bringing-toy-gun-to-school/>.
6. Daniel Dew, “Couple Faces Jail Time for Saving Baby Deer’s Life,” The Heritage Foundation, The Foundry, January 30, 2013, <http://blog.heritage.org/2013/01/30/couple-faces-jail-time-for-saving-a-baby-deers-life/>.
7. Bernick, “Fishing as a Felony.”
8. Evan Bernick, “Hard Time for Chalk Crime,” The Heritage Foundation, The Foundry, August 23, 2013, <http://blog.heritage.org/2013/08/23/hard-time-for-chalk-crime/#.UoPZH8o670>.
9. Evan Bernick, “Why Florida Police Shouldn’t Have Arrested a Gator for Barking at a Dog,” The Heritage Foundation, The Foundry, July 24, 2013, <http://blog.heritage.org/2013/07/24/stupidity-isnt-a-crime-why-florida-police-shouldnt-have-arrested-a-gator-for-barking-at-a-dog/>.
10. Evan Bernick, “Charged with Theft for Charging his Electric Car—with Five Cents’ Worth of Electricity,” The Heritage Foundation, The Foundry, December 6, 2013, <http://blog.heritage.org/2013/12/06/charged-theft-charging-electric-car-five-cents-worth-electricity/>.
11. Daniel Dew, “No Joke: Man Jailed for Laughing in Own Home,” The Heritage Foundation, The Foundry, March 13, 2013, <http://blog.heritage.org/2013/03/13/no-joke-man-jailed-for-laughing-in-own-home/>.
12. See *United States v. Lovasco*, 431 U.S. 783, 794 (1977): “The decision to file criminal charges, with the awesome consequences it entails, requires consideration of a wide range of factors in addition to the strength of the Government’s case.”

digital signatures, and the hashtag #BambiGate attracted a substantial following.<sup>13</sup>

Furthermore, voters directly elect state prosecutors in all but three states,<sup>14</sup> and state prosecutors might urge their offices to steer clear of wildly unpopular cases for political reasons, if nothing else. Similarly, United States Attorneys do not want to be embarrassed by seeing the local media publicize unreasonable charging decisions by their offices.

**Toward a Sunlit Future.** It is good that authorities dropped charges in the cases discussed above. But they should never have arrested or charged these people in the first place. An arrest is a humiliating, terrifying ordeal. A charge compounds the ordeal by raising the possibility of being deprived of money and your liberty and being branded for life as a criminal. Every overcriminalization incident costs actors in the criminal justice system time that

could have been better spent on more pressing law enforcement priorities and therefore wastes the taxpayers' money. It also undermines the criminal law's efficacy as a means of moral education.

Concerned citizens should bring "sunlight" to overcriminalization incidents in the hopes of generating adverse publicity. They should urge not only that bad criminal laws be repealed and that vague criminal laws be clarified but also that the people who inadvertently violate these laws should not be arrested or charged unless they had clear notice that this conduct could subject them to criminal liability. In this way, Brandeis's insight into the power of publicity can be used to mitigate the impact of overcriminalization.

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13. Marisa Gerberg, "'Bambigate': Indiana Pair Rescue Deer, Get Snarled in Legal Woes," *Los Angeles Times*, February 2, 2013, <http://articles.latimes.com/2013/feb/02/nation/la-na-nn-indiana-deer-crime-governor-20130201> (accessed December 30, 2013).

14. See Ronald F. Wright, "How Prosecutor Elections Fail Us," *Ohio State Journal of Criminal Law*, Vol. 6, Nos. 581 and 589 (2009). The exceptions are Alaska, Connecticut, and New Jersey. In these states, the elected state attorney general appoints the chief prosecutors at the local level.