Legal Memorandum
Published by The Heritage Foundation
No. 76
January 9, 2012

When Fighting Crime Becomes Piling On: The Overcriminalization of Fraud

Paul J. Larkin, Jr.

Abstract: *Are maple syrup felons sufficiently heinous that they should be imprisoned for perhaps as long as 45 years? Some members of the U.S. Senate seem to believe the answer is yes: How else to explain the provisions of the Maple Agriculture Protection and Law Enforcement Act of 2011? This bill, known as the MAPLE Act, would make it a "federal crime…for anyone knowingly and willfully to distribute into interstate commerce a product that is falsely labeled as maple syrup." While falsely labeling a product should not go unpunished, there are ample criminal laws on the books to deal with the false labeling of maple syrup. The real threat raised by the MAPLE Act is not that of a shadowy syrup syndicate, but a U.S. Congress determined to expand the federal criminal law well beyond its intended limitations—the phenomenon known as overcriminalization.*

Three months ago, the Maple Agriculture Protection and Law Enforcement Act of 2011 (MAPLE Act) was introduced in the Senate. The bill would make it a federal crime, punishable by up to five years' imprisonment, for anyone knowingly and willfully to distribute into interstate commerce a product that is falsely labeled as maple syrup. Although punishing offenders for genuine fraud is a reasonable policy, this bill does not materially advance that policy—at least not at a reasonable cost. Instead, it amounts to piling on.

The MAPLE Act is an innocuous-looking bill. No one would contend that falsely labeling a product

Talking Points

- The Maple Agriculture Protection and Law Enforcement Act of 2011 (MAPLE Act) would make it a federal offense knowingly and willfully to distribute into interstate commerce a product that is falsely labeled as maple syrup.
- The MAPLE Act is an example of overcriminalization. Even considering only the two most widely used federal antifraud laws—the mail fraud and wire fraud acts—there is no reason to believe that any large-scale fraud in the marketing or sale of maple syrup is not already a crime.
- Legislators and prosecutors like to double up on the penalties for the same conduct and, to do so, prefer to use existing laws as precedents for future ones.
- Enacting multiple industry-specific fraud laws can lead to overpunishment of offenders without any attendant benefits to the criminal justice system.

This paper, in its entirety, can be found at:
http://report.heritage.org/lm0076

Produced by the Center for Legal & Judicial Studies

Published by The Heritage Foundation
214 Massachusetts Avenue, NE
Washington, DC 20002–4999
(202) 546-4400 • heritage.org

The Heritage Foundation
LEADERSHIP FOR AMERICA

should go unpunished in some way or other. For example, a party injured by fraud can seek relief under the law of torts, contracts, and restitution.[1] Because "all civil penalties have some deterrent effect,"[2] private civil actions also can discourage other parties from committing fraud and therefore serve a valuable public interest. Fraud also is punished under the criminal law: Fraud has been a crime at common law in some form or another for more than 300 years;[3] the states outlaw fraud;[4] and numerous statutes make fraud a federal offense.[5]

The type of fraud at which the MAPLE Act is aimed already is outlawed by one or more federal criminal laws, to say nothing of state criminal laws and state tort law.

Such redundant criminalization, however, is the problem. The type of fraud at which the MAPLE Act is aimed already is outlawed by one or more federal criminal laws, to say nothing of state criminal laws and state tort law. Indeed, there are dozens of federal statutes making fraud a crime.

Even considering only the two most widely used federal antifraud laws—the mail fraud and wire fraud acts[6]—there is no reason to believe that any large-scale fraud in the marketing or sale of maple syrup is not already a crime. After all, the parties who commit such fraud need to use the mails or telecommunications facilities to advertise, to ship their goods, to be paid, or for other reasons. One or the other (or both) of those laws should do the trick. To be sure, neither statute may reach someone who sells falsely labeled maple syrup at a roadside stand for cash,[7] but how many such cases are there? In fact, how many cases are there altogether involving the false labeling of maple syrup? And why should state or local law enforcement authorities not be responsible for such (to mix metaphors) small-potatoes cases?

True, there are times in which development of a new technology (e.g., cars, aircraft, or telephones)

1. *See* RESTATEMENT (SECOND) OF TORTS §§ 526–28, 530, 538 (1976); RESTATEMENT (SECOND) OF CONTRACTS §§ 159–62 (1979); RESTATEMENT (SECOND) OF RESTITUTION § 8 (1937).
2. Hudson v. United States, 522 U.S. 93, 102 (1997).
3. JOHN KAPLAN ET AL., CRIMINAL LAW: CASES AND MATERIALS 861–66 (5th ed. 2004). Fraud originated in the doctrines of "cheats" (i.e., using a false token or weights and measures), obtaining property by false pretenses, and larceny by trick. See, e.g., SANFORD H. KADISH ET AL., CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS 956 (8th ed. 2007).
4. *Id.*
5. STUART P. GREEN, LYING, CHEATING, AND STEALING: A MORAL THEORY OF WHITE-COLLAR CRIME 152 (2006) ("Under American law, for example, there are now dozens of statutory provisions that criminalize offenses such as mail fraud, wire fraud, bank fraud, health care fraud, tax fraud, computer fraud, securities fraud, bankruptcy fraud, accounting fraud, and conspiracy to defraud the government.") (footnote omitted); *id.* at 152 n.23 (citing 18 U.S.C. § 1341 (mail fraud), § 1343 (wire fraud), § 1344 (bank fraud), § 1347 (health care fraud), 26 U.S.C. § 7201 (tax fraud), 18 U.S.C. § 1030 (computer fraud), 15 U.S.C. §§ 77x, 78ff (securities fraud), 18 U.S.C. § 157 (bankruptcy fraud), § 371 (conspiracy to commit fraud against the United States); Ellen S. Podgor, *Criminal Fraud*, 48 AM. U. L. REV. 729, 730–31 (1999) ("Although fraud is not a crime in itself, fraud is an integral aspect of several criminal statutes. For example, one finds generic statutes such as mail fraud and conspiracy to defraud being applied to an ever-increasing spectrum of fraudulent conduct. In contrast, other fraud statutes, such as computer fraud and bank fraud, present limited applications that permit their use only with specified conduct. In recent years, criminal fraud statutes have multiplied, offering new laws that often match legislative or executive priorities.") (footnotes omitted); *id.* at 740 ("The terms 'fraud,' 'fraudulent,' 'fraudulently,' or 'defraud' appear within the text of a total of ninety-two substantive statutes in title 18 of the United States Code.").
6. 18 U.S.C. § 1341 (mail fraud) and § 1343 (wire fraud). For an explanation of the growth of those two statutes, *see* Anne S. Dudley & Daniel F. Schubert, *Mail and Wire Fraud*, 38 AM. CRIM. L. REV. 1025 (2001).
7. There also is a question as to whether Congress, under the Commerce Clause, has the power to make a solitary roadside business a crime. Commerce Clause, U.S. CONST. art. I, § 8, cl. 3. *See* United States v. Morrison, 529 U.S. 598 (2000); United States v. Lopez, 514 U.S. 549 (1995).

might require Congress to adopt a new law specifically focused on the use of that invention to commit a crime, but maple syrup is hardly a 21st century creation. It also is true that there are times when a new societal consensus develops regarding conduct that already is a crime yet justifies harsher treatment of offenders (e.g., spousal abuse), but there is no such justification driving the MAPLE Act. The people who make, market, and sell genuine maple syrup, as well as the people who enjoy that product, are in the same position that they always have been and are not more hurt by fraudulent sales today than they were 20 or 30 years ago. As a result, it is quite difficult to see what good this new fraud statute could accomplish other than giving those in the maple syrup industry a federal fraud statute of their own.

The punishments imposed under this statute would enhance the penalties that can be imposed on offenders today: The sentence for this crime can be tacked onto the sentence for mail fraud and wire fraud and whatever else the prosecutor can charge.

Is that a sufficient reason for another dose of punishment? The answer is "No." There are ample criminal laws on the books to deal with this problem. Adding this new one is just overkill.[8] If this were football, the referee would throw a penalty flag for unnecessary roughness. Keep in mind that the punishments imposed under this statute would enhance the penalties that can be imposed on offenders today: The sentence for this crime can be tacked onto the sentence for mail fraud (up to 20 years' imprisonment) and wire fraud (up to 20 years' imprisonment) and whatever else the prosecutor can charge.[9] Are maple syrup felons sufficiently heinous that they should be imprisoned for perhaps as long as 45 years?

Finally, consider the example that this bill would create. As the late Professor William Stuntz has explained, legislators and prosecutors like to double up on the penalties for the same conduct and, to do so, prefer to use existing laws as precedents for future ones.[10] Consider, then, the new raft of statutes that this legislation could spawn: False labeling of Iowa corn, Virginia peanuts, or Coney Island hot dogs soon could become separate federal offenses. Selling phony replicas of the Statue of Liberty, Wrigley Field, the Golden Gate Bridge, the St. Louis Arch, the Louisiana Superdome, and a host of other replicas each could be made its own crime.

Of course, fraudulent conduct should be deterred or punished, even stopped if possible; no one would disagree. But is a sledgehammer needed to accomplish that goal? Put aside the harm done to the offender and his family (an unfortunate, but nonetheless inevitable, example of the collateral damage done by criminal sentencing). What marginal retributive or deterrent benefits do such new criminal laws provide? If the answer is none—and it most likely is—then such laws would be all cost and no benefit.

—Paul J. Larkin, Jr., is Senior Legal Fellow and Manager of the Overcriminalization Initiative in the Center for Legal & Judicial Studies at The Heritage Foundation.

8. Both parties are to blame for the problem of overcriminalization. "[Law professor John S.] Baker blamed Republicans as well as Democrats for the trend, saying that both parties fuel it. One-third of about 4,200 federal crimes on the books have been passed since 1970 and Republican President Richard Nixon's 'war on crime,' he said." Kevin McKenzie, *Law Professor Slams Expansion of Federal Crimes*, THE COMMERCIAL APPEAL, Oct. 25, 2011, *available at* http://www.commercialappeal.com/news/2011/oct/25/law-professor-slams-expansion-federal-crimes/ (Last viewed Dec. 6, 2011).
9. Under the *Blockburger* test, Congress can impose multiple sentences under different laws for the same conduct as long as each statute requires proof of a fact that the others do not. *See* Blockburger v. United States, 284 U.S. 299, 304 (1932); *see also, e.g.*, Texas v. Cobb, 532 U.S. 162, 173 (2001); Rutledge v. United States, 517 U.S. 292, 297 (1996); Brown v. Ohio, 432 U.S. 161, 164–66 (1977).
10. *See, e.g.*, WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE (2011); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505 (2001).