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The Injustice of Imposing Domestic Criminal Liability for a Violation of Foreign Law

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Abstract

For six years, Abner Schoenwetter languished in U.S. federal prison. His crime? Importing Honduran lobsters in violation of Honduran law. Despite having broken no domestic law, Schoenwetter ran afoul of the Lacey Act, which is one of many U.S. regulations that criminalize the violation of foreign law. Such regulations, however, undermine a long-held tenet of U.S. law: No one can be held criminally liable for violating a law that he or she cannot understand. Given the staggering number of current federal laws and regulations—to say nothing of state laws—demanding that Americans know foreign law on pain of domestic criminal liability is more than unreasonable; it is unjust and most likely unconstitutional.

Introduction: Reconciling Two Inconsistent Principles

Everyone is presumed to know the law, yet no one can be held criminally liable for violating a law that he or she cannot understand. The difficulty involved in trying to reconcile these two propositions has real-life consequences.

People have, in fact, been sent to prison for making a mistake of law. The interpretative problem, however, is exacerbated when the law in question is a *foreign* law. Few people are aware that some federal laws make it a domestic crime to violate a foreign law for regulatory conduct occurring beyond U.S. shores. What is more, the law allegedly violated need not be a foreign *criminal* law: It could be a foreign labor or environmental law.

Key Points

- Everyone is presumed to know the law, yet no one can be held criminally liable for violating a law that he or she cannot understand. The difficulty of reconciling these two propositions has real-life consequences.
- The idea that every American knows every U.S. criminal statute makes no sense when applied to the statutes and regulatory codes of foreign nations.
- Holding Americans criminally liable for not knowing the regulatory policies of countries halfway around the world, whose laws are not written in English and whose mores may differ markedly from our own, is both bad public policy and sufficiently irrational as to be unconstitutional.
- There are three solutions to this problem: (1) eliminate domestic criminal liability for a violation of a foreign law; (2) require the government to prove that the defendant acted "willfully"; and (3) apply a mistake of law defense to violations of foreign law.

This paper, in its entirety, can be found at **http://report.heritage.org/lm94**

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Demanding that Americans know foreign law on pain of domestic criminal liability is more than unreasonable; it is unjust and most likely unconstitutional.

Proposition 1: Everyone knows the criminal law. The first proposition is that the law presumes that everyone knows every criminal statute and the relevant decisions interpreting them.[1] Courts and commentators justified that rule on several grounds, such as the proposition that everyone knows the laws in the locale in which he or she resides,[2] as well as the fear that a contrary rule would eviscerate the ability of the law to police the public's conduct.[3]

That proposition made sense at common law, because the few criminal laws that existed at the time reflected contemporary mores, and violations were recognized as morally blameworthy.[4] Today, however, that proposition is not just a fiction[5] or a "legal cliché";[6] it is an absurdity. The criminal law is now used not just to express societal condemnation of inherently nefarious acts (e.g., murder)—so-called *malum in se* offenses—but also to regulate the conduct of individuals and corporations by making it a crime to commit a variety of acts that are unlawful only because Congress has said so—crimes known as *malum prohibitum* offenses.[7]

That number is quite large: There are more than 4,500 federal criminal statutes;[8] many recent federal statutes create regulatory regimes and use the criminal law to implement those programs;[9] and there could be more than 300,000 relevant regulations.[10] Given this reality, it is dishonest to presume that anyone, much less everyone, knows everything that the federal penal code outlaws today.

If knowledge of the criminal law is essential, how then do people learn what the law forbids? For a few, it is through specialized education; for most, it is an informal process.

Consider how lawyers, law professors, and judges come to learn the criminal law. All start as law students, and during their first year in law school, they ordinarily take a basic course in criminal law. That course gives them a general familiarity with the elementary concepts of this subject—the requirement that a criminal law predate the conduct at issue, the requirement that the statute identify an unlawful act, the requirement that a person commit that act with a particular mental state, and so forth—as well as the scope of some well-known common law and contemporary crimes, such as homicide.

But a law school criminal law class does not instruct fledgling lawyers in the entire corpus of the

1. *See, e.g.*, Barlow v. United States, 32 U.S. (7 Pet.) 404, 411 (1833) ("It is a common maxim, familiar to all minds, that ignorance of the law will not excuse any person, either civilly or criminally * * *."); Oliver Wendell Holmes, The Common Law 40–41 (1881) (Reprint 2009); Wayne R. LaFave, Criminal Law § 5.6, at 305–18 (5th ed. 2010).
2. *See, e.g.*, Cheek v. United States, 498 U.S. 192, 199 (1991) (the rule that ignorance of the law is no defense is "[b]ased on the notion that the law is definite and knowable").
3. *See, e.g.*, *Barlow*, 32 U.S. (7 Pet.) at 411 (the principle that mistake of law is not an excuse "results from the extreme difficulty of ascertaining what is, *bonâ fide*, the interpretation of the party * * *."). As Oliver Wendell Holmes explained: "The true explanation of the rule is the same as that which tends to account for the law's indifference to a man's particular temperament, faculties, and so forth. Public policy sacrifices the individual to the general good. It is desirable that the burden of all should be equal, but it is still more desirable to put an end to robbery and murder. It is no doubt true that there are many cases in which the criminal could not have known that he was breaking the law, but to admit the excuse at all would be to encourage ignorance where the law-maker has determined to make men know and obey, and justice to the individual is rightly outweighed by the larger interests on the other side of the scales." Oliver Wendell Holmes, *supra* note 1, at 41.
4. *See* Livingston Hall & Selig J. Seligman, *Mistake of Law and Mens Rea*, 8 U. Chi. L. Rev. 641, 644 (1940–1941) ("[T]he early criminal law appears to have been well integrated with the mores of the time, out of which it arose as 'custom.'"). As John Salmond put it: "The common law is in great part nothing more than common honesty and common sense. Therefore although a man may be ignorant that he is breaking the law, he knows very well in most cases that he is breaking the rule of right." John Salmond, Jurisprudence 426 (8th ed. 1930).
5. Jerome Hall, *Ignorance and Mistake in Criminal Law*, 33 Ind. L. Rev. 1, 14 (1957).
6. Flores-Figueroa v. United States, 556 U.S. 646, 652 (2009).
7. *See* Wayne R. LaFave, *supra* note 1, § 1.3(f), at 14–15 (defining *malum in se* and *malum prohibitum* offenses).
8. *See, e.g.*, John Baker, Jr., *Revisiting the Explosive Growth of Federal Crimes*, Heritage Foundation Legal Memorandum No. 26 (June 16, 2008), http://www.heritage.org/research/reports/2008/06/revisiting-the-explosive-growth-of-federal-crimes; Paul Rosenzweig & Brian W. Walsh, eds., One Nation, Under Arrest: How Crazy Laws, Rogue Prosecutors, and Activist Judges Threaten Your Liberty (Paul R. and Brian W. eds.) (2010) (hereafter One Nation, Under Arrest); George Terwilliger, *Under-Breaded Shrimp and Other High Crimes—Addressing the Over-Criminalization of Commercial Regulation*, 44 Am. Crim. L. Rev. 1417, 1418 (2007).
9. *See* Edwin Meese III & Paul J. Larkin, Jr., *Reconsidering the Mistake of Law Defense*, 102 J. of Crim. L. & Criminology 725, 739–44 (2012).

penal code. Nor could it. Each state outlaws the same conduct that was a crime at common law—for example, murder, rape, and robbery—but some states have numerous different variations on common law offenses. New York, for example, has more than 150 possession offenses, with penalties going as high as life imprisonment.[11] And that is just state criminal law. As noted, there are thousands of federal criminal statutes and pertinent regulations.[12] No law student learns all of those statutes and regulations in one 15-week-semester class on criminal law or even in all three years of formal legal education.

In fact, as distinguished an academic as the late Harvard Law School professor William Stuntz confessed that he was far from an expert on the state penal code. As he put it, "Ordinary people do not have the time or training to learn the contents of criminal codes; indeed, even criminal law professors rarely know much about what conduct is and isn't criminal in their jurisdictions."[13]

Making the matter worse, of course, is the fact that most people do not have the opportunity to receive formal instruction in the penal code or legal analysis. So how do they learn it? It turns out that they learn what is and is not criminal in various informal ways. Religious precepts, morals, customs, traditions, and laws are the glue that holds society together and keeps it from becoming *bellum omnium contra omnes* ("the war of all against all").[14] We learn them from family members, friends, schoolmates, coworkers, the news media, and others at home, church, school, work, and play.

Not surprisingly, what people learn in this nation are the rules, policies, and mores *of this nation*. Just as the French, Argentineans, Laotians, and Senegalese learn the rules demanded of them in their own countries, in this country what children, adolescents, and adults learn are the laws and mores of America.

Proposition 2: The criminal law must be sufficiently clear that a reasonable person can readily understand it. Proposition 2 is equally important. One of the most elementary requirements of criminal and constitutional law is that a person cannot be held liable for violating a criminal statute unless the government has offered the public adequate notice of what conduct is outlawed. The Latin phrases *Nullum crimen sine lege* and *Nulla poena sine lege* stand for the proposition that there can be no crime or criminal punishment without a positive law, meaning that one cannot be punished for doing something that was not prohibited by law at the time.[15]

There also are requirements for criminal statutes already on the books. Unlike the laws of Caligula, which were published in a location that made them unreadable,[16] criminal laws must be available to the public so that they can be found, read, and understood.[17] That last factor is particularly critical. Statutes that are unduly vague, so indefinite that the average person is forced to guess at their meaning, cannot serve as the basis for a criminal charge.

The criminal law seeks to reconcile the requirement that everyone know the law with reality by requiring that the criminal law be understandable

10. One Nation, Under Arrest, *supra* note 8, at xv–xvi, 218.
11. Douglas Husak, Overcriminalization: The Limits of the Criminal Law 44 (2009).
12. *See* Meese & Larkin, *supra* note 9, at 739–40.
13. William J. Stuntz, *Self-Defeating Crimes*, 86 Va. L. Rev. 1871, 1871 (2000).
14. *See* Thomas Hobbes, Leviathan 80 (Edwin Curley ed., Hackett Publ'g Co. 1994) (1651).
15. *See* Jerome Hall, *Nulla Poena Sine Lege*, 47 Yale L.J. 165, 165, 178 (1937); United States v. Evans, 333 U.S. 483, 485 (1948) (refusing to allow a criminal penalty to be imposed on conduct when Congress had outlawed it but had not clearly defined what the penalty should be); *see also* Jerome Hall, General Principles of Criminal Law (2d ed. 1947); the Ex Post Facto Clauses, U.S. Const. art. I, § 9, cl. 3 and art. I, § 10, cl. 1.
16. *See* Screws v. United States, 325 U.S. 91, 96 (1945) (plurality opinion) ("To enforce such a [vague] statute would be like sanctioning the practice of Caligula, who 'published the law, but it was written in a very small hand, and posted up in a corner, so that no one could make a copy of it.'"); Hall & Seligman, *supra* note 4, at 650 n.39 ("[W]here the law was not available to the community, the principle of 'nulla poena sine lege' comes into play.").
17. That rule does not rest on the fiction that people will read the penal code before acting. Instead, the law requires that, were someone to make that effort, the criminal statutes must be written with sufficient clarity that a reader could understand them. *See* McBoyle v. United States, 283 U.S. 25, 27 (1931): "Although it is not likely that a criminal will carefully consider the text of the law before he murders or steals, it is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear."

to the average person. Clarity is not just a matter of good criminal justice policy; it is a constitutional command. A well-known doctrine, known as the "void-for-vagueness" doctrine, enforces that principle. That doctrine prevents the government from punishing someone for violating a statute if a reasonable person could not have understood where the statute drew a line distinguishing innocent from unlawful conduct. The criminal law must be sufficiently clear to the average person so that no one has to guess at what conduct is prohibited. A long series of Supreme Court decisions have enforced that principle by holding unconstitutional unduly vague laws.[18]

The Supreme Court has not minced words on this subject. As long ago as 1876, the Court said that "[i]t would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large."[19] More recently, the Court has made it clear that "[n]o one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids."[20]

The Court also has devised a minimum standard of clarity: "The constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute."[21] Accordingly, "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law."[22]

Note the terms that the Court used to describe who must be able to understand what a criminal statute means: "all," "men of common intelligence," and "a person of ordinary intelligence"—not lawyers, law professors, or judges.

All of that is settled law. What has become controversial today, however, is how that inconsistency should be resolved when the entire penal code has become so immense in size, so extensive in scope, so complex, so reticulated, and so technical that no reasonable person fairly could be deemed to know everything that the criminal code outlaws. This problem—one of the consequences of the modern-day phenomenon known as overcriminalization—is serious and has damaged the lives of ordinary Americans.

Furthermore, federal laws make it a crime to violate a foreign law, whether that foreign law is criminal, civil, or regulatory. That requirement is unreasonable because it demands far too much of the average person and further exacerbates the problems posed by today's sprawling, incoherent penal code.

The Injustice of Holding a Person Criminally Liable for Violating a Foreign Law

The problems associated with overcriminalization, while serious, pale by comparison to the risk that Americans run whenever they travel or conduct business internationally. While everyone knows that travelling to London subjects that person to the law of Great Britain, few people know that what they do in a foreign country, whether for business or for pleasure, can also violate *domestic* American criminal law. In fact, several federal laws make it a crime to violate a foreign law—for example, the Endangered Species Act.[23] But the law that causes the most problems is the Lacey Act.[24]

In 1900, Congress passed the Lacey Act to protect states against poachers who fled with their goods across state lines. Since then, Congress has

18. *See, e.g.*, Chicago v. Morales, 527 U.S. 41 (1999); Lanzetta v. New Jersey, 306 U.S. 451 (1939); Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926); *see generally* Anthony G. Amsterdam, Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. Pa. L. Rev. 67 (1960) (discussing the historical development of the void-for-vagueness doctrine).
19. United States v. Reese, 92 U.S. 214, 221 (1876).
20. Lanzetta v. New Jersey, 306 U.S. 451, 453 (footnote omitted).
21. United States v. Harriss, 347 U.S. 612, 617 (1954).
22. *Connally* v. Gen. Constr. Co., 269 U.S. 385, 391 (1926).
23. *See* 16 U.S.C. §§ 4223 & 4224 (2006).
24. *See, e.g.*, United States v. McNabb, 331 F.3d 1228 (11th Cir. 2003); United States v. Todd, 735 F.2d 146, 149 (5th Cir. 1984); S. Rep. No. 97-123 (1981); S. Rep. No. 91-526 (1969).

expanded the act to outlaw the importation of wildlife or plants in violation of a foreign nation's law by making it a crime to take or import fish, wildlife, or plants "in violation of any foreign law."[25] The apparent rationale for that extension was that foreign nations will help this country to protect its flora and fauna against unlawful export if the U.S. helps them to protect their own.

The Lacey Act perhaps would not raise a serious concern if the only penalty were a civil fine or an administrative penalty, but the law authorizes incarceration for each offense, up to one year's imprisonment for every violation of the act. A one-year term of confinement may not seem onerous (except, of course, for the people who must serve it), but a combination of one-year sentences could add up quickly. For example, if each fish taken in violation of the act were to constitute a separate offense, a fisherman could wind up with a three- or four-figure term of imprisonment just by bringing aboard one net's worth of fish. That prospect alone justifies concern. But there is more, and it is worse.

The most serious problem with the Lacey Act is that it makes it a federal offense to import fish, wildlife, or plants *in violation of any foreign law*. That is a novel—and untenable—proposition. It is an ancient rule of Anglo–American common law that every person is presumed to know the criminal law. There is, however, no similar basis for assuming that Americans will know the criminal, civil, and regulatory laws, policies, and customs *in a foreign land*. Yes, Americans will know that it is illegal to murder, rape, rob, burgle, and swindle foreign citizens, but few, if any, will be conversant with the intricacies of a foreign nation's regulatory code.

Consider the case of *United States v. McNab*. Abner Schoenwetter and several other individuals were convicted of several federal offenses in connection with their importation of Caribbean spiny lobsters from Honduras. The federal government charged Schoenwetter and the other parties with violating the Lacey Act by importing Honduran lobsters in violation of Honduran law: The lobsters were too small to be taken under Honduran law; some contained eggs and so could not be exported; and the lobsters were packed in plastic rather than in boxes as required by Honduran law.

The jury convicted the defendants, and both the district court and the U.S. Court of Appeals for the Eleventh Circuit upheld the convictions. The district court relied on the opinions of officials in the Honduran agriculture department that the *McNab* defendants violated Honduran law. The appellate court, however, refused to give any weight to the opinions of a Honduran court, the Honduran embassy, and the Honduran Attorney General that the regulations in question were invalid under Honduran law and could not serve as predicate violations under the Lacey Act. Consequently, Schoenwetter was sentenced to eight years in a federal prison—a term longer than what some violent criminals spend behind bars—for foreign regulatory offenses that, according to key Honduran officials, did not even violate foreign law.[26]

The *McNab* case illustrates why no one should be held accountable under this nation's law for violating a foreign nation's law. Laws come in all forms (e.g., statutes vs. regulations); in all shapes and sizes (e.g., the Sherman Act vs. the Clean Air Act); and in all degrees of comprehensibility (e.g., the law of homicide vs. the Resource Conservation and Recovery Act). Different bodies have authority to create laws (legislatures vs. agencies); to interpret them (e.g., the President or an agency's general counsel); and to enforce them (e.g., city, state, and federal law enforcement officers and prosecutors). And that is just in America.

Consider some of the additional difficulties that an American must confront in complying with foreign regulatory law. For instance:

- Some foreign laws may have English translations; some will not.
- Some foreign statutes may be codified in the same manner as the United States Code; some will not.
- Some foreign regulations may be collected into their equivalent of our Code of Federal Regulations; some will not.

25. *See* Meese & Larkin, *supra* note 9, at 776–77.

26. There were four defendants in the *McNab* case. Three received eight-year prison terms, while one received only a two-year term. *See A Lobster Tale*, *in* One Nation, Under Arrest, *supra* note 8, at 8.

- Some foreign statutes and regulations may have commentary that is publicly available in the same manner as our congressional committee reports and *Federal Register* notices; some will not.

- Some foreign executive branch officials and judges will make their decisions public (and in English); some will not.

- Foreign nations may have very different allocations of governmental power, bureaucracies, and enforcement personnel. For example, some countries will have one entity—and not necessarily a court—that can speak authoritatively about its own laws; some will not.

- Different components of foreign governments may change their interpretations of their own laws over time, perhaps nullifying the effect of a prior interpretation, or perhaps not.

It is unreasonable to assume that the average American citizen can keep track of foreign laws and regulations, as well as the (potentially multifarious) official government interpretations of them, let alone do so by him- or herself without a supporting cast of lawyers—that is, assuming that the average citizen could find and afford a lawyer knowledgeable about the intricacies of a particular foreign nation's laws. The vast majority of domestic lawyers and judges are not familiar with foreign law, let alone qualified as experts.

In any event, the relevant standard is not whether the average lawyer knows the criminal law. The criminal law must be clear not to the average lawyer, but to the average *person*. Even if there were lawyers who could readily answer intricate questions of foreign law—and would be willing to do so for free—the criminal law is held to a higher standard. Unless men and women "of common intelligence" can understand what a law means, the law might as well not exist—and no one should be convicted for violating it.

There Is Relief in Sight: Three Potential Remedies

There are three solutions to this problem. The first, best, and easiest to implement is to eliminate domestic criminal liability for a violation of a foreign law. If no one in this country should be required to know foreign law, then there is no need for a criminal statute exposing anyone to that liability. Tort and administrative remedies can and should be sufficient for deterrence or retributive purposes. The criminal process is simply too heavy a hammer to use for such conduct.

A second solution is to require the government to prove that the defendant acted "willfully." Adding that element to the Lacey Act would at least ensure that the criminal law reaches only evil-minded individuals—those who knew what the foreign law prohibited and intended to violate it through their conduct. Congress has included a "willfulness" element in the federal criminal tax laws, and the Supreme Court has interpreted that term to require proof of an intentional violation of a known legal duty.[27] The result is that the government would have to prove that a person intended to flout a known legal rule.

A third solution is to apply a mistake of law defense to violations of foreign law. As discussed elsewhere,[28] this defense should be applied to all alleged violations of domestic law in which the government does not currently have to prove that the accused acted "willfully." The defense would exonerate a defendant if he or she reasonably and honestly believed that what he or she did was not a crime, even if that conduct technically constituted a criminal violation under some obscure statute or regulation. In those circumstances, imposing criminal liability would entail punishing a morally blameless person. That is the role for tort law or

27. *See, e.g.*, Bryan v. United States, 524 U.S. 184, 191 (1998); Ratzlaf v. United States, 510 U.S. 135, 138 (1994); *Cheek* 498 U.S. at 200; United States v. Pomponio, 429 U.S. 10, 12 (1976); United States v. Bishop, 412 U.S. 346, 360 (1973).

28. For a full discussion of this defense, see Paul J. Larkin, Jr., *Public Choice Theory and Overcriminalization*, 36 Harv. J.L. & Pub. Pol'y 715, 777–81 (2013); Paul J. Larkin, Jr., *A Mistake of Law Defense as a Remedy for Overcriminalization*, 26 A.B.A.J. Criminal Justice 10 (Spring 2013); Meese & Larkin, *supra* note 9.

administrative sanctions, but not the full force of the penal code.[29]

Whatever the merits of recognizing such a defense for most domestic crimes, a mistake of law defense should be permitted—indeed, it is essential—in the case of an alleged violation of a foreign law. It is utterly unreasonable—so unreasonable, in fact, as to be unconstitutional—to demand that people in this country know all of the laws in whatever language they are written, in whatever form they may take, in every foreign nation in order to avoid criminal liability.[30]

Conclusion

No jurist could honestly say that it makes sense today to believe that everyone knows or could know the entire penal code. The common law proposition that the law presumes that everyone knows every criminal statute served a purpose when it was first adopted, but that purpose has passed into history. Indeed, that proposition, which still largely exists, makes no sense whatsoever when applied not to a domestic law, but to the statutes and regulatory code of a foreign nation.

Holding Americans criminally liable for not knowing the regulatory policies of countries halfway around the world, whose laws are not written in English and whose mores may differ markedly from our own, is not just bad public policy. It is irrational—sufficiently irrational, in fact, for it to be unconstitutional.

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29. The criminal law historically has looked askance on imposing liability for negligence. Negligence is sufficient for tort liability, but criminal liability demands blameworthiness, an "evil" mind. Negligence liability falls far short of that standard. *See, e.g.*, Wayne R. LaFave, Criminal Law §§ 1.3, 5.4 (5th ed. 2010); Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 Law & Contemp. Probs. 401, 421–22 (1958); Edwin R. Keedy, *Ignorance and Mistake in the Criminal Law*, 22 Harv. L. Rev. 75, 84–85 (1908); Otto Kirchheimer, *Criminal Omissions*, 55 Harv L. Rev. 615 (1942); Francis Boles Sayre, *Public Welfare Offenses*, 33 Colum. L. Rev. 55, 72 (1933); *see generally* Meese & Larkin, *supra* note 9, at 758 n.158 (collecting authorities).

30. *See* Meese & Larkin, *supra* note 9, at 775–83.