The Heritage Foundation

LEGAL MEMORANDUM

No. 130 | AUGUST 6, 2014

Criminal Law and the Administrative State: The Problem with Criminal Regulations

John G. Malcolm

Abstract

Unlike malum in se *offenses, most criminal regulations do not prohibit morally indefensible conduct. Regulations allow conduct, but they circumscribe—often in ways that are very hard for the non-expert to understand—when, where, how, how often, and by whom certain conduct can be done. Most people are unaware that they are exposed to potential criminal liability for engaging in routine activities as part of their everyday lives. For many people and small entities that cannot afford high-priced lawyers, these laws are largely inaccessible and incomprehensible, which raises serious concerns of notice and fair warning. Nobody should find himself at risk of imprisonment merely because he cannot afford a lawyer to decipher unduly complex laws and regulations.*

The relationship between criminal and administrative law dates to the turn of the 19th century, when Congress established early federal administrative agencies and a regulatory framework that included both civil and criminal penalties for failing to abide by the rules those agencies promulgated. However, as with federal criminal statutes, regulatory offenses that purport to flesh out and refine the details of those statutes have proliferated to the point that, literally, nobody knows how many federal criminal regulations exist today.[1]

This is in and of itself a problem, but it is often compounded by regulators who expand the scope of those statutes by implementing regulations in ways that Congress most likely never envisioned. The result is a vast web of criminalized conduct, much of which is not inherently immoral or blameworthy, that creates risks for an unwary and unsuspecting public.

This paper, in its entirety, can be found at **http://report.heritage.org/lm130**

The Heritage Foundation
214 Massachusetts Avenue, NE
Washington, DC 20002
(202) 546-4400 | heritage.org

Key Points

- There is a significant difference between regulations that carry civil or administrative penalties for violations and regulations that carry criminal penalties for violations. Individuals caught up in the latter may find themselves deprived of their liberty and stripped of their right to vote, to sit on a jury, and to possess a firearm, among other penalties that do not apply when someone violates a regulation that carries only civil or administrative penalties.
- There is a serious problem when reasonable, intelligent individuals and entities are branded as criminals for violating a regulation they had no intent to violate, never knew existed, and may not have understood applied to their actions even if they did know of its existence.
- To preserve the moral authority of our legal system and engender respect for the rule of law, we should be especially careful before enacting laws or promulgating regulations that can cause an individual to be unfairly branded as a criminal.

While people often debate whether our society is overregulated, regardless of one's views on that subject, it is important to recognize that there is a significant difference between regulations that carry civil or administrative penalties for violations and regulations that carry criminal penalties for violations. Individuals caught up in the latter may find themselves deprived of their liberty and stripped of their right to vote, to sit on a jury, and to possess a firearm, among other penalties that simply do not apply when someone violates a regulation that carries only civil or administrative penalties.

There is a unique stigma that goes with being branded a criminal. Not only can you lose your liberty and certain civil rights, but you lose your reputation—an intangible yet invaluable commodity, precious to entities and individuals alike, that once damaged can be nearly impossible to repair. In addition to standard penalties that are imposed on those who are convicted of crimes, a series of burdensome collateral consequences that are often imposed by state or federal laws can follow an individual for life.[2]

In order to preserve the moral authority of our legal system and engender respect for the rule of law, we should be especially careful before enacting laws or promulgating regulations that can cause an individual to be unfairly branded as a criminal.

Delegation and the Proliferation of Regulatory Crimes

One of the underpinnings of the Declaration of Independence and the Constitution is that a government's legitimacy and moral authority to exercise power are premised on the "consent of the governed." This theory of governance was highly influenced by English philosopher John Locke, who wrote in 1690, "The power of the Legislative being derived from the People by a positive voluntary Grant and Institution ... the Legislative can have no Power to transfer their Authority of making Laws, and place it in other Hands."[3]

Chief Justice John Marshall, however, distinguished between promulgating rules on "important" subjects, which is strictly a legislative function, and delegating power to others "to fill up the details."[4] It is in this light that regulatory offenses purport to flesh out and refine the details of federal statutes that have been enacted by Congress. In fact, the Supreme Court of the United States has held that Congress can delegate to executive branch agencies the ability "to fill up the details" so long as Congress provides an "intelligible principle" in the underlying statute to guide those agencies and to which they must conform.[5] This is called the non-delegation doctrine.

The fact is, though, that Congress often passes broad, open-ended statutes that are the result of

1. The proliferation of criminal laws and regulations is not a uniquely federal phenomenon. States also suffer from this problem. The Manhattan Institute reports that North Carolina, for example, added more than 34 new criminal offenses per year between 2008 and 2013, many of them regulatory crimes laid out in rules promulgated by bureaucratic agencies. *See* James R. Copeland and Isaac Gorodetski, *Overcriminalizing the Old North State: A Primer and Possible Reforms for North Carolina*, Manhattan Institute for Policy Research (May 2014), *available at* http://www.manhattan-institute.org/html/ib_28.htm#.U4yOzPldV8E.
2. An inventory of collateral consequences is maintained by the American Bar Association, accessible at American Bar Association, National Inventory of the Collateral Consequences of Conviction, http://www.abacollateralconsequences.org/. In short, individuals convicted of crimes face consequences extending beyond the end of their actual sentences, potentially lasting their entire lives. Examples include being barred from entering a variety of licensed professional fields and receiving federal student aid. The Internet has spawned numerous websites designed specifically to catalog, permanently retain, and publicize individuals' criminal histories—all but guaranteeing perpetual branding as a criminal. These websites can demand payment from individuals in exchange for removing their mug shots and related personal information. For additional discussion about the detrimental nature of collateral consequences, see *Collateral Damage: America's Failure to Forgive or Forget in the War on Crime*, National Association of Criminal Defense Lawyers (2014), *available at* http://thf_media.s3.amazonaws.com/2014/pdf/Collateral%20Damage%20FINAL%20Report.pdf.
3. John Locke, The Second Treatise of Civil Government § 141 (1690).
4. Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 41 (1825).
5. *See, e.g.*, J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 406 (1928). ("In determining what Congress may do in seeking assistance from another branch, the extent and character of that assistance must be fixed according to common sense and the inherent necessities of the government co-ordination. So long as Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform, such legislative action is not a forbidden delegation of legislative power.").

compromise or a desire to avoid making tough choices that may prove politically unpopular. This results in the delegation of immense power to regulators, including the power to promulgate regulations that carry criminal penalties. With two notable exceptions in 1935,[6] the Supreme Court has upheld every delegation to a regulatory agency, even in cases where congressional guidance has been virtually nonexistent or at best nebulous.[7]

Criminal laws are meant to enforce a commonly accepted moral code backed by the full force and authority of the government. Regulations, on the other hand, are meant to establish rules of the road in a variety of areas designed to curb excesses and to address consequences in a complex, rapidly evolving, highly industrialized society, with penalties attached for violations of those rules. As this *Legal Memorandum* will explain, blurring the two comes at a cost.

Nonetheless, the reality today is that unelected officials in a myriad of federal agencies—many of which are likely unknown to the average citizen—promulgate regulations that carry criminal penalties. In fact, the regulations carrying criminal penalties have grown so voluminous that nobody really knows how many there are. The total has been conservatively estimated at over 300,000, with dozens or hundreds more being promulgated every year.[8]

The mere existence of criminal regulations dramatically alters the relationship between the regulatory agency and the regulated power. All an agency has to do is suggest that a regulated person or entity *might* face criminal prosecution and penalties for failure to follow an agency directive, and the regulated person or entity will likely fall quickly into line without questioning the agency's authority.[9]

In 2001, in *Rogers v. Tennessee*,[10] the Supreme Court cited "core due process concepts of notice, foreseeability, and, in particular, the right to fair warning as those concepts bear on the constitutionality of attaching criminal penalties to what previously had been innocent conduct." These are foundational elements—first principles—underlying the moral authority of our criminal laws.

Then there is the well-known legal maxim that when it comes to violating the law, especially criminal laws, "Ignorance of the law is no excuse." Yet the Code of Federal Regulations (CFR), a compendium similar to the U.S. Code but specifically for federal regulations, is over 80,000 pages long and has been growing steadily for three decades.[11] Considering the rows of library shelves needed to store the CFR's 200 volumes, the old maxim has been reduced to a cruel joke.

Although some heavily regulated entities receive notice about what is and is not illegal, that is not the case for many other entities and individuals that may end up altogether unwittingly committing acts that constitute crimes. The risk is exacerbated by the fact that many of these criminal prohibitions lack an adequate—or even any—*mens rea* ("guilty mind") requirement. In short, *mens rea* requires

6. *See* Panama Refining Co. v. Ryan, 293 U.S. 388 (1935); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

7. The Supreme Court of the United States has given the "green light" to Congress to delineate the "general policy" and broad boundaries of delegated authority. *See, e.g.*, Mistretta v. United States, 488 U.S. 361, 372 (1989) ("Applying this 'intelligible principle' test to congressional delegations, our jurisprudence has been driven by a practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives. Accordingly, this Court has deemed it 'constitutionally sufficient' if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority."). Congress has certainly taken advantage of this broad latitude, as have regulatory agencies.

8. Paul Rosenzweig, *The History of Criminal Law*, in One Nation Under Arrest: How Crazy Laws, Rogue Prosecutors, and Activist Judges Threaten Your Liberty (Paul Rosenzweig ed., 2d ed. 2013).

9. For an excellent article discussing the pressures that companies face when confronted with the possibility of, and the lengths to which they will go to avoid, criminal prosecution, see Richard A. Epstein, *The Dangerous Incentive Structures of Nonprosecution and Deferred Prosecution Agreements*, The Heritage Found. Legal Memorandum No. 129 (June 26, 2014), *available at* http://www.heritage.org/research/reports/2014/06/the-dangerous-incentive-structures-of-nonprosecution-and-deferred-prosecution-agreements. *See also* James R. Copeland, *The Shadow Regulatory State: The Rise of Deferred Prosecution Agreements*, Manhattan Institute for Policy Research (May 2012), *available at* http://www.manhattan-institute.org/html/cjr_14.htm.

10. 532 U.S. 451 (2001).

11. The CFR spans 50 titles and approximately 200 volumes and is more than 80,000 pages long. *See* U.S. Government Printing Office, Code of Federal Regulations (CFRs) in Print, http://bookstore.gpo.gov/catalog/laws-regulations/code-federal-regulations-cfrs-print#4 (last visited July 10, 2014).

that for someone to be found criminally guilty, he must have acted with the intent to violate the law, or at least with the knowledge that his conduct violated the law, so that one can justifiably say that the person knew he was defying a law or indifferent to it.

Throughout most of Anglo–American legal history, *mens rea* was considered an essential element of virtually every crime because it ensured that the criminal law ensnared only morally culpable parties.[12] A *mens rea* requirement forces the government to prove beyond a reasonable doubt that the defendant acted with a guilty mind, which protects someone who engaged in accidental or innocent behavior from prosecution (but not from civil liability or administrative penalties).

Regulatory crimes are not, for the most part, *malum in se* offenses in which the prohibited conduct is clearly understood to be morally blameworthy regardless of what the state says or does. Most regulatory crimes are *malum prohibitum* offenses, prohibiting acts that are not inherently blameworthy. Such offenses are "wrongs" only because the state has said so; they would not raise "red flags" in the eyes of average citizens (or even in the eyes of most lawyers and judges) who are unfamiliar with the voluminous, highly technical, and obscure contents of the CFR.

Unlike *malum in se* offenses, regulations do not prohibit morally indefensible conduct. Regulations *allow* conduct, but they circumscribe—often in ways that are very hard for the non-expert to understand—when, where, how, how often, and by whom certain conduct can be done. Most people are unaware that they are exposed to potential criminal liability for engaging in routine activities as part of their everyday lives.

For many people and small entities that cannot afford high-priced lawyers, these laws are largely inaccessible and incomprehensible, which raises serious concerns of notice and fair warning. Nobody should find himself at risk of imprisonment merely because he cannot afford a lawyer to decipher unduly complex laws and regulations. Needless to say, there is a serious problem when reasonable, intelligent individuals and entities are branded as criminals for violating a regulation they had no intent to violate, never knew existed, and may not have understood applied to their actions even if they did know of its existence.

Regulatory Overreach

Regulatory bodies with guns and badges and little sense of perspective can take an unduly broad view of their own authority to enforce regulatory crimes.[13] For instance, during its next term, the U.S. Supreme Court will hear arguments in *Yates v. United States*,[14] an appeal by an individual who was convicted of violating the anti-shredding provision of the Sarbanes–Oxley Act, which was enacted in 2002 in the aftermath of massive document-shredding parties at Enron. That law makes it a crime to destroy "any document, record or tangible object" to impede a federal investigation.[15]

The catch here is that John Yates destroyed not documents, but *three undersized fish*.[16] While it is true that fish are tangible objects, who can honestly say that a reasonable person would have been aware that tossing three fish overboard would violate a pro-

12. *See, e.g.*, Oliver Wendell Holmes, Jr., The Common Law 47 (Belknap 2009) (1881) ("It is not intended to deny that criminal liability ... is founded on blameworthiness. Such a denial would shock the moral sense of any civilized community; or, to put it another way, a law which punished conduct which would not be blameworthy in the average member of the community would be too severe for that community to bear."); United States v. Morissette, 342 U.S. 246, 250 (1952) ("The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.").

13. For examples of the consequences to citizens of regulatory overcriminalization, see the following Heritage Foundation publications: "USA vs. You," www.usavsyou.com (July 10, 2014); One Nation Under Arrest: How Crazy Laws, Rogue Prosecutors, and Activist Judges Threaten Your Liberty (Paul Rosenzweig ed., 2nd ed. 2013).

14. United States v. Yates, 733 F.3d 1059 (11th Cir. 2013), *cert. granted*, 134 S.Ct. 1935 (U.S. Apr. 28, 2014) (No. 13-7451).

15. 18 U.S.C. § 1519 —Destruction, alteration, or falsification of records in Federal investigations and bankruptcy.

16. John Yates, *A Fish Story: I Got Busted for Catching a Few Undersized Grouper. You Won't Believe What Happened Next*, Politico Magazine, Apr. 24, 2014, *available at* http://www.politico.com/magazine/story/2014/04/a-fish-story-106010.html#.U4jfFPmwJ4e.

vision of a law that carried the title of "destruction, alteration or falsification of records in federal investigations and bankruptcy"?[17]

Consider what happened to Nancy Black.[18] Nancy, a nationally renowned marine biologist, operates a whale-watching company. She also has a permit to research killer whales in Monterey Bay, California. On two different occasions, Nancy and her crew encountered a pod of orcas feasting on a dead gray whale. In order to film this activity, Nancy had her crew remove a piece of blubber from the water, attach it to the boat with a rope, and then lower it back into the water. In an unrelated incident, the captain of one of her vessels whistled at a humpback whale to try to keep it in the vicinity. A crew member on her other boat encouraged the passengers to do likewise. Nancy reprimanded both of them.[19]

When the chastened captain's wife contacted the authorities to find out whether her husband had done anything wrong, an investigator with the National Oceanic and Atmospheric Administration began an investigation into potential harassment of a whale, which is a federal offense. The investigator contacted Nancy and asked her about the captain. Nancy told the investigator that she had a videotape of the incident, produced to sell to that day's passengers as a memento of their experience, which she voluntarily provided to law enforcement. She did not, however, tell the investigator that the tape had been edited to cut out what she thought was extraneous footage. The footage she provided included the captain whistling but not the crew member on the other boat egging on the passengers.[20]

Did anything happen to the captain or the crew member? No. Nancy Black, on the other hand, was charged with two felony counts for providing an edited video to the officer without telling him it was edited, as well as two misdemeanor violations of the Marine Mammal Protection Act for "feeding" killer whales. The government also sought forfeiture of her boats.[21]

Facing the prospect of a felony conviction, a prison sentence, and loss of her property, and having already spent $100,000 in attorney's fees,[22] Black pleaded guilty to a misdemeanor. In doing so, Nancy admitted that she had removed the blubber and then returned it to the water, which was not explicitly authorized by her permit, and that she had edited the video that she had turned over to the inspector, which "could have" impeded the investigation.[23] Thus, a statute designed to protect mammals, not to impede harmless and potentially valuable research, was used to dragoon Nancy Black.

Dr. Peter Gleason is another example of the terrible consequences of regulatory overcriminalization. A Maryland psychiatrist, he dedicated much of his professional life to caring for the poor and underserved.

Dr. Gleason got into trouble when he gave a series of paid lectures about Xyrem, a drug that had been approved by the Food and Drug Administration (FDA) to treat narcolepsy but is also used by a number of physicians to treat a variety of other medical conditions.[24] The conferences where Gleason spoke were sponsored by the manufacturer of Xyrem. While drug manufacturers are prohibited by law from promoting off-label usages of FDA-approved

17. For an excellent article discussing the issues involved in this case, see Paul J. Larkin, Jr., *Oversized Frauds, Undersized Fish, and Deconstruction of the Sarbanes–Oxley Act*, 103 Geo. L.J. Online 17 (2014), *available at* http://georgetownlawjournal.org/files/2014/06/Larkin.Oversized.pdf. See also Bond v. United States, No. 12-158, slip op. at 15 (U.S. June 2, 2014) ("To begin, as a matter of natural meaning, an educated user of English would not describe Bond's crime as involving a 'chemical weapon.' Saying that a person 'used a chemical weapon' conveys a very different idea than saying the person 'used a chemical in a way that caused some harm.' The natural meaning of 'chemical weapon' takes account of both the particular chemicals that the defendant used and the circumstances in which she used them.... In settling on a fair reading of a statute, it is not unusual to consider the ordinary meaning of a defined term, particularly when there is dissonance between that ordinary meaning and the reach of the definition.").

18. Daniel Dew, *Save the Whales NOAA*, The Daily Signal (Sept. 2, 2012), http://dailysignal.com/2012/09/05/save-the-whales-noaa/.

19. Evan Bernick, *Much Ado About Blubber: Marine Biologist Faces Fines, Probation for Research*, The Daily Signal (Dec. 20, 2013), http://dailysignal.com/2013/12/20/much-ado-blubber-marine-biologist-faces-fines-probation-research/.

20. *Id.*

21. *Id.*

22. George Will, *Blowing the Whistle on Leviathan*, The Washington Post, July 27, 2012, *available at* http://www.washingtonpost.com/opinions/george-will-blowing-the-whistle-on-leviathan/2012/07/27/gJQAAsRnEX_story.html.

23. Bernick, *supra* note 19.

24. Harvey Silverglate, *A Doctor's Posthumous Vindication*, The Wall Street Journal, Dec. 25, 2012, *available at* http://online.wsj.com/news/articles/SB10001424127887323981504578174973015235686?mg=reno64-wsj.

drugs, physicians face no such restrictions. Doctors may prescribe a drug for off-label purposes and communicate with other physicians about the efficacy of the drug in treating those conditions.[25]

Nonetheless, Dr. Gleason found himself under indictment for allegedly conspiring with some of the drug manufacturer's representatives to promote off-label usages of Xyrem.[26] The federal government seized Dr. Gleason's assets, claiming that they were ill-gotten gains traceable to the so-called criminal conspiracy. Although he believed he had done nothing wrong, in order to avoid the possibility of being branded a felon and losing his life's savings, Dr. Gleason pleaded guilty to a misdemeanor and was sentenced to one year's probation and a $25 fine.[27]

A co-defendant, however, opted to fight. He persuaded the trial court and the Second Circuit Court of Appeals that the First Amendment protects the right of physicians and manufacturers to convey truthful, factual information about the beneficial uses, including off-label uses, of drugs.[28] Sadly, this vindication came too late for Dr. Gleason. Following his guilty plea, state medical authorities suspended Dr. Gleason's license, making it extremely difficult for him to practice psychiatry in any state. Dr. Gleason became increasingly despondent and hanged himself.[29]

What Should Be Done

How should we address this problem? Ideally, courts would do one of three things to rein in criminal regulations.

- *First*, courts could accord less deference (often referred to as *Chevron* deference) to an agency's own interpretation of criminal regulations than they do to an agency's interpretation of non-criminal regulations.

- *Second*, courts could apply the rule of lenity[30] more rigorously to give the defendant the benefit of the doubt with respect to any ambiguity in a criminal regulation.

- *Third*, courts could apply the non-delegation doctrine more strictly to make sure that an agency received narrow and clear guidance from Congress before promulgating criminal regulations.

Are courts likely to do this? Don't hold your breath. There are, however, some things that Congress can do.

- *First*, Congress could require regulatory agencies to identify all regulations that fall under their purview that carry potential criminal penalties and to make that list, which would obviously have to be kept up to date, available to the public without charge in one easily accessible location.[31]

- *Second*, Congress should pass a default *mens rea* provision that would apply to crimes in which no *mens rea* has been provided. In other words, if there is an element of a criminal statute or regulation that is missing a *mens rea* requirement, a default standard should be inserted with respect to that element.[32] Congress can, of

25. *Id.*

26. Alex Berenson, *Indictment of Doctor Tests Drug Marketing Rules*, The New York Times, July 22, 2006, *available at* http://www.nytimes.com/2006/07/22/business/22drugdoc.html?pagewanted=all&_r=3&.

27. Silverglate, *supra* note 24.

28. United States v. Caronia 703 F.3d 149 (2nd Cir 2012).

29. Silverglate, *supra* note 24.

30. The rule of lenity is a rule of statutory construction that requires courts to construe ambiguous criminal statutes or terms in favor of the defendant. *See, e.g.*, United States v. Santos, 553 U.S. 507, 514 (2008); United States v. Granderson, 511 U.S. 39, 54 (1994); United States v. Bass, 404 U.S. 336, 347–49 (1971). While courts have invoked this rule on occasion, more often than not they seem to bend over backwards to avoid finding an ambiguity.

31. A pending piece of legislation, the Smarter Sentencing Act, includes a provision that would do this. *See* S. 1410, 113th Cong. § 7 (as reported by S. Comm. on the Judiciary, Mar 11, 2014), *available at* https://www.govtrack.us/congress/bills/113/s1410/text.

32. For more on the erosion of *mens rea* requirements and the establishment of a default *mens rea* requirement, *see* Brian Walsh and Tiffany Joslyn, *Without Intent: How Congress Is Eroding the Criminal Intent Requirement in Federal Law*, The Heritage Found. Special Report No. 77 (May 5, 2010), *available at* http://report.heritage.org/sr0077, and Paul Rosenzweig, *Congress Doesn't Know Its Own Mind—And That Makes You a Criminal*, The Heritage Found. Legal Memorandum No. 98 (July 18, 2013), *available at* http://www.heritage.org/research/reports/2013/07/congress-doesnt-know-its-own-mind-and-that-makes-you-a-criminal.

course, choose to enact a strict liability criminal provision without a *mens rea* element and for which someone can be held liable for committing a bad act regardless of intent. However, if Congress wishes to do so, it should do so explicitly, thereby making its intentions clear.[33]

- *Third*, Congress should review and ratify (or not, as it sees fit) regulations that carry potential criminal penalties. As a general matter, unelected bureaucrats in scores of federal agencies should not be in the business of creating new crimes without vigilant congressional oversight. Very simply, if a matter is serious enough to brand someone a criminal and potentially send him to prison, it is serious enough to be considered by those whom we have elected to represent us.
- *Fourth*, Congress should consider passing a mistake of law defense in which someone accused of a regulatory violation carrying a criminal penalty could present an affirmative defense, requiring him to establish not only that he did not know his actions constituted a crime, but also that a reasonable person in his position would not have realized it either.[34]

Such reforms would go a long way toward ameliorating the problem of unknowing and unwitting individuals and entities violating obscure or unknowable regulations and being branded as criminals as a result. Whenever that happens, the public's respect for the fairness and integrity of our criminal justice system is diminished, and *that* is something that should concern everyone.

*—**John G. Malcolm** is Director of the Edwin Meese III Center for Legal and Judicial Studies and Ed Gilbertson and Sherry Lindberg Gilbertson Senior Legal Fellow at The Heritage Foundation.*

33. Courts have frequently upheld criminal regulations lacking a *mens rea* requirement based on a presumption that Congress must have deliberated and made a conscious choice to create a strict liability crime. *See, e.g.*, United States v. Balint, 258 U.S. 250, 254 (1922) ("Congress weighed the possible injustice of subjecting an innocent seller to a penalty against the evil of exposing innocent purchasers to danger from the drug, and concluded that the latter was the result preferably to be avoided."); United States v. Dotterweich, 320 U.S. 277, 284–85 (1943) ("Hardship there doubtless may be under a statute which thus penalizes the transaction though consciousness of wrongdoing be totally wanting. Balancing relative hardships, Congress has preferred to place it upon those who have at least the opportunity of informing themselves of the existence of conditions imposed for the protection of consumers before sharing in illicit commerce, rather than to throw the hazard on the innocent public who are wholly helpless."). Although this is a doubtful proposition to begin with, the moral stakes are too high to leave such matters to guessing whether Congress truly intended to create a strict liability offense or, more likely, in the rush to pass legislation simply neglected to consider the issue.
34. For further explanation of the mistake of law defense, see Edwin Meese III & Paul J. Larkin, Jr., *Reconsidering the Mistake of Law Defense*, 102 J. Crim. L. & Criminology 725 (2013), *available at* http://scholarlycommons.law.northwestern.edu/jclc/vol102/iss3/7/; Paul J. Larkin, Jr., *The Need for a Mistake of Law Defense as a Response to Overcriminalization*, The Heritage Found. Legal Memorandum No. 91 (Apr. 11, 2013), *available at* http://www.heritage.org/research/reports/2013/04/the-need-for-a-mistake-of-law-defense-as-a-response-to-overcriminalization. For other examples of unnecessary regulatory offenses, *see* Meese & Larkin, *supra* at 747–48 n.115.