The Heritage Foundation

LEGAL MEMORANDUM

No. 146 | FEBRUARY 12, 2015

The Perils of Overcriminalization

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Abstract

Overcriminalization is a serious problem that has led to questionable prosecutions and injures the public interest. Thousands of criminal laws are scattered throughout the federal criminal code, and hundreds of thousands of regulations are supposed to implement those laws. In addition, the whole notion of consciousness of wrongdoing in the criminal law has been obscured. Because prosecutors have no incentive to change a system that rewards their excesses, revisions may have to come from Congress—itself the source of much of the problem, both in the laws it passes and in the standards it uses to measure prosecutorial success. If we are to take pride in the claim that we are a nation governed by law, the criminal law must be sensible and accessible, not simply a trap for the unwary.

What has happened to federal criminal law in recent decades? Several former senior Department of Justice officials have expressed their concern with the path we have taken,[1] along with the American Bar Association,[2] numerous members of the academy,[3] journalists,[4] and other organizations like The Heritage Foundation.[5] We agree with their considered opinion that overcriminalization is a serious problem and needs to be remedied before it further worsens the plight of the people tripped up by it and further injures the public interest.

To begin with, the sheer number of federal laws that impose criminal penalties has grown to an unmanageable point. The Department of Justice and American Bar Association have been unable to tally the correct number.[6]

Key Points

- The number of federal laws that impose criminal penalties has become unmanageable. Even the Department of Justice and American Bar Association have been unable to tally the correct number.
- Overcriminalization is encouraged by statutes and regulations, efforts to achieve institutional reform through prosecutions rather than legislation.
- One possible reform would be a statute requiring proof of guilty knowledge in any criminal prosecution unless Congress has legislated specifically to the contrary.
- Administrative agencies could be required to list and make generally available all regulations with potential criminal penalties, with Congress required to ratify any such regulation before it can provide the basis for a criminal prosecution.
- Congress should adopt a general, across-the-board defense of mistake of law, requiring that a defendant be acquitted if he can prove by a preponderance of evidence that he believed reasonably that what he did was not a crime.

This paper, in its entirety, can be found at **http://report.heritage.org/lm146**

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Proliferation of Federal Crimes

The Congressional Research Service reportedly has been unable to come up with a definitive total of federal criminal laws; the nearest they could come was to say they number in the thousands.[7] They are by no means confined to the federal criminal code—Title 18, itself a weighty volume—but are scattered among the laws contained in the 51 titles or subject-matter volumes of the federal code and the hundreds of thousands of regulations that are supposed to implement those laws.[8] The result is that there are more criminal laws than anyone could know.

Indeed, federal crimes are not confined to offenses against the domestic laws of the United States. Under the Lacey Act, it is a crime to import into the United States animals or plants gathered in violation of the laws of the countries from whence they came.[9]

In a sense, you can understand such a law from the standpoint of a conservationist who wishes to guard against the extinction of species of animals or destruction of the world's forests. But one result of that seemingly well-meaning legislative effort was a raid by federal agents on the premises of the Gibson Guitar Company for importing wood for guitar frets that was allegedly exported in violation of the

1. *See, e.g.*, Edwin Meese III, *Big Brother on the Beat: The Expanding Federalization of Crime*, 1 Tex. Rev. L. & Pol. 1 (1997); Edwin Meese III, *Overcriminalization in Practice: Trends and Recent Controversies*, 8 Seton Hall Circuit Rev. 505 (2012); George J. Terwilliger III, *Under-Breaded Shrimp and Other High Crimes: Addressing the Over-Criminalization of Commercial Regulation*, 44 Am. Crim. L. Rev. 1417 (2007); Dick Thornburgh, *The Dangers of Over-Criminalization and the Need for Real Reform: The Dilemma of Artificial Entities and Artificial Crimes*, 44 Am. Crim. L. Rev. 1281 (2007); Larry D. Thompson, *The Reality of Overcriminalization*, 7 J.L. Econ. & Pol'y 577 (2011). *See also*, *e.g.*, *Principles for Revising the Criminal Code*, *Hearing Before the Subcomm. on Crime, Terrorism & Homeland Sec. of the H. Comm. on the Judiciary*, 112th Cong. (2011) (statement of Hon. Edwin Meese III, Chairman, Center for Legal & Judicial Studies, Heritage Foundation); *Criminal Code Modernization and Simplification Act of 2011: Hearing on H.R. 1823, Before the Subcomm. on Crime, Terrorism & Homeland Sec. of the H. Comm. on the Judiciary*, 112th Cong. (2011) (statement of Hon. Dick Thornburgh, Counsel, K & L Gates).
2. *See* ABA Task Force on the Federalization of Criminal Law, The Federalization of Criminal Law (1998).
3. *See, e.g.*, Douglas Husak. Overcriminalization: The Limits of the Criminal Law (2007); Andrew Ashworth, *Conceptions of Overcriminalization*, 5 Ohio St. J. of Crim. L. 407 (2008); Sara Sun Beale, *The Many Faces of Overcriminalization: From Morals and Mattress Tags to Overfederalization*, 54 Am. U. L. Rev. 747 (2005); Darryl K. Brown, *Can Criminal Law Be Controlled?,* 108 Mich. L. Rev. 971 (2010); Stuart P. Green, *Why It's a Crime to Tear the Tag Off a Mattress: Overcriminalization and the Moral Content of Regulatory Offenses*, 46 Emory L.J. 1533 (1997); Sanford H. Kadish, *The Crisis of Overcriminalization*, 374 Annals Am. Acad. Pol. & Soc. Sci. 157 (1967); Sanford H. Kadish, *Some Observations on the Use of Criminal Sanctions to Enforce Economic Regulations*, 30 U. Chi. L. Rev. 423 (1963); Erik Luna, *Overextending the Criminal Law*, *in* Go Directly to Jail: The Criminalization of Almost Everything (Gene Healy ed., 2004); Ellen S. Podgor, *Overcriminalization: The Politics of Crime*, 54 Am. U. L. Rev. 541 (2005); Paul H. Robinson & Michael T. Cahill, *The Accelerating Degradation of American Criminal Codes*, 56 Hastings L.J. 633 (2005); Stephen F. Smith, *Overcoming Overcriminalization*, 102 J. of Crim. L. & Criminology 537 (2012); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 Mich. L. Rev. 505 (2001).
4. *See, e.g.*, Gary Fields & John R. Emshwiller, *As Federal Crime List Grows, Threshold of Guilt Declines*, Wall St. J., Sept. 27, 2011, http://online.wsj.com/article/SB10001424053111904060604576570801651620000.html; Adam Liptak, *Right and Left Join Forces on Criminal Justice*, N.Y. Times, Nov. 24, 2009, http://www.nytimes.com/2009/11/24/us/24crime.html?_r=0; George F. Will, *Blowing the Whistle on the Federal Leviathan*, Wash. Post, July 27, 2012, http://www.washingtonpost.com/opinions/george-will-blowing-the-whistle-on-leviathan/2012/07/27/gJQAAsRnEX_story.html.
5. *See, e.g.*, Brian W. Walsh & Tiffany M. Joslyn, Heritage Found. & Nat'l Ass'n of Criminal Def. Lawyers, Without Intent: How Congress Is Eroding the Criminal Intent Requirement in Federal Law (2010).
6. *See, e.g.*, Paul J. Larkin, Jr., *Public Choice Theory and Overcriminalization*, 36 Harv. J.L. & Pub. Pol'y 715, 726 (2013).
7. *See Defining the Problem and Scope of Over-Criminalization and Over-Federalization*, Hearing Before the Overcriminalization Task Force of 2013 of the H. Comm. on the Judiciary, 113th Cong. 65 (2013) (statement of Rep. F. James Sensenbrenner, Chair, Overcriminalization Task Force).
8. *See, e.g.*, Larkin, *supra* note 6, at 726–29; John Malcolm, *Criminal Law and the Administrative State: The Problem with Criminal Regulations*, The Heritage Foundation, Legal Memorandum No. 130, at 3 (Aug. 6, 2014).
9. *See, e.g.*, C. Jarrett Dieterle, Note, *The Lacey Act: A Case Study in the Mechanics of Overcriminalization*, 102 Geo. L.J. 1279 (2014); Paul J. Larkin, Jr., *The Dynamic Incorporation of Foreign Law and the Constitutional Regulation of Federal Lawmaking*, 38 Harv. J.L. & Pub. Pol'y 335 (2015); Rachel Saltzman, *Establishing a "Due Care" Standard Under the Lacey Act Amendments of 2008*, 109 Mich. L. Rev. First Impressions 1, 2 (2010); Francis G. Tanczos, Note, *A New Crime: Possession of Wood—Remedying the Due Care Double Standard of the Revised Lacey Act*, 42 Rutgers L.J. 549, 555–58 (2011).

laws of India and Madagascar (the latter, by the way, are not even written in English).[10] It is utterly unreasonable to require anyone to know the laws of every other nation in order to avoid criminal liability.

There have also been questionable prosecutions under domestic federal criminal laws. Consider the case of Lawrence Lewis. Mr. Lewis grew up in difficult circumstances but escaped the fate of two brothers, who died in prison. A blue-collar employee who worked his way up to the position of head engineer at a military retirement home, Lewis was charged with felonious pollution of a navigable waterway, a charge that summons the image of dumping toxic chemicals into a river.[11]

That image, however, has nothing to do with the facts. Mr. Lewis was simply using a facially reasonable procedure—one that he had been instructed to use and had used uneventfully for years—to clean up occasional toilet overflows in the hospice area of the home (caused by adult diapers clogging the pipes) by spraying water from a hose to direct the waste into a sewer that led to a small creek that he believed went to the District of Columbia's publicly owned treatment works but that, unbeknownst to him, emptied into Rock Creek and ultimately into the Potomac River. The federal government charged him with a felony for making a reasonable mistake.

Even setting aside the fact that what goes on alongside the Potomac in Washington makes the occasional runoff from a toilet at a military retirement home seem hygienic by comparison, how could this happen? The Lewis case is an example of the result of a process that started out with good intentions but has taken us far down the road that the old proverb tells us is paved with good intentions.

Before the 20th century, to the extent that there were federal criminal laws, they concerned acts that everyone knew and understood were morally wrong.[12] Accordingly, the old saw that ignorance of the law is no excuse was one that could be uttered seriously and without evoking a sarcastic snicker.

At the beginning of the 20th century, laws were adopted that had the effect of protecting the purity of food, the safety of workers, and other goals included in the rubric of health and safety.[13] Violations of some of those laws were made criminal, and some permitted conviction without a finding of criminal intent: That is, all that had to be proved was that the defendant had done the act. Courts allowed that but said it was permissible only in the kinds of cases that involved protecting the health and safety of the community. The courts' rationale for permitting this departure from usual standards was that the stakes—public health and safety—were so high that protecting public welfare was paramount.[14]

Many may well have reasoned that people whose conduct affected health and safety should be bound to pay particular attention and that if they let their intention flag, it was not unreasonable to hold them to a strict standard of something less than criminal intent. In the process, however, the whole notion of consciousness of wrongdoing in the criminal law was obscured, although the penalties of loss of freedom or property, and moral taint, remained.[15]

10. *Id.*; *see also*, *e.g.*, Paul J. Larkin, Jr., *Gibson Guitar: Settling Away Bad Publicity*, The Heritage Foundation, The Foundry (Aug. 7, 2012), available at http://blog.heritage.org/2012/08/07/gibson-guitar-settling-away-bad-publicity/; Paul Rosenzweig, *Gibson Guitar Plays the Overcriminalization Blues*, The Heritage Foundation, The Daily Signal (Oct. 3, 2011), http://dailysignal.com/2011/10/03/gibson-guitar-plays-the-overcriminalization-blues/.

11. *See*, *e.g.*, Evan Bernick, *Diverted from the Straight and Narrow Path for Diverting Sewage*, The Heritage Foundation, The Daily Signal (July 5, 2013), http://dailysignal.com/2013/07/05/diverted-from-the-straight-and-narrow-path-for-diverting-sewage/.

12. *See*, *e.g.*, Wayne R. LaFave, Criminal Law § 1.3(f) (5th ed. 2010); Livingston Hall & Selig J. Seligman, *Mistake of Law and* Mens Rea, 8 U. Chi. L. Rev. 641, 644 (1940) ("[T]he early criminal law appears to have been well integrated with the mores of the time, out of which it arose as 'custom.'").

13. *See*, *e.g.*, Morissette v. United States, 342 U.S. 246, 253–56 (1952); Francis Bowes Sayre, *Public Welfare Offenses*, 33 Colum. L. Rev. 55 (1933).

14. *See*, *e.g.*, United States v. Park, 421 U.S. 658 (1975) (food safety); United States v. Freed, 401 U.S. 601 (1971) (explosives); United States v. Int'l Minerals & Chem. Corp., 402 U.S. 558 (1971) (hazardous waste); United States v. Dotterweich, 320 U.S. 277 (1943) (pharmaceuticals); United States v. Balint, 258 U.S. 250, 252–53 (1922) (same).

15. *See*, *e.g.*, Lon L. Fuller, The Morality of Law 77 (1969) ("Strict criminal liability has never achieved respectability in our law."); H.L.A. Hart, *Negligence,* Mens Rea*, and Criminal Responsibility*, *in* H.L.A. Hart, Punishment and Responsibility: Essays in the Philosophy of Law 152 (1968) ("[s]trict liability is odious"); Herbert L. Packer, The Limits of the Criminal Sanction 130–31 (1968); Herbert Wechsler, *The Challenge of a Model Penal Code*, 65 Harv. L. Rev. 1097, 1109 (1952) ("The most that can be said for such provisions [prescribing liability without regard to any mental factor] is that where the penalty is light, where knowledge normally obtains and where a major burden of litigation is envisioned, there may be some practical basis for a stark limitation of the issues; and large injustice can seldom be done. If these considerations are persuasive, it seems clear, however, that they ought not to persuade where any major sanction is involved.").

Achieving Institutional Reform Through Prosecution

In addition to the passage of statutes and regulations, another phenomenon that started in the setting of civil litigation but has since spilled over into the criminal law is the practice of bringing prosecutions to achieve institutional reform rather than seeking legislation that would have that end. Litigators in what are referred to loosely as civil rights or civil liberties issues have long known that they could often achieve their goals more quickly and with greater certainty through litigation than through legislation. One obvious example was a Connecticut statute that banned the sale of contraceptives. The state had not enforced the statute for years,[16] but a plaintiff eventually persuaded the Supreme Court that the law violated a constitutional right to privacy.[17]

That practice has now spread to criminal cases. Take, for example, prosecutions for promoting drugs for uses other than those for which the Food and Drug Administration has approved them, even though the targets of the promotion are not laymen but physicians who exercise independent judgment about whether to prescribe a drug or not. The prescribing of a drug for a purpose other than the one for which it was approved is not an offense at all; indeed, physicians may help to make medical progress while curing their patients if they are able to see new uses for pharmaceuticals. Yet promoting drugs for what is called off-label use is a felony.

Peter Gleason, a Maryland psychiatrist who regularly served poor and underserved constituencies, delivered a series of paid lectures at medical conventions describing success he had had with off-label use of certain drugs, and he was prosecuted for doing so. He did not have the resources to fight, so he pleaded guilty to a misdemeanor and paid a small fine. Nonetheless, the guilty plea ruined his medical practice. The Department of Health and Human Services told Dr. Gleason that his conviction excluded him from all medical programs, and virtually all of his patients were on Medicare or Medicaid.[18]

Another defendant in the same case went to trial and prevailed when the U.S. Court of Appeals for the Second Circuit held that the First Amendment protects the right to communicate truthful information about the benefits of pharmaceuticals, even off-label benefits.[19] Dr. Gleason, however, did not benefit from that ruling because his desperation over loss of his practice led to his suicide before the Second Circuit decided the case. The Gleason case is proof that good intentions can go haywire.

Nonprosecution and Deferred Prosecution Agreements

Another factor contributing to the proliferation of criminal regulations has been the advent of nonprosecution and deferred prosecution agreements with corporate defendants. The Department of Justice often uses settlements known as nonprosecution or deferred prosecution agreements to resolve criminal cases. It may seem paradoxical that agreements whereby corporations escape actual prosecution themselves contribute to the efflorescence of criminal laws and proceedings, but the process itself has pernicious results.

Consider the corporation investigated for a possible violation of criminal law. For most corporations, particularly those that are publicly traded, otherwise have a public profile, or do business in a highly regulated industry, a conviction can be crippling,[20] but an indictment alone can also have catastrophic results.[21] As a result, many large corporations negotiate deferred prosecution or nonprosecution agreements that permit them to escape the filing of a criminal charge in return for payment of a sizable penalty as a settlement.

16. *See* Poe v. Ullman, 367 U.S. 497 (1961).
17. *See* Griswold v. Connecticut, 381 U.S. 479 (1965).
18. *See* E-mail from Richard Samp (Dec. 9, 2014).
19. *See* United States v. Caronia, 703 F.3d 147 (2d Cir. 2012).
20. The Arthur Anderson case is the classic example. *See* Arthur Andersen LLP v. United States, 544 U.S. 696 (2005).
21. *See* United States v. Stein, 435 F. Supp. 2d 330, 381–82 (S.D.N.Y.) (noting that "the threat of indictment" can be "a matter of life and death to many companies and therefore a matter that threatens the jobs and security of blameless employees"), 440 F. Supp. 2d 315 (S.D.N.Y. 2006), 495 F. Supp. 2d 390 (S.D.N.Y. 2007), *aff'd*, 541 F.3d 130 (2d Cir. 2008); Christopher A. Wray & Robert K. Hur, *Corporate Criminal Prosecution in a Post-Enron World: The Thompson Memo in Theory and Practice*, 43 Am. Crim. L. Rev. 1095, 1097 (2006) ("[I]ndictment often amounts to a virtual death sentence for business entities.").

The size of these settlements has made both state and federal governments begin to look upon prosecutors' offices, where the interests of justice are supposed to govern, as profit centers. In some jurisdictions, proceeds of those penalties are used in whole or in part by law enforcement agencies to conduct activities or purchase equipment. In virtually all jurisdictions, including the federal government, the dollar value of penalties extracted from corporations is featured by law enforcement agencies and departments as a principal measure of their effectiveness and worth.

Moreover, as pointed out by Matthew Fishbein in the *New York Law Journal*, the very size of many of these settlements has raised the expectation of lay observers that individual defendants will be prosecuted as well; those expectations are then disappointed when no such prosecutions follow.[22] The reason is that corporate settlements do not challenge the government's legal theories or its evidence, but the government is wary of bringing charges against individual defendants because people who stand to lose their freedom often go to trial and prevail when the government's case is tested in court.

The Department of Justice often goes beyond even the extraction of large settlements and has insisted on changes in corporate governance through the imposition of standards or monitors and even changes in corporate personnel as the price of avoiding criminal charges.[23] The Department of Justice makes that demand even though those remedies would not be available as part of a sentence after conviction.[24] To that extent, the running of corporations is taken out of the hands of shareholders and directors and placed instead in the hands of prosecutors.

Proposals for Reform

If these unhappy results of the proliferation of criminal laws and prosecutions are to change, the changes will not come from courts, which have upheld criminal penalties even without a showing of intent against claims of denial of due process.[25] Obviously, prosecutors have no incentive to make changes in a system that rewards their excesses. The changes will have to come from Congress, which itself has been the source of much of the problem, both in the laws it passes and in the standards it uses to measure prosecutorial success.[26]

There have been many proposals for reform, some with merit.

- One is for a statute requiring proof of guilty knowledge in any criminal prosecution unless Congress has legislated specifically to the contrary.

- Another is that administrative agencies be required to list and make generally available in full text all regulations that carry potential criminal penalties, and perhaps that Congress then be required to ratify any such regulation before it can provide the basis for a criminal prosecution.

22. *See* Matthew E. Fishbein, *Why Individuals Aren't Prosecuted for Conduct Companies Admit*, N.Y. L.J. Sept. 19, 2014, http://www.newyorklawjournal.com/id=1202670499295/Why-Individuals-Arent-Prosecuted-for-Conduct-Companies-Admit?slreturn=20141109113951.

23. *See, e.g.*, U.S. Gov't Accountability Office, GAO-09-636T, Corporate Crime: Preliminary Observations on DOJ's Use and Oversight of Deferred Prosecution and Non-Prosecution Agreements 4, 10–11 (2009), http://www.gao.gov/assets/130/122853.pdf; James R. Copland, *The Shadow Regulatory State: The Rise of Deferred Prosecution Agreements*, *in* Civil Justice Report 2012, at 1, 14 (Ctr. For Legal Policy at the Manhattan Inst., 2012); Richard A. Epstein, *Deferred Prosecution Agreements on Trial: Lessons from the Law of Unconstitutional Conditions*, *in* Prosecutors in the Boardroom: Using Criminal Law to Regulate Corporate Conduct 52–57 (Anthony S. Barkow & Rachel E. Barkow eds., 2011).

24. *See* Paul J. Larkin, Jr., *Funding Favored Sons and Daughters: Nonprosecution Agreements and "Extraordinary Restitution" in Environmental Criminal Cases*, 47 Loyola L.A. L. Rev. 1, 27–28 (2014).

25. At the same time, the Supreme Court has never held that an offender can be incarcerated for the commission of a strict liability offense. There is a strong argument that the Constitution does not permit that punishment to be imposed without proof of subjective intent. *See* Paul J. Larkin, Jr., *Strict Liability Offenses, Incarceration, and the Cruel and Unusual Punishments Clause*, 37 Harv. J.L. & Pub. Pol'y 1065 (2014).

26. "Federal prosecutors already operate under an incentive structure that forces them to focus on the statistical 'bottom line.' Statistics on arrests and convictions are the Justice Department's bread and butter. They are submitted to the department's outside auditors, are instrumental in assessing the 'performance' of the U.S. Attorneys' Offices, and are the focus of the department's annual report. As George Washington University Law School professor Jonathan Turley puts it, 'In some ways, the Justice Department continues to operate under the body count approach in Vietnam.... They feel a need to produce a body count to Congress to justify past appropriations and secure future increases.'" Gene Healy, *There Goes the Neighborhood: The Bush–Ashcroft Plan to "Help" Localities Fight Gun Crime*, in Go Directly to Jail: The Criminalization of Almost Everything 105–06 (Gene Healy ed., 2004).

- Finally, Congress should adopt a general, across-the-board defense of mistake of law, requiring that a defendant be acquitted if he can prove by a preponderance of evidence that he believed reasonably that what he did was not a crime.[27]

If we are to take pride in the claim that we are a nation governed by law, the criminal law must be sensible and accessible, not simply a trap for the unwary.

*—**Michael B. Mukasey,** Partner, Debevoise & Plimpton, served as 81st Attorney General of the United States from 2007–2009 and as a judge on the U.S. District Court for the Southern District of New York from 1988–2006. **Paul J. Larkin, Jr.,** is Senior Legal Research Fellow in the Edwin Meese III Center for Legal and Judicial Studies at The Heritage Foundation.*

27. Former U.S. Attorney General Edwin Meese has already urged Congress and state legislatures to adopt a mistake-of-law defense. *See* Edwin Meese III & Paul J. Larkin, Jr., *Reconsidering the Mistake of Law Defense*, 102 J. OF CRIM. L. & CRIMINOLOGY 725, 726–27 (2012).