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Wall Street Journal Exposes Federal Overcriminalization

Posted By [Brian Walsh](#) On July 29, 2011 @ 11:30 am In [Rule of Law](#) | [No Comments](#)

Aspiring inventor [Krister Evertson](#) ^[1] received a two-year sentence for allegedly abandoning materials that he had stored in sealed, stainless-steel containers and thus doing no harm to the environment. Indianapolis 500 champion [Bobby Unser](#) ^[2] was prosecuted and convicted because federal prosecutors *estimated* that he and his snowmobiling companion wandered into a national wilderness area when they were fighting for their very lives, stranded for 2 days in a Rocky Mountain high-country blizzard. And federal officials [prosecuted and convicted](#) ^[3] two arrowhead-collecting hobbyists, 66-year-old Eddie Leroy Anderson and his son, who *unsuccessfully* spent time looking for arrowheads. Unfortunately for the Andersons, it a crime (one of the tens of thousands of federal criminal offenses on the books) even *to attempt* to remove "archaeological resources" from public lands.

These are some of the shocking real-life stories featured in a must read Wall Street Journal [investigative article](#) ^[4] on the growing problem of overcriminalization. The article sounds an alarm for all Americans, who should be concerned that average, hard-working citizens who have no intention of breaking the law are being convicted based on poorly-drafted laws criminalizing conduct that almost no one would suspect is illegal.

The Journal chronicles several cases similar to the Andersons' and makes it quite clear that the laws under which these Americans were prosecuted and punished are not anomalies.

"The Andersons are two of the hundreds of thousands of Americans to be charged and convicted in recent decades under federal criminal laws – as opposed to state or local laws – as the federal system has dramatically expanded its authority and reach."

Theoretically, sheer numbers alone might not be a problem. But "[a]s federal criminal statutes have ballooned, it has become increasingly easy for Americans to end up on the wrong side of the law."

Based in part on a [Heritage Foundation report by law professor John S. Baker, Jr.](#) ^[5], the Journal states that the number of federal criminal laws exploded from dozens at the beginning of the 20th century to over 4,500 today. And this does not include a count of the crimes in federal regulations. Citing a Department of Justice spokeswoman, the article reports that the total number of federal crimes is so large that it cannot be quantified.

But it is not just the raw numbers: The worst problem with a large percentage of these criminal laws is that they are flawed. For example, far too many "don't require prosecutors to prove criminal intent, eroding a bedrock principle in English and American law." Laws with this flaw "set a lower bar for conviction than in the past." Further, the Journal points out that many federal criminal laws duplicate existing state laws governing the same conduct, and many cover matters that should be addressed only by a civil penalty, if at all.

Disappointingly, despite the abuses documented by the Journal ([and](#) ^[6] [several](#) ^[7] [others](#) ^[8]), the Justice Department officials interviewed for the article seem to have defended every example of overcriminalization about which they were questioned. Given the sorry state of federal criminal law, this leads one to wonder who at the Justice Department's helm is focused on increasing justice rather than maximizing convictions.

The WSJ does points out a couple of bright spots. One is that a few of the nation's leading jurists are beginning to reexamine and rein in the problems of overcriminalization. Supreme Court Justices Alito, Kennedy, and Scalia have questioned the seemingly unlimited expanse, and unprincipled expansion, of certain federal criminal laws or enforcement practices. So have judges in the lower federal courts such as Ninth Circuit Judge Alex Kozinski, Seventh Circuit Judge Richard Posner, and United States District Court for the Southern District of New York Judge Lewis Kaplan.

The other bright spot the Journal identifies is that a broad range of individuals and organizations are now fighting overcriminalization. Heritage's Ed Meese is a key leader of these efforts, but the leaders

also include scholars and advocates at the National Association of Criminal Defense Lawyers, Cato Institute, and ACLU. We all should be grateful, for as Cato's Tim Lynch is quoted as saying, Americans are just "one misstep away from the nightmare of a federal indictment."

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URLs in this post:

- [1] Krister Evertson: <http://www.heritage.org/multimedia/video/2010/05/krister-evertson-a-victim-of-overcriminalization-tells-his-story>
- [2] Bobby Unser: <http://blog.heritage.org/2011/03/14/bobby-unser-vs-the-feds/>
- [3] prosecuted and convicted: <http://www.idahoreporter.com/2010/father-and-son-plead-guilty-to-illegally-digging-up-arrowheads/>
- [4] investigative article: <http://online.wsj.com/article/SB10001424052748703749504576172714184601654.html>
- [5] Heritage Foundation report by law professor John S. Baker, Jr.: http://s3.amazonaws.com/thf_media/2008/pdf/lm26.pdf
- [6] and: <http://www.amazon.com/One-Nation-Under-Arrest-Prosecutors/dp/0891951342>
- [7] several: <http://www.encounterbooks.com/books/threefelonies/>
- [8] others: <http://www.cato.org/store/books/go-directly-jail-criminalization-almost-everything-hardback>

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