

Go Directly to Jail: The Criminalization of Almost Everything

Edited by Gene Healy

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Reviewed by George C. Leef

In the gigantic theater that is American politics, one of the favorite roles for politicians to play is that of the tough guy who is determined to “crack down” on something or other. Such actions are predictably cheered by whatever voting groups the politician wants to curry favor with. An often-heard campaign line is, “Vote for me and I’ll push legislation to make it a crime to . . .” We already have an enormous criminal code, but adding one more thing to it serves to show the voters that the pol really means business.

Like most features of our politics this mania for the criminalization of behavior is harmful. As is usual with government, the unseen problems dwarf the seen benefits. The more we criminalize conduct that voters dislike, the more we put people who never intended any wrongdoing into the quicksand of criminal prosecution. With legions of prosecutors who are more interested in making names for themselves than in doing justice, Americans are living in an increasingly dangerous country.

That’s the point of *Go Directly to Jail*, edited by lawyer and Cato Institute writer Gene Healy. “At one time,” he writes, “the common law doctrines of mens rea (“guilty mind”) and actus reus (“guilty act”) cabined the reach of criminal sanctions, but those protections have eroded dramatically over the past 50 years. Today it’s possible to send a person to prison without showing criminal intent or even a culpable act. . . .”

Consider this case. Edward Hanousek worked for a railroad in Alaska. One day, a backhoe operator working under his supervision accidentally ruptured an oil pipeline while removing some boulders from the tracks. Hanousek, who wasn’t even at the site of the accident, was nevertheless prosecuted for having violated the Clean Water Act, which makes it a crime if a “negligent failure to supervise” leads to any discharge that might pollute water. Hanousek was convicted for someone else’s accident. His case was appealed to the Supreme Court, which declined to review this legal abomination. Americans must now worry about criminal prosecution for all sorts of conduct that a few decades ago hardly anyone would have thought should be illegal.

The book has six chapters by different authors. Erik Luna’s “Overextending the Criminal Law” explores the unfortunate tendency for politicians to use criminal sanctions as an all-purpose tool of social control. It’s impossible to disagree with Luna’s assessment that “When the criminal sanction is used for conduct that is widely viewed as harmless . . . the moral force of the penal code is diminished, possibly to the point of near irrelevance. . . .”

In the second essay, “The New Criminal Classes: Legal Sanctions and Business Managers,” James V. DeLong observes that the spread of criminalization means that

nearly anyone can fall victim to prosecution for some regulatory crime, and often the defendant finds that the law accords him a lower degree of protection for his rights than do old-fashioned criminals who rob and murder. The Fourth and Fifth Amendments have been subverted in the crusade to send people like Ed Hanousek to jail.

Legal scholar Timothy Lynch, in “Polluting Our Principles: Environmental Protection and the Bill of Rights,” shows that the incentives for environmental regulators to produce “results” (that is, convictions to prove how dedicated they are to safeguarding the environment) lead to terrible travesties of justice. The vagueness of many environmental regulations gives the enforcers almost unfettered discretion to prosecute businesspeople. Lynch notes that individuals accused of environmental crimes are often subjected to procedures that the courts would not tolerate for normal criminal defendants. He calls it the “environmental exception to the Bill of Rights.”

Galen Institute president Grace-Marie Turner discusses criminalization in medical care, specifically, the dangerous trend toward criminal prosecution in the futile crusade against Medicare and Medicaid fraud. An especially frightening feature of the law here is that the enforcers get to keep a percentage of the fines they impose.

Editor Healy contributes a chapter on the rampant federalization of crime. To provide just one example, President Bush’s Project Safe Neighborhoods has led to a surge in federal prosecutions for illegal firearms possession. Healy writes that this law “violates the Tenth Amendment, clogs the federal courts, encourages a mindless zero tolerance policy and opens the door for every special interest group in Washington to politicize criminal justice policy.”

The book’s final chapter, again by Erik Luna, examines the nation’s sorry experience with federal sentencing guidelines, which he argues “saps moral judgment from the process of punishment.”

The U.S. is off track in many, many ways. *Go Directly to Jail* leaves no doubt that our legal system is careening out of control and poses a grave threat to our liberty.