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## Overcriminalization: Sacrificing the Rule of Law in Pursuit of “Justice”

*The Honorable Dick Thornburgh*

**Abstract:** *Those who commit real crimes should be prosecuted and appropriately punished. But the question of what kind of conduct is deserving of criminal punishment has become increasingly muddled in federal law. Although numerous ridiculous crimes that punish relatively trivial wrongs have crept into federal law, the greater danger comes from serious laws that are vague and overbroad. Further, Congress has authorized federal agencies to create tens of thousands of additional crimes that trap Americans by punishing obscure conduct. Federal agencies and prosecutors with inadequate oversight make overly aggressive application of these laws to target Americans who are often unaware their conduct is now illegal. Congress should complete the task it undertook in the 1970s and 1980s to shape the thousands of criminal offenses into a rational, orderly Federal Criminal Code; end its practice of authorizing unelected agency officials to create criminal offenses and penalties; and eliminate laws that rely on tort-law doctrines to allow one person to be punished for the criminal acts of another. The Department of Justice, as well, must exercise more vigorous supervision of its prosecutors and their charging decisions. As part of The Heritage Foundation’s “Preserve the Constitution” series, former U.S. Attorney General Dick Thornburgh explains what should be done to reestablish federal criminal enforcement on its proper moorings in the rule of law.*

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It is a great privilege to speak to you about the perils of overcriminalization in our society today, and of the need to undertake specific reforms in this area. I have served on both sides of the aisle in criminal cases

### Talking Points

- Those who commit *real* crimes should be held responsible and punished accordingly. In federal law, however, the line has frequently become blurred between what conduct constitutes a crime and what conduct does not.
- Today there are so many federal crimes—estimated at 4,450 in federal statutes alone—that legal scholars, researchers, and the Department of Justice cannot determine their exact number. Yet ordinary Americans are, quite unreasonably, expected to be aware of everything they must do to avoid becoming a federal criminal.
- Congress has essentially delegated its constitutional authority to regulate crime to federal prosecutors, who now have immense latitude to construe the often vague, overly broad language of federal criminal law.
- To rein in overcriminalization’s injustices, Congress must also rein in the continuing proliferation of regulatory offenses carrying criminal penalties.
- Conduct that Congress desires to prohibit but that is not truly criminal should be punished with civil or administrative penalties.

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during my career—as a federal prosecutor for many years and, more recently, as a defense attorney involved in proceedings adverse to the U.S. Department of Justice. These experiences provide me, I believe, with a balanced view of the issues in today's criminal justice system and can, I hope, provide some insights and ideas to deal with the growing challenge of overcriminalization. Because of the serious corporate scandals we have observed over the past several years, and the recent financial crisis, the public's attention has been particularly focused on potential criminal sanctions for wrongdoers in the business and financial communities. It is therefore an especially appropriate time to assess the impact of our criminal laws and consider proposals for reform.

The problem of overcriminalization is truly one of those issues on which a wide variety of constituencies can agree—witness the broad support for reform from such varied groups as The Heritage Foundation, the Washington Legal Foundation, the National Association of Criminal Defense Lawyers, the American Bar Association, the Cato Institute, the Federalist Society, and the American Civil Liberties Union. These groups all share a common goal: to have criminal statutes that punish *actual* criminal acts and that do not seek to criminalize conduct better dealt with through civil and regulatory remedies.

## The Criminal Sanction

The criminal sanction is a unique one in American law, and the stigma, public condemnation, and potential deprivation of liberty that go along with that sanction demand, I suggest, that it should be utilized only when specific mental states and behaviors are present.

By way of background, let us briefly remind ourselves of some fundamentals of the criminal law. Traditional criminal law encompasses various acts, which may or may not cause results, and various

mental states, which indicate volition or awareness on the part of the actor. These factors are commonly known as the requirements of *mens rea* and *actus reus*, or an “evil-meaning mind [and] an evil-doing hand.” Most efforts to codify the criminal law of common-law jurisdictions employ a variety of requisite mental states—usually describing purpose, knowledge, reckless indifference to a consequence, and, in a few instances, negligent failure to appreciate a risk.

With respect to what has now become known as “overcriminalization,” objections are focused on those offenses that go beyond these traditional, fundamental principles and are grounded more on what were historically civil or regulatory offenses that lack the mental-state requirements historically needed for a criminal conviction. The reason for this focus is evident: Without a clear *mens rea* requirement, citizens may not be able to govern themselves in a way that assures them of following the law, and many actors may be held criminally responsible for actions that do not require a wrongful intent. Such “strict” liability in a criminal action does have a long history—almost three thousand years ago, an Emperor of China decreed that it would be a criminal offense, punishable by death, for a governor of a province to permit the occurrence, within the province, of an earthquake. Even our own imperial Congress has not gone that far...yet!

Our Congress, however, has not been entirely modest. A 2004 Federalist Society report states that federal statutes provide for over a hundred separate terms to denote the required mental state with which an offense may be committed,<sup>1</sup> and The Heritage Foundation has issued a report stating that 17 of the 91 federal criminal offenses enacted between 2000 and 2007 had no *mens rea* requirement *at all*.<sup>2</sup> Such trends must not continue, and suggested legislative reform in the nature of a default *mens rea* requirement when a statute does not require it is worthy of consideration.

1. JOHN S. BAKER, JR., THE FEDERALIST SOCIETY FOR LAW & PUBLIC POLICY STUDIES, MEASURING THE EXPLOSIVE GROWTH OF FEDERAL CRIME LEGISLATION 10 (2004), available at <http://fedsoc.server326.com/Publications/practicingroupnewsletters/criminallaw/crimreportfinal.pdf>.
2. John S. Baker, Jr., *Revisiting the Explosive Growth of Federal Crimes*, THE HERITAGE FOUNDATION L. MEMO. No. 26, June 16, 2008, at 6-7, available at [http://s3.amazonaws.com/thf\\_media/2008/pdf/lm26.pdf](http://s3.amazonaws.com/thf_media/2008/pdf/lm26.pdf).

## The Vast Scope of Federal Criminalization

Many scholars, as well as the Department of Justice, have tried to count the total number of federal crimes, but only well-informed estimates have emerged. The current estimate is a staggering 4,450 statutory crimes on the books with a projected additional 50 per year in years to come. If legal scholars and researchers, and the Department of Justice itself, cannot accurately count the number of federal crimes, how can we expect ordinary American citizens to be able to be aware of them? One criminal law expert stated that we can no longer repeat with confidence the long-standing legal maxim that “ignorance of the law is no excuse,” because the average American citizen cannot know how many criminal laws there actually are. That is why, as my friend and fellow former Attorney General Ed Meese has stated, “Overcriminalization should concern everyone in America, both as citizens and as potential accused.”<sup>3</sup>

Although I could probably spend my whole time citing the often-mentioned, truly absurd examples of federal overcriminalization of trivial wrongs, such as using without authorization the characters of “Smokey Bear” or “Woodsy Owl,” or the latter’s slogan “Give a Hoot, Don’t Pollute,” or even the lesser known but equally absurd prohibition that you cannot “willfully injure” a shrub or a sink in any public building, ground, or park in the District of Columbia.<sup>4</sup> No matter how absurd, the dangers of overcriminalization for more serious offenses are real and impact real people.

Make no mistake: When individuals commit crimes they should be held responsible and appropriately punished. The line has become blurred, however, on what conduct constitutes a crime, particularly in corporate criminal cases, and this line needs to be redrawn and re-clarified. Over-breadth in the criminal law can lead to a near-paranoid corporate culture that is constantly looking over its

shoulder for the “long arm of the law” and wondering whether a good-faith business decision will be interpreted as a crime by an ambitious prosecutor armed with an overly broad criminal offense. Perhaps even more significant is the impact on corporate innovation—if an idea or concept is novel or beyond prior models, a company may stifle the idea if it is concerned about potential criminal penalties. This stifling may render some companies unable to compete in a global marketplace just to ensure compliance with domestic laws—certainly a “cutting off of the nose to spite the corporate face.”

The unfortunate reality is that Congress has effectively delegated some of its important authority to regulate crime in this country to federal prosecutors, who are given an immense amount of latitude and discretion to construe federal crimes, and not always with the clearest motives or intentions. As one commentator aptly noted, “To put it bluntly, beat cops do not become homicide detectives by helping little old ladies across the street, and district attorneys are not reelected for dismissing cases or shrugging off acquittals.”<sup>5</sup> However, there may be some hope—in a recent interview with the *Financial Times*, the United States Attorney for the Southern District of New York responded to the perceived lack of criminal cases resulting from the financial crisis, by simply stating that “not every case is a criminal case,” as he announced the creation of a civil enforcement unit in his jurisdiction.<sup>6</sup> It is to be hoped that other federal prosecutors will take heed of this development.

## Rule of Law, Abuse of Law

A striking recent example of overcriminalization is the “honest services” mail and wire fraud statute, 18 U.S.C. §1346, which was addressed recently by the U.S. Supreme Court in the high-profile *Skilling v. United States* and *Black v. United States* decisions.<sup>7</sup> This statute was subject to scrutiny because of its

3. Edwin Meese III, *Introduction to ONE NATION UNDER ARREST* x, xix (Paul Rosenzweig & Brian W. Walsh, eds., 2010).
4. 18 U.S.C. § 711 (“‘Smokey Bear’ character or name”); 18 U.S.C. § 711a (“‘Woodsy Owl’ character, name, or slogan”); 40 U.S.C. § 8103 (specifying criminal punishment for anyone injuring the District of Columbia’s shrubs, sinks, and other objects).
5. Erik Luna, *Overcriminalization: The Politics of Crime*, 54 AM. U. L. REV. 703, 723 (2005).
6. Jean Eaglesham, *Prosecutor launches new front in the war on Wall St fraud*, FIN. TIMES, Sept. 8, 2010.

expansion from traditional public corruption cases to private acts in business or industry that are deemed to be criminal almost exclusively at the whim of the individual prosecutor who is investigating the case, becoming essentially a “moral compass” statute. The Supreme Court rejected the government’s expansive view of the statute and narrowed the statute to its core purpose—prosecuting kick-back and bribery schemes. Interestingly, the Court went a step further and specifically cautioned Congress regarding creating further “honest services” statutes, stating that “Congress would have to employ standards of sufficient definiteness and specificity to overcome due process concerns.” Another commendable decision came recently from a United States District Judge who dismissed an indictment and reminded the government of the court’s purpose: “The Court is not an arbiter of morality, economics, or corporate conduct. Rather, it is an arbiter of the law.”<sup>8</sup> Now, *that* signals a welcome return to the rule of law.

As I noted, the issue of overcriminalization is especially poignant in corporate crime. In 1909, the Supreme Court held in a railroad regulation case<sup>9</sup> that a corporation could be held criminally liable for the acts of its agents under the civil tort law theory of what is known as *respondeat superior*, or, in non-legalese, “the superior must answer,” meaning that an employer is responsible for the actions employees perform within the course of their employment.

Since 1909, business entities have routinely been held *criminally* liable for the acts of their employees as well. In recent history, one of the more significant cases is the prosecution of international accounting firm Arthur Andersen, in which the company effectively received a death sentence based on the acts of isolated employees over a limited period of time. As this case illustrates, this is not a partisan issue—Arthur Andersen was prosecuted under a Republican administration.

In 2007, I gave a speech at the Georgetown Law Center regarding overcriminalization. I mentioned the Arthur Andersen case and referenced a political cartoon, published after the Supreme Court reversed the company’s conviction.<sup>10</sup> In the cartoon, a judge in a black robe was standing by the tombstone of Arthur Andersen and said, “Oops. Sorry.” That apology didn’t put the tens of thousands of partners and employees of that entity back to work. Something like this simply cannot be repeated, and reform is needed to make sure there are no such future miscarriages of justice.

### Restoring Justice

What can be done to curb these abuses? I have suggestions for both the long term and the short term. First, I have advocated for many years that we adopt a true Federal Criminal Code. While this may not be the first thing that comes to mind when analyzing the issues of concern in the criminal justice system, it is an important one that should be undertaken without delay. As I mentioned, there are now some 4,450 or more separate criminal statutes—a hodgepodge scattered throughout 50 different titles of the United States Code without any coherent sense of organization. As one distinguished commentator noted, “[O]ur failure to have in place even a modestly coherent code makes a mockery of the United States’ much-vaunted commitments to justice, the rule of law, and human rights.”<sup>11</sup>

There is a template in existence, the American Law Institute’s Model Penal Code, that can act as a sensible start to an organized criminal code. The Model Penal Code has formed the basis for many efforts to establish state criminal codes in this country. What is needed is a clear, integrated compendium of the totality of the federal criminal law, combining general provisions, all serious forms of penal offenses, and closely related administrative provisions into an orderly structure, which would be, in short, a true Federal Criminal Code.

7. *Skilling v. United States*, 130 S. Ct. 2896 (2010); *Black v. United States*, 130 S. Ct. 2963 (2010).

8. *United States v. Radley*, 659 F. Supp. 2d 803, 820 (S.D. Tex. 2009).

9. *New York Cent. & Hudson R.R. v. United States*, 212 U.S. 481 (1909).

10. *Arthur Andersen LLP v. United States*, 544 U.S. 696, 698 (2005).

11. Herbert Wechsler, *A Thoughtful Code of Substantive Law*, 45 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 524, 526 (1955).



A commission should be constituted, perhaps in connection with Senator James Webb's proposed National Criminal Justice Commission Act, which passed the House of Representatives in July 2010, to review federal criminal law, collect all similar criminal offenses in a single chapter of the United States Code, consolidate overlapping provisions, revise those with unclear or unstated *mens rea* requirements, and consider other overcriminalization issues. This is not a new idea—Congress has tried in the past to reform federal criminal law, most notably through the efforts of the “Brown Commission” in 1971. The legislative initiatives based on that commission's work failed despite widespread recognition of their worth. As Assistant Attorney General in charge of the Criminal Division at the time, I well remember the disappointment felt among Department of Justice leadership over the inability to focus the attention of legislative leaders on this important issue. And thus it has been since. It is therefore doubly incumbent on this Congress to make sense out of our laws and make sure that average ordinary citizens can be familiar with what conduct actually constitutes a crime in this country.

Second, Congress needs to rein in the continuing proliferation of criminal regulatory offenses. Regulatory agencies routinely promulgate rules that impose criminal penalties which have not been enacted by Congress. Indeed, criminalization of new regulatory provisions has become seemingly mechanical. One estimate is that there are a staggering 300,000 federal regulatory violations that may be punished with criminal penalties.<sup>12</sup>

This tendency, together with the lack of any congressional requirement that the legislation pass through judiciary committees, has led to an evolution of a new and troublesome catalogue of criminal offenses. Congress should not delegate such an important function to agencies.

In this area, one solution that a renowned expert and former colleague from the Department of Jus-

tice, Ronald Gainer, has advocated is to enact a general statute providing administrative procedures and sanctions for all regulatory breaches. It would be accompanied by a general provision removing all present criminal penalties from regulatory violations, notwithstanding the language of the regulatory statutes, except in two instances. The first exception would encompass conduct involving significant harm to persons and property interests, and to those institutions designed to protect persons and property interests—i.e., the traditional reach of criminal law. The second exception would permit criminal prosecution, not for breach of the remaining regulatory provisions, but for a pattern of intentional, repeated breaches. This relatively simple reform could provide a much sounder foundation for the American approach to regulatory crime than currently exists.

Third, Congress should also consider whether *respondeat superior* should be the standard for holding companies criminally responsible for acts of its employees. The Department of Justice has issued a succession of memoranda from Deputy Attorneys General during the past 10 years, setting forth ground rules for when a corporation should be charged criminally for the acts of its employees. It should be noted that in the most recent memorandum, the government stated that “it may not be appropriate to impose liability upon a corporation, particularly one with a robust compliance program in place, under a strict *respondeat superior* theory for the single isolated act of a rogue employee.”<sup>13</sup> A law is needed to ensure uniformity in this critical area so that the guidelines and standards do not continue to change at the rate of four times in 10 years. Indeed, if an employee was truly a “rogue,” or acting in violation of corporate policies and procedures, Congress can protect a well-intentioned and otherwise law-abiding corporation by enacting a law that specifically holds the individual rather than the corporation responsible for the criminal conduct

12. John C. Coffee, Jr., *Does “Unlawful” Mean “Criminal”?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. REV. 193, 216 (1991).

13. Memorandum from Mark Filip, Deputy Attorney General, U.S. Department of Justice, to Heads of Department Components and United States Attorneys 5 (Aug. 28, 2008), available at <http://www.justice.gov/dag/readingroom/dag-memo-08282008.pdf>.

without subjecting the corporation to the whims of any particular federal prosecutor.

One other aspect of overcriminalization should not escape our notice. A former colleague of mine at the Justice Department noted that there is something self-defeating about a society that seeks to induce its members to abhor criminality, but simultaneously brands as “criminal” not only those engaged in murder, rape, and arson, but also those who dress up as Woodsy Owl, sell mixtures of two kinds of turpentine, file forms in duplicate rather than triplicate, or post company employment notices on the wrong bulletin boards. The appropriate moral stigma of criminal conviction is dissipated by such enactments, and the law loses its capacity to reinforce moral precepts and to deter future misconduct. Our criminal sanctions should be reserved for only the most serious transgressions. To do otherwise causes disrespect for the law.

While nearly all of the remedies I have suggested today would require legislative action, there are some steps which could be taken by the Department of Justice itself to aid in the process of reducing overcriminalization. Let me mention just three.

First, the Justice Department should require pre-clearance by senior officials of novel or imaginative prosecutions of high-profile defendants. One of Supreme Court Justice Antonin Scalia’s major objections to the “honest services” fraud theory, for example, was its propensity to enable “abuse by headline-grabbing prosecutors in pursuit of [those]

who engage in any manner of unappealing or ethically questionable conduct.”<sup>14</sup> A second look before bringing any such proposed charges would, I suggest, be very much in order.

Second, a revitalized Office of Professional Responsibility should help ensure that “rogue” prosecutors are sanctioned for their overreaching in bringing charges that go well beyond the clear intent of the statute involved.

Finally, of course, the Justice Department should actively support, as a matter of policy, the effort to enact a true Federal Criminal Code.

### Conclusion

Let me summarize. Reform is needed. True crimes should be met with true punishment. While we must be “tough on *real* crime,” we must also be intellectually honest. Those acts that are not criminal should be countered with civil or administrative penalties to ensure that true criminality retains its importance and value in our legal system. The Department of Justice must with greater vigor “police” those empowered to prosecute. These are changes that truly merit our attention if we are to remain a government of laws and not of men. And they merit attention by all three branches of government—the legislative, the executive, and the judicial—if productive change is to be forthcoming.

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14. *Sorich v. United States*, 129 S. Ct. 1308, 1310 (U.S. 2009) (Scalia, J., dissenting from denial of cert.).