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Eric Garner, criminalized to death

By [George F. Will](#)

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By history's frequently brutal dialectic, the good that we call progress often comes spasmodically, in lurches propelled by tragedies caused by callousness, folly or ignorance. With a New York grand jury's as yet inexplicable and probably inexcusable [refusal to find criminal culpability in Eric Garner's death](#) on a Staten Island sidewalk, the nation might have experienced sufficient affronts to its sense of decency. It might at long last be ready to stare into the abyss of its criminal justice system.

It will stare back, balefully. Furthermore, the radiating ripples from the nation's overdue reconsideration of present practices may reach beyond matters of crime and punishment, to basic truths about governance.

Garner died at the dangerous intersection of something wise, known as "[broken windows](#)" policing, and something worse than foolish: decades of [overcriminalization](#). The policing applies the wisdom that where signs of disorder, such as broken windows, proliferate and persist, a general diminution of restraint and good comportment takes hold. So, because minor infractions are, cumulatively, not minor, police should not be lackadaisical about offenses such as jumping over subway turnstiles.

Overcriminalization has become a national plague. And when more and more behaviors are criminalized, there are more and more occasions for police, who embody the state's monopoly on legitimate violence, and who fully participate in humanity's flaws, to make mistakes.

Harvey Silverglate, a civil liberties attorney, titled his 2009 book "[Three Felonies a Day](#)" to indicate how easily we can fall afoul of the United States' metastasizing body of criminal laws. Professor [Douglas Husak](#) of Rutgers University says that approximately 70 percent of American adults have, usually unwittingly, committed a crime for which they could be imprisoned. In his 2008 book, "[Overcriminalization: The Limits of the Criminal Law](#)," Husak says that more than half of the 3,000 *federal* crimes — itself a dismaying number — are found not in the Federal Criminal Code but in numerous other statutes. And, by one estimate, at least 300,000 federal regulations can be enforced by agencies wielding criminal punishments. Citing Husak, professor [Stephen L. Carter](#) of the Yale Law School, like a hammer driving a nail head flush to a board, forcefully underscores the moral of this story:

Society needs laws; therefore it needs law enforcement. But "overcriminalization matters" because "making an offense criminal also means that the police will go armed to enforce it." The job of the police "is to carry out the legislative will." But today's political system takes "bizarre

delight in creating new crimes” for enforcement. And “every act of enforcement includes the possibility of violence.”

Carter continues: “It’s unlikely that the New York Legislature, in creating the crime of selling untaxed cigarettes, imagined that anyone would die for violating it. But a wise legislator would give the matter some thought before creating a crime. Officials who fail to take into account the obvious fact that the laws they’re so eager to pass will be enforced at the point of a gun cannot fairly be described as public servants.”

Garner lived in part by illegally selling single cigarettes untaxed by New York jurisdictions. He lived in a progressive state and city that, being ravenous for revenue and determined to save smokers from themselves, have raised to [\\$5.85 the combined taxes on a pack of cigarettes](#). To the surprise of no sentient being, this has created [a black market in cigarettes](#) that are bought in states that tax them much less. Garner died in a state that has a [Cigarette Strike Force](#).

He lived and died in a country with about [5 percent](#) of the world’s population but [25 percent of its prisoners](#). In 2012, [one of every 108 adults was behind bars](#), many in federal prisons containing about 40 percent more inmates than they were designed to hold.

Most of today’s 2.2 million prisoners will be coming back to their neighborhoods, and few of them will have been improved by the experience of incarceration. This will be true even if they did not experience the often deranging use of prolonged solitary confinement, which violates the Eighth Amendment’s ban on “cruel and unusual punishments” and is, to put things plainly, torture.

The scandal of mass incarceration is partly produced by the frivolity of the political class, which uses the multiplication of criminal offenses as a form of moral exhibitionism. This, like Eric Garner’s death, is a pebble in the mountain of evidence that American government is increasingly characterized by an ugly and sometimes lethal irresponsibility.