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Overextending the Criminal Law

by Erik Luna

Nothing is certain, Ben Franklin once said, but death and taxes. Had he lived during our time, Franklin might have added a few other certainties—and almost assuredly among them would have been the concept of "crime." By this, I am not referring to the rate of violence and unlawful deprivations of property or privacy in the United States, which ebbs and flows from year to year and decade to decade, often coinciding with dips in the economy or spikes in the number of young males in the general population. Instead, it is the troubling phenomenon of continually adding new crimes or more severe punishments to the penal code, criminalizing, recriminalizing, and overcriminalizing all forms of conduct, much of it innocuous, to the point of erasing the line between tolerable and unacceptable behavior.

Where once the criminal law might have stood as a well-understood and indisputable statement of shared norms in American society, now there is only a bloated compendium that looks very much like the dreaded federal tax code. The end results can be downright ugly: a soccer mom thrown in jail in a small Texas town for failing to wear a seatbelt; a 12-year-old girl arrested and handcuffed for eating french fries in a Metro station in Washington, DC; and defendants serving 25-year to life sentences in California prisons for, among other things, pilfering a slice of pizza.

These incidents may seem like outliers, the exceptions rather than the rule. And to be sure, every U.S. jurisdiction has on its books a set of crimes and punishments that are incontrovertible, involving acts and attendant mental states that must be proscribed in order to constitute a just society—murder, rape, robbery, arson, and the like. But beyond those so-called common law crimes is a seemingly endless list of behaviors that, at a minimum, do not seem well suited for the penal code and at times appear to fall within a zone of personal liberty that should be outside the state's coercive powers. Moreover, the sheer number of idiosyncratic laws and the scope of discretionary enforcement might give reason to wonder whether the exceptions have become the rule.

Some crimes barely pass the laugh test. New Mexico makes it a misdemeanor to claim that a product contains honey unless it is made of "pure honey produced by honeybees." Florida criminalizes the display of deformed animals and the peddling of untested sparklers, as well as the mutilation of the Confederate flag for "crass or commercial purposes." Pretending to be a member of the clergy is a misdemeanor in Alabama, and Kentucky bans the use of reptiles during religious services. Maine prohibits the catching of crustaceans with anything but "conventional lobster traps,"

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Former Costa Rican president Miguel Angel Rodríguez talks with the famous Peruvian novelist and former presidential candidate Mario Vargas Llosa at "A Modern Vision for Latin America," a Sept. 30 conference sponsored by the International Foundation for Liberty and hosted by Cato. **See p. 19.**

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Colorado makes it a misdemeanor to hunt wildlife from an aircraft, and Texas declares it a felony to trip a horse or “seriously overwork” an animal. In turn, California forbids “three card monte” and, as a general rule, cheating at card games, while it’s a crime in Illinois to camp on the side of a public highway or offer a movie for rent without clearly displaying its rating. Add to those gems countless local offenses, such as playing frisbee on Galveston beaches after being warned by a lifeguard, molesting monarch butterflies in Pacific Grove, California, failing to return library books in Salt Lake City, or annoying birds in the parks of Honolulu.

Less comical but certainly more pervasive and consequential are the so-called vice crimes that have exasperated generations of American libertarians. These offenses are marked by the absence of violence or coercion, with parties engaged in voluntary transactions for desired goods or services. This category would include the possession, sale, or use of illegal drugs; acts of prostitution and other commercialized sexual conduct; transactions involving pornography or allegedly obscene materials; and all kinds of gambling activities. Government has also banned behaviors that are related to vice or seen as precursors, for example, the possession of drug paraphernalia such as pipes and spoons and loitering in public places with the apparent intent to sell drugs or turn tricks. Congress has even considered a bill that would make it a federal crime to throw a party where drugs might be used.

Criminalizing Business

Other growth areas for the penal code include regulatory or business-related offenses and crimes involving misrepresentation and the like. Today’s administrative state has created a massive web of laws concerning trade, labor, product and workplace safety, environmental protection, securities regulation, housing, transportation, and so on, often backed by the criminal sanction. Many of the statutes may make a good deal of sense—for example, prohibiting modern iterations on the common law crime of larceny. Others seem a bit silly, such as the infamous federal crimes of removing mattress tags and the unauthorized use of “Smokey Bear” or “Woodsy Owl.” But many regulatory offenses—filing an inaccurate monitoring report under the Clean Water Act or being in a position of responsibility when an employee violates regulations of the FDA, EPA, SEC, and other acronym agencies—place otherwise honest folks in real jeopardy. As Berkeley law professor Sanford Kadish once noted, some economic crime, such as violations of securities regulations, antitrust statutes, and unfair competition laws, more “closely resembles acceptable aggressive business behavior.” In turn, mail and wire fraud statutes have been expanded to seemingly irrational ends, covering conduct that amounts to little more than breaches of fiduciary duty. In one case, a college professor was convicted of mail fraud for awarding degrees to students who plagiarized others’ work.

Beyond the truly novel are offenses that merely recriminalize or overcriminalize conduct that is already prohibited. Many penal codes contain dozens of provisions covering the same basic crime—assault, theft, sex offenses, arson, and so on—each provision dealing with an allegedly unique scenario but in fact just retreading the same conduct. Politically inspired offenses fall within this category as well, with, for instance, “carjacking” more than well covered by proscriptions on robbery and kidnapping. Penal code machinations have also involved drastic expansions in punishment, most notably the enactment of mandatory minimum sentences for narcotics crimes and anti-recidivist statutes along the lines of “three strikes and you’re out.” And after factoring in various liability-expanding doctrines, such as conspiracy and solicitation, the reach and force of the criminal law and its penalties can be awe inspiring and disconcerting.

None of this is particularly new, as the criminalization phenomenon has been the subject of legal commentary for decades. Legendary figures of academe such as Kadish and Stanford’s Herbert Packer have chronicled the American propensity to use and abuse the criminal sanction, with further refinements by distinguished contemporary scholars like Columbia’s John Coffee and Harvard’s William Stuntz. And yet the phenomenon continues largely unabated: Over the past century, the number of crimes in most state penal codes has at least doubled, and there are now more than 3,000 offenses punishable as federal crimes.

Why the Urge to Criminalize?

Any number of explanations can be offered for America’s drive to criminalize, its appetite for a crime-of-the-month. Part of the rationale likely stems from a slow but certain movement away from common law principles of crime and punishment and toward a larger ambit for the criminal justice system. To simplify a bit, the common law required a convergence of harmful conduct (*actus reus*) and a culpable mental state (*mens rea*). As an example, larceny involved more than just taking someone’s private property—the accused must have known that the object in question belonged to another and intended to deprive him of that property. There were also fairly robust limitations on vicarious liability, whether a homeowner could be criminally culpable for the actions of his drunken visitor, for instance, or the businessman could be liable for the wrongful deeds of his employee. Today, however, criminal responsibility can be doled out without a culpable mental state through the concept of “strict liability,” and corporate managers can be held liable for serious offenses without evidence of personal guilt. An honest and reasonable claim of “I didn’t know” is often deemed irrelevant, despite the mind-boggling number of administrative regulations that carry criminal sanctions. This trend is only exacerbated by the slow disappearance of the line between crime and tort, with conduct that was once actionable only by civil suit now susceptible to criminal prosecution as well, oftentimes at the sole discretion of the relevant law enforcement agency. And in an age of “Enron-itis,” we can only expect further expansions of criminal liability for business managers and corporate executives.

Another explanation can be found in the continuing power of legal moralism and its transformation in popular discourse. Almost all vice crimes stem from religious-based conceptions of good and evil. Drugs, alcohol, gambling, prostitution, adultery, fornication, sodomy, pornography, and other obscenities are banned by the state on the basis of notions of human wickedness and righteousness and, ultimately, the desire to reform society in accord with puritanical or Victorian standards. Some of these crimes have fallen by the wayside with, for example, the end of Prohibition in 1933 and, more recently, a variety of statu-

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tory or constitutional changes on issues of sex and sexuality. But drug crimes continue to be added or augmented in modern penal codes, and some jurisdictions have created new sex- and gambling-related offenses, although not expressly as a result of religious moralizing. Instead, proponents argue that such behaviors cause “harm” not only to the direct participants but to the greater community as well. To see an alleged prostitute or drug dealer on the streets produces a type of social harm sufficient to justify the full force of the criminal justice system, or so it is claimed.

Probably the most powerful explanation for the criminalization phenomenon is the one-way ratchet of law-and-order politics. To put it simply, lawmakers have every reason to add new crimes and punishments, which make great campaign fodder, but no countervailing political interest in cutting the penal code. The benefits of overcriminalization are concentrated on the political class, providing nice sound bites and résumé filler at reelection time, while the costs are either diffuse (but very real, as will be discussed below) or borne by discrete and insular minorities without sway in the political process, such as members of lower socioeconomic classes or those accused of crime. Experience has shown that being tough on crime wins elections, and a sure-fire way to look tough is to add a superfluous carjacking statute or boost the penalty for drug dealers, irrespective of the statute’s normative justification or ultimate effect on society. And once on the books, criminal laws are virtually impossible to rescind (consider, for instance, the continued existence of anti-dueling statutes).

Law enforcement officials also contribute to criminalization binges. As Professor Stuntz has noted, the more crimes on the books, the more conduct prohibited (and prohibited in more ways), and the more punishment for a given crime, the more authority police and prosecutors can exert in the criminal justice system. Imagine that law enforcement is pursuing a crime that is composed of three elements: X, Y, and Z. If Z happens to be difficult to observe on the streets or prove in court, then law enforcement may well want a new crime composed of only two elements, X and Y. In similar fashion, if crime A carries only a fine or a short jail term, criminal defendants may lack an incentive to enter into plea bargaining with officials. But if a new law adds five years of prison time for crime A, creates a new crime B that covers roughly the same conduct yet carries a 15-year sentence, or establishes a life-imprisonment scheme for repeat offenders, law enforcement now has a blunt instrument that will often leave the accused little choice but to negotiate a guilty plea.

The Costs of Overcriminalization

The costs and consequences of overcriminalization are many and, in many cases, all too obvious—but let me briefly mention a few. To begin with, a bloated penal code and overly broad criminal liability are unhealthy for an adversarial system of criminal justice, where law enforcers are not neutral and detached but instead interested parties actively seeking arrests and convictions. Overcriminalization leads to enormous police discretion to stop pedestrians or motorists using legal pretexts, which serve as cover for discriminatory enforcement based on class, race, or ethnicity. As observed by racial profiling scholar David Harris, no driver could cover more than three blocks without violating some traffic law, thereby providing a pretense for an elongated detention and extensive search. For prosecutors, overcriminalization results in a total imbalance of arms, with severe punishment, often in the form of mandatory minimums or habitual offender statutes, used as leverage in extracting information or guilty pleas. Prosecutorial domination via overcriminalization is bad enough when the underlying offense and attached penalties are dubious to begin with (drug crimes being the paradigmatic case for libertarians like myself). But the sledgehammer of draconian punishment is most disturbing when it is used to coax pleas out of individuals with valid claims of mitigation or even innocence, an unsettling situation that has proven to be all too common.

Overcriminalization also has the potential to squander or misallocate scarce resources, particularly when the underlying offense—a vice crime, for example—causes little direct harm. “One can imagine side effects of the effort to enforce morality by penal law,” Professor Louis Schwartz of the University of Pennsylvania wondered some 40 years ago, “Are police forces, prosecution resources, and court time being wastefully diverted from the central insecurities of our metropolitan life—robbery, burglary, rape, assault, and governmental corruption?” The answer is the same today as it was then: Resources spent chasing the otherwise innocuous prostitute and panderer, for instance, could be spent instead in pursuit of the real sex criminals—the rapist and the child molester. And, of course, the billions of dollars wasted on the so-called war on drugs would be better spent on a different, much graver battle: the “war on terror” and the pursuit of those who would fly commercial airliners into American skyscrapers, set off bombs in public venues and government buildings, and release biochemical weapons through mail, commerce, or public works.

Most of all, overcriminalization weakens the moral force of the criminal law. By “moral,” I am not referring to big-M Morality, as in the occasionally obnoxious religiosity of the “Moral Majority,” but instead the shared norms of American society as to what should or should not be subject to the single most powerful action any government can take: the deprivation of human liberty or even life itself. That is, after all, what a penal code should be about—a communal decision that certain behaviors, pursuant to certain mental states, are so violent or harmful to their direct victims and society at large as to justify the social reprobation and deprivation of liberty that accompany the adjudication of guilt. When the criminal sanction is used for conduct that is widely viewed as harmless or undeserving of the severest condemnation, the moral force of the penal code is diminished, possibly to the point of near irrelevance among some individuals and groups. It fails to distinguish between the acceptable and the intolerable, between the lawful and the illicit. And it no longer deters *ex ante*, before crime, but only catalogs punishment *ex post,* at trial and at sentencing when the damage has already been done. Unwarranted bans or penalties can fulfill none of the valid goals of the criminal sanction, namely, preventing future harmful conduct and justly punishing individuals for past wrongdoing.

Before another offense or punishment is added to the penal code, we should start asking ourselves, *Is this really necessary or just another crime-of-the-month?* ■