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Losing the Law: From Shield to Weapon

by William L. Anderson and Candice E. Jackson

In recent years lawmakers and enforcers have increasingly criminalized business behavior. From the prosecution of Michael Milken and other Wall Street figures in the 1980s to the indictment of Martha Stewart in 2003, federal criminal law has become a wild card influencing economic matters in unpredictable ways. This affects everyone. Should this criminalization continue, the result will be less private investment, as frightened executives decide that investment in this country is not worth risking a stint in federal prison.

We must first explode the myth that only "guilty" people get in trouble with the law. Federal law today encompasses such a wide range of actions that the majority of people reading this article have probably engaged in conduct that could result in federal criminal charges.

For example, readers who have miscalculated their income taxes and sent the incorrect form through the mail have committed mail fraud, a federal felony. Anyone who has sent wrong figures or information over the Internet has committed wire fraud. In the first case, if you had the help of another person in figuring (or misfiguring) your taxes, that is conspiracy.

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Federal prosecutors usually don't pursue individuals making innocuous mistakes, but they can if they so wish. The U.S. Supreme Court already has ruled that *intent* to commit a crime (the ancient doctrine of *mens rea*, or "guilty mind") is no longer a requisite element in some criminal prosecutions. The Supreme Court has created an entire category of statutory crimes it calls "public welfare offenses," permitting Congress and state legislatures to provide criminal penalties for acts and omissions that technically violate a regulatory statute.[1] The unfortunate defendant need not even know that a violation of the law occurred.[2] While the Court initially applied this doctrine to permit Congress to dispense with *mens rea* requirements for regulations concerning things like possession of narcotics and hand grenades, the doctrine has evolved to include ordinary business activities, and threatens today to become the rule for criminal liability rather than the exception.[3]

The evisceration of *mens rea* is a mechanism for empowering the state. In a 1943 Supreme Court decision, Justice Felix Frankfurter declared: "The good sense of prosecutors, the wise guidance of trial judges, and the ultimate judgment of juries must be trusted. Criminal justice necessarily depends on 'conscience and circumspection' in prosecuting officers."[4]

In other words, government employees whose careers depend on convicting people determine the standard of justice. However,

reality is different from Frankfurter's idealistic picture. Mary Sue Terry, former attorney general of Virginia, recently declared that modern justice "has turned from seeking truth to seeking convictions."[5]

If a prosecutor's own words are not evidence enough of the alarming trend in criminal law, consider a speech at Harvard University in February 2003 by Judge Edith Jones of the Fifth Circuit U.S. Court of Appeals. In the speech Judge Jones claimed that the American legal system has been "corrupted almost beyond recognition." According to the *Idaho Observer,* "Judge Jones explained that zealous prosecutors are increasingly willing to sacrifice what is morally right for political expediency. She also said that the change has come because our nation's legal philosophy has descended to 'nihilism.'"[6]

Jones further declared: "The integrity of law, its religious roots, its transcendent quality are disappearing. . . . The first 100 years of American lawyers were trained on [William] Blackstone, who wrote that, 'The law of nature . . . dictated by God himself . . . is binding . . . in all countries and at all times; no human laws are of any validity, if contrary to this. . . .' The Framers created a government of limited power with this understanding of the rule of law—that it was dependent on transcendent religious obligation."[7]

The Martha Stewart Case

Federal investigators often target individuals by stretching already dubious laws and regulations beyond recognition. Take the Martha Stewart case. Stewart's indictment and conviction demonstrate just how far federal criminal law and its application have strayed from their Blackstonian roots. Her name surfaced in the press because of an *illegal* leak of information from a congressional committee investigating the sale of ImClone Systems stock in December 2001. In other words, someone committed a felony by leaking the information to the press, but federal investigators ignored that. To make things worse, someone from the U.S. Department of Justice almost certainly *illegally* leaked information to the press on the grand jury testimony given in the Stewart case prior to her indictment, yet another felony that prosecutors ignored.

There is an obvious pattern here. Government officials who are sworn to uphold the law broke that law—and could do so without any fear of reprisals, because for all intents and purposes the law does not apply to them.

The U.S. Government charged Stewart with obstructing justice, conspiracy, and securities fraud. "Obstruction of justice" sounds ominous, but is often nothing more than a refusal to incriminate oneself to federal investigators—a refusal that should be protected by the Fifth Amendment. There is no fixed standard defining the offense, and federal officials have near-absolute discretion over when to charge it. The basis for the obstruction charge against Stewart was not that she merely failed to cooperate, but rather that she lied when government agents asked why she sold her ImClone stock. (It should be noted that the FBI takes a more casual attitude toward lying when it's done by its own agents. The syllabus from an official FBI course for new recruits on ethics states that subjects of investigations have "forfeited their right to the truth."[8]) Even if Stewart did lie, one can only wonder: how can it be obstruction of justice not to tell the truth to a government agent who is asking about something that is none of the government's business? (Insider trading is not an objective crime, and Stewart was never charged with it.)

"Conspiracy" simply means that more than one person was involved; in Stewart's case it is conspiracy to commit obstruction of justice. Furthermore, the evidence needed to prove a conspiracy can be so circumstantial (such as phone records showing a conversation) or untrustworthy (uncorroborated "accomplice" testimony) that probably any one of us could be accused and convicted of conspiracy to do *something* illegal.

The "securities fraud" charge against Stewart (later dismissed by the trial judge) was especially egregious. Prosecutors pinned

this "crime" to her indictment just because she publicly declared her innocence of the insider-trading charges rumored to be forthcoming against her, but which were never filed. U.S. Attorney James B. Comey (who since has been promoted to the number-two position in the Department of Justice) stated that Stewart's public declaration of innocence was actually illegal stock manipulation because it kept the price of Martha Stewart Living Omnimedia higher than it would otherwise have been. For mounting a public defense in search of a fair trial before the government had proved her guilty of *anything*, the government added another potential prison term to her bill of indictment.

Congress has created a classification of legal violations that we have termed "derivative crimes."[9] Under the Constitution, states are the entities responsible for defining and prosecuting "common law" crimes, such as theft, robbery, and murder. To work around the Constitution's mandate of federalism, Congress and the Supreme Court began to reinterpret the Commerce Clause to mean that Congress could invent a national set of crimes to cover activities that only remotely affect interstate commerce.

While Congress created the first "derivative crime," mail fraud, more than a century ago, this kind of crime really began to affect businesses in 1970 with the creation of the Racketeer Influenced and Corrupt Organizations Act, or RICO. Created supposedly to deal with "organized crime," RICO created a new class of crimes in order to bring mob suspects into federal court where it was believed that the chances of convicting them of *something* would be stronger.

The RICO law declared that any discernible "pattern" of crimes, such as prostitution, gambling, and the like, could be bundled into a new *federal* crime of "racketeering." (Of course, since no one "racketeers" someone else, this new "crime" was a statutory fiction.) It did not take long for prosecutors to discover that they could apply it against ordinary business people about whom it was not even alleged that they had connections to "organized crime."

In the 1980s RICO enabled Rudolph Giuliani, then U.S. attorney for the southern district of New York, to go after upstart investment firms on Wall Street. With approval from established Wall Street firms that did not appreciate competition from companies like Princeton-Newport and Michael Milken's Drexel Burnham Lambert, Giuliani used RICO to destroy those companies and jailed Milken in the process.[10]

Fighting the War on Drugs

The War on Drugs took off during the 1980s, so federal prosecutors demanded—and received from Congress—new "crime-fighting tools" to deal with drug rings. The Comprehensive Crime Control Act of 1984, for example, expanded the definitions of crimes like "money laundering," which is little more than depositing money allegedly garnered from criminal activity. While "money laundering" brings visions of a Miami Vice drug kingpin purchasing a new Mercedes with suitcases full of hundred-dollar bills, the charge usually is applied in order to add prison time for people convicted of other white-collar crimes. The idea is that if someone has committed a crime in the course of business, the money earned by that business was ill-gotten, which then kicks the "money laundering" tripwire. Prosecutors found that such laws also increased their ability to target anyone they wanted, despite the intended scope of the legislation.

Like RICO, most crimes in the federal code are works of fiction, not real offenses. Even the crimes that deal with real wrongdoing, such as "fraud," are defined differently from what most people would consider criminal fraud to be. Intent to deceive is usually a crucial element of fraud. For example, if I purchase a used car that has "low mileage" at a local dealer only to find out later that the dealer tampered with the odometer, I can claim to have been defrauded. But I have to prove that the dealer sold me the car with intent to deceive.

The federal system, however, attaches the term "fraud" to a wide range of cases, and denudes the term of any real meaning.

According to the well-known criminal-defense attorney Harvey Silverglate, federal criminal law creates what he calls a "third category" of prisoners.[11] The first category, Silverglate says, consists of those who are guilty of a crime. The second category includes those wrongly convicted of a crime. The third are those convicted under vague and broad statutes for engaging in conduct that a reasonable person would not have assumed is criminal. This third category represents not a reasonable system of laws, but rather a dangerous trap for the unwary and politically unpopular.

When Ronald Reagan became President in 1981, there were about 1,500 U.S. attorneys. Today, there are more than 7,000, all of whom need high conviction rates to gain promotions and increased pay.[12] The federal prison population in early 1981 stood at about 20,000; today it is more than 170,000.[13]

Most readers will never go to prison, but their lives are affected nonetheless. As the number of people shunted into federal prisons rises, the human wreckage increases as families are devastated, and businesses and reputations are destroyed.

Because it is politically feasible to target business owners and executives, "white collar" prosecutions will continue. The political feeding frenzy that occurred in the wake of the Enron and WorldCom collapses has resulted in even broader criminal statutes,[14] and the "war on terror" has brought a host of new statutes replete with intrusive investigatory tools for use by prosecutors not just against suspected terrorists, but also against ordinary business people.

Business owners and executives are not stupid. They realize that if trends continue, the handwriting on the wall will be unmistakable: invest in the United States, risk going to prison. Entrepreneurial activity will be chilled as the public, egged on by ambitious prosecutors and demagogic politicians, demands that the prisons be filled with even more people who by any reasonable definition are innocent of truly criminal behavior.

The Founders believed that law should be a shield to protect people both from those who would prey on their person and property, and from the state itself. Today, law has become a weapon the state uses against us for the political benefit of those in power. If the original vision is not resurrected, we will lose the law altogether. □

1. The Court itself has defined "public welfare offenses" to mean violations of statutes (often carrying criminal penalties) that "depend on no mental element but consist only of forbidden acts or omissions." *Liparota v. United States*, 1985.

2. See for example, *Staples v. United States*, a 1994 case in which Justice Clarence Thomas summed up the Court's public welfare offense doctrine and refused to apply it to a statute requiring regulation of machine guns. Justice Thomas may be fighting a losing battle, however (see note 3).

3. For example, Edward Hanousek, a railroad supervisor, was convicted on criminal charges of violating the Clean Water Act when an independent contractor accidentally ruptured an oil pipeline, spilling oil into a U.S. waterway in Alaska. Hanousek was not even at the site that day and had no knowledge, intent, or ability to prevent the "crime," but his criminal conviction was upheld by the Ninth Circuit Court of Appeals, and the U.S. Supreme Court denied review of his case, *Hanousek v. United States*, 2000.

4. *United States v. Dotterweich*, 1943; also quoted in Paul Craig Roberts and Lawrence M. Stratton, *The Tyranny of Good Intentions: How Prosecutors and Bureaucrats are Trampling the Constitution in the Name of Justice* (Roseville, Cal.: Forum, 2000), p. 63.

5. Quoted in Paul Craig Roberts, "Jailing the Innocent," January 7, 2004, www.townhall.com/columnists/paulcraigroberts/pcr20040107.shtml.

6. "American Legal System Corrupt beyond Recognition, Says Federal Judge," *Idaho Observer,* March 2003, http://proliberty.com/observer/20030304.htm.

7. Ibid.

8. Quoted in James Bovard, *Freedom in Chains: The Rise of the State and the Demise of the Citizen* (New York: St. Martin's, 1999), p. 162; Bovard's source was Roberto Suro, "Law Enforcement Ethics: A New Code for Agents; FBI Trainees Lectured On Integrity, Deception," *Washington Post*, August 21, 1997, p. A.17.

9. See William L. Anderson and Candice E. Jackson, "Law as a Weapon: How RICO Destroys Liberty and Undermines the Purpose of Law as a Shield," scheduled for publication in *The Independent Review*, June 2004.

10. Appeals courts later overturned the Princeton-Newport convictions, but not before Giuliani was able to use his tenure as U.S. attorney to get elected mayor of New York City.

11. From personal correspondence.

12. Roberts and Stratton.

13. *2002 Statistical Abstracts of the United States,* compiled by U.S. Bureau of the Census. Information taken from the website of Federal CURE, www.fedcure.org.

14. When the United States was created, there were three federal crimes: treason, counterfeiting, and piracy. Today there are more than 3,000 criminal statutes and 10,000 federal regulations that can be interpreted as having criminal penalties for their violation.