

# IT'S A CRIME?: Flaws in Federal Statutes That Punish Standard Business Practice

Marie Gryphon  
*Senior Fellow*  
*Manhattan Institute for Policy Research*



CENTER FOR LEGAL POLICY  
AT THE MANHATTAN INSTITUTE



Since the dawn of Anglo-Saxon common law, conviction for committing a crime required evidence of malicious intent—that is, a conscious willingness to violate society’s norms by inflicting harm on people directly or by misappropriating or abusing their property. This stricture, which is often referred to as the blameworthiness principle, has tended to ensure that people who inadvertently and in good faith infringe laws and regulations will not suffer the stigmatization of a criminal conviction or face incarceration.

The economic and social policies of the 1930s and beyond came to undermine the blameworthiness principle. Standards of conduct promulgated to protect and advance the public’s health, safety, and welfare carried with them deterrents imported from the criminal law. Today, the regulatory state so thoroughly encompasses the range of commercial activity that businesses and businesspeople trying to reduce their costs, better their products, best their rivals—do all of the things, in short, on which survival in a market economy depends—run an ever-present risk of becoming ensnared in the criminal law. In many instances, the laws in question are so voluminous and loosely drafted that even a student of the legislation would not have fair notice of what conduct was prohibited and what was not.

Ordinary Americans have been convicted of crimes under overbroad federal laws because their employer unsuspectingly forwarded drugs that had been mislabeled by another company; because their adult children failed to properly record the itinerary of a camping trip in a public park while doing volunteer work for the family touring business; and because their computer servers stored copies of clients’ e-mails as an emergency precaution. Others have been judged criminals for such common failings as violating the terms of an employee handbook that prohibited otherwise legal behavior; lying about the details of a legal business transaction in response to media inquiries; and falsely claiming to be a talent scout in order to attract women.

Perhaps the most egregiously catch-all statutes are those governing mail and wire fraud. They assign criminal penalties to any “scheme or artifice to defraud” as long as the defendant could have foreseen that someone would use either the U.S. Postal Service or any form of electronic communication in (perhaps inadvertent) furtherance of the scheme as it unfolded. Yet these statutes lack any explicit language requiring a showing of harm, and the courts have not inferred or supplied such a requirement. Today criminal liability attaches to “any scheme or artifice to deprive another of the intangible right of honest services” via the above channels. Such vague and capacious language gives overzealous prosecutors a virtual carte blanche to indict.

Responsibility for this state of affairs lies with both Congress and the courts. The former should make clear what categories of actor laws like the fraud statutes contemplate. Congress should also insert into both existing and new laws, if they carry criminal penalties, the requirement of a showing of criminal intent. It should cease assigning criminal penalties to violations of agency-made regulations. And it should insert sunset provisions into all criminal laws.

The courts, as guardians of individual rights, have traditionally moved against due process abuses of the criminal law, but in modern times they have shown undue deference to the regulatory aims of Congress and federal agencies. The courts could begin by reading some standard of criminal intent into all laws carrying criminal penalties. And they should give criminal defendants the benefit of the doubt when the laws they have allegedly broken are ambiguous. The price for not doing so is not only the unjust punishment of many innocent people, but a chilling of the competitive spirit of those the law never touches.

## ABOUT THE AUTHOR

---

MARIE GRYPHON is a senior fellow at the Manhattan Institute. As an attorney in private practice, she worked on ERISA, securities, class action, commercial contract, legal malpractice, and constitutional law cases. She has also been a legal and policy analyst at the Cato Institute, working on issues related to education policy. Her articles have appeared in *Investor's Business Daily*, *Business Week*, and National Review Online. She holds a J.D. from the University of Washington School of Law and is a Ph.D. candidate in public policy at Harvard University.

# CONTENTS

---

3	Part 1. Blameworthiness as a Limiting Principle
5	Part 2. Missing or Inadequate Mens Rea Language
6	Part 3. Vaguely or Ambiguously Defined Crimes
8	Part 4. Incorporation of Federal Regulatory Requirements
9	Part 5. What Congress Should Do
10	Part 6. What Courts Can Do
11	Part 7. Conclusion
12	Endnotes



# IT'S A CRIME?: FLAWS IN FEDERAL STATUTES THAT PUNISH STANDARD BUSINESS PRACTICE

---

Marie Gryphon

**M**ore than 150 bills are currently pending in Congress that will either create new federal crimes or expand existing ones.<sup>1</sup> These bills generally have laudable purposes, from protecting the public from the practice of “cyberbullying”<sup>2</sup> to preserving the privacy of cellular telephone numbers.<sup>3</sup> But the road to hell is paved with good intentions.

This latest blaze of activity represents a trend that has been gathering momentum since the New Deal. It has been rationalized from that era forward as simply a group of regulatory measures aimed at protecting the public’s health and safety. Yet it has eroded Americans’ fundamental rights.

One purpose of this paper is to identify the poor drafting choices that Congress too often makes when it creates new criminal laws—choices that ensnare well-intentioned citizens for inadvertent mistakes or for honest and understandable misjudgments that they commit in the course of their professional activities. A second purpose is to identify misguided judicial decisions reached in support of those choices. A third is to recommend a starkly different approach to writing federal criminal legislation and selecting judicial standards of review.

The federalization of crime is a relatively new phenomenon. For the first century of its history, the federal government left the making of criminal law and its enforcement largely to the states, which assumed responsibility for protecting the health and safety of the general public.<sup>4</sup> Since the late nineteenth century, however, federal lawmakers

have increasingly enacted criminal penalties for violations of federal laws and regulations concerning economic activity that crosses states' borders and therefore may escape their jurisdiction.<sup>5</sup> Federal antitrust laws, for example, authorize the prosecution of business executives for certain activities such as price-fixing that may have an anticompetitive effect on their industry.<sup>6</sup> Federal securities laws criminalize the withholding of material information, other than trade secrets and other privileged information, from stockholders and bondholders.<sup>7</sup> And federal environmental laws call for the fining and imprisonment of polluters because their activities impose unauthorized costs on innocent property owners and the general public.<sup>8</sup>

The 1943 U.S. Supreme Court case *United States v. Dotterweich* is a seminal example of the kind of thinking that drove what I call the “blameworthiness principle”—the traditional notion that only those who willingly violated society’s basic social norms deserved the stigma and penalties associated with the criminal law—from federal criminal jurisprudence in the latter half of the twentieth century.<sup>9</sup> *Dotterweich* held that the head of a company that shipped incorrectly labeled drugs as the result of a reasonable mistake could be convicted and imprisoned under the U.S. Food, Drug, and Cosmetic Act. The Court upheld strict criminal liability in this case because it believed that the “penalties serve as an effective means of regulation” of an industry in which the actions of one person have the potential to harm thousands.

But the federal government has other tools at its disposal to accomplish these important regulatory goals, and what little research there is into the question of the effectiveness of criminal penalties compared with alternative approaches to compliance, such as inspections and administrative fines, offers little basis for the belief that criminal sanctions are an especially useful tool for this purpose.<sup>10</sup> Rather, such research suggests that businesspeople are motivated to comply with government regulations primarily by ongoing, collaborative relationships with regulators.<sup>11</sup>

In the absence of any actual evidence that strict-liability criminal sanctions are especially capable of ensuring public safety in the modern world, both Con-

gress and the courts are wrong to abandon traditional standards of blameworthiness in the criminal law. Certainly, some overbroad federal laws are used to prosecute some individuals who thoroughly deserve to be prosecuted. Bernard Madoff, whose infamous Ponzi scheme defrauded more than 4,000 clients around the world of billions of dollars,<sup>12</sup> is perhaps the most flagrant example of the kind of wide-ranging and sophisticated criminal whom federal legislators hope to deter or incapacitate.<sup>13</sup>

However, federal laws that do not require a traditional demonstration of blameworthiness on the part of the defendant also endanger citizens who are not villains. The modern federal criminal law empowers prosecutors to indict people who inadvertently violate a wide range of complex federal laws and regulations in the course of their professional lives, and judges and juries in such cases are not permitted to consider evidence that those indicted had a good-faith belief, based on a careful reading of the law, that their conduct was legal. Ordinary Americans have been convicted of crimes under overbroad federal laws because their employer forwarded drugs that had been mislabeled by another company, despite a lack of evidence that any regulation had been intentionally violated;<sup>14</sup> because their adult children failed to properly record the itinerary of a camping trip in a public park while doing volunteer work for a family touring business;<sup>15</sup> and because their computer servers stored copies of clients’ e-mails as an emergency precaution.<sup>16</sup> Others have been judged criminals for such common failings as violating the terms of an employee handbook that prohibited otherwise legal behavior,<sup>17</sup> lying about the details of a legal business transaction in response to media inquiries,<sup>18</sup> and falsely claiming to be a talent scout in order to attract women.<sup>19</sup>

While the phenomenon of “overcriminalization”—the inappropriate use of criminal sanctions to achieve social goals that ought to be pursued by other, less drastic means—has been applied to all areas of human activity, this paper will focus on the overcriminalization of business conduct. Criminalizing business conduct raises special concerns because the prohibited behaviors are often hard to distinguish



from the kinds of productive activities that businesspeople are obligated to engage in, often on the fly. Competing aggressively with rival companies by cutting prices can be deemed “predatory pricing” under antitrust law, and giving morale-boosting speeches to employees can, if the speech is too optimistic about a public company’s prospects, expose the speaker to charges of securities fraud. Due to business pressures, businesspeople often try to go up to the line that separates legitimate, if aggressive, business conduct from indictable behavior without crossing it.<sup>20</sup> Unfortunately, the location of that line is often dangerously unclear.

Federal prosecutors tend to indict larger numbers of business executives and corporations for alleged criminal acts in the aftermath of painful recessions and economic crises,<sup>21</sup> suggesting that public anger and distress may inspire politically opportunistic and unjust prosecutions. As this paper will endeavor to show, many federal statutes feature language that lends itself to such abuse.

First, many federal criminal statutes fail to specify the level of *mens rea*—or criminal intent—required for conviction. In fact, some federal statutes no longer require a showing of any *mens rea*, allowing even an entirely innocent mistake to result in a jail sentence. Second, many of these laws set out the purported nature of the offense in vague and ambiguous language, which forces citizens to guess at what the laws prohibit. What’s more, courts no longer invoke judicial doctrines calling for a narrow construction of such laws. Third, many federal statutes make criminal any violation of vast swaths of the complex and ever-changing Code of Federal Regulations, the contents of which are written and issued by bureaucrats, not elected officials, and which even experts have difficulty interpreting, so unclearly have they been drafted.

This paper documents the injustices made possible by such laws as they now stand and explains how both Congress and the federal courts can reduce the frequency with which federal criminal law is applied unjustly. This project is of timely and immediate interest because many of the more than 150 bills currently pending in Congress that propose expansions of the

federal criminal law have exactly the features—missing or inadequate *mens rea* language, vague and ambiguous prohibitions, and criminalization of regulatory violations—that make such legislation a danger to Americans.

Part 1 of this paper will discuss traditional legal doctrines that support the “blameworthiness principle” in English and American law. Part 2 will discuss the threat to the blameworthiness principle that is posed by federal statutes lacking *mens rea* requirements or possessing ambiguous ones. Part 3 will discuss the proliferation of vague and ambiguous federal criminal statutes. Part 4 will discuss statutes that criminalize violations of the Code of Federal Regulations. Part 5 offers recommendations to Congress based on the findings in Parts 2–4, and Part 6 offers recommendations to courts. Part 7 concludes.

## PART I. BLAMEWORTHINESS AS A LIMITING PRINCIPLE

Eighteenth-century English jurist William Blackstone wrote that there is no crime without a “vicious will.”<sup>22</sup> Blackstone’s words encapsulated the touchstone principle of English criminal law: unlike civil-law penalties, criminal sanctions are traditionally reserved for those who have freely and deliberately committed acts that society at large condemns. These must be something much worse than costly to an affected party or counterproductive according to the assessments of a government agency. The American legal system has largely embraced this classic liberal principle, or “blameworthiness principle,” since the nation’s founding. The blameworthiness principle has been rigorously defended in academic literature<sup>23</sup> as well as in U.S. Supreme Court opinions.<sup>24</sup>

In *The Aims of the Criminal Law*, first published as an article of that title in 1958, criminal-law scholar Henry M. Hart articulated the traditional function of the criminal law:

[T]he criminal law is the statement of those minimum obligations of conduct which the conditions

of community life impose upon every participating member if community life is to be maintained and to prosper—that is, of those obligations which result not from a discretionary and disputable judgment of the legislature, but from the objective facts of the interdependencies of the people who are living together in the community.<sup>25</sup>

When citizens violate these very fundamental obligations, their conduct will “evinced a blameworthy lack of social responsibility.”<sup>26</sup> Even in cases in which such culprits are unaware of the laws prohibiting their wrongful conduct, their ignorance of such basic social norms is itself blameworthy, as it identifies them as having refused to be bound by the social contract.<sup>27</sup>

Thoughtful jurists have observed that there are occasional situations in which the blameworthiness principle is not inconsistent with strict liability. Oliver Wendell Holmes observed that the court system must always look to the behavior of those who commit wrongful acts to determine whether they acted with a criminal state of mind because the system cannot directly read the minds of defendants.<sup>28</sup> Given that looking to some external behavior, such as guilty statements or surreptitious activities, for evidence of a guilty mind is unavoidable, Holmes reasoned that it was not unjust to adopt a strict liability standard in the criminal law for those offenses whose commission alone, without any additional evidence regarding *mens rea*, strongly indicated the involvement of a guilty mind. A prerequisite of such a finding, however, is that the act in question is broadly understood to be intrinsically wrongful. If, according to Holmes, a focus on behavior, not intent, criminalized behavior that “would not be blameworthy in the average member of the community,” its imposition “would shock the moral sense of any civilized community.”<sup>29</sup>

There are several ways in which those who commit what would ordinarily be criminal acts might not be blameworthy. Insanity<sup>30</sup> and what is known as duress<sup>31</sup>—circumstances making it especially difficult for the actor in question to meet society’s moral expectations—are standard defenses and grounds for acquittal in the American criminal-justice system.

Traditionally, defendants were also acquitted if they were mistaken about the facts that made their conduct illegal. For example, air travelers sometimes unwittingly claim suitcases that belong to other passengers. Such innocent mistakes do not demonstrate an indifference to or defiance of the community’s basic social contract. Therefore, by traditional standards, such mistakes are not an appropriate basis for criminal punishment.

Finally, defendants may not be blameworthy if they acted on the basis of honestly mistaken beliefs about what the law prohibits. Traditionally, so-called mistake-of-law defenses were considered invalid because good citizens were expected either to know or to sense their legal obligations.<sup>32</sup> This ancient principle that “ignorance of the law is no excuse” has become more difficult to defend, however, with the expansion of the criminal law to include ever more obscure and unexpected prohibitions. As a result, courts have occasionally held that certain narrow areas of the law, such as income-tax law,<sup>33</sup> are so complicated that defendants can be excused for committing acts that they wrongly believed were legal, as long as the prohibited acts were not intrinsically wrongful (*malum in se*) but only contrary to some selective, perhaps arbitrary, notion of the public good.<sup>34</sup>

The blameworthiness principle earns its place in any classically liberal political system by limiting the reach of the criminal-justice system and thus the power of the state over its citizens. Because the criminal law, unlike the civil law, authorizes the state to incarcerate wrongdoers, it includes numerous procedural safeguards, such as a high burden of proof and a defendant’s right to testify in his own defense, intended to prevent the conviction of innocents. Limiting the scope of the criminal law to conduct covered by the blameworthiness principle serves a parallel function. It prevents the state from incarcerating citizens who have inadvertently run afoul of the “discretionary and disputable judgment of the legislature” in the course of their ordinary activities. What follows are three examples of drafting choices by Congress that are a serious danger to such citizens.

## PART 2. MISSING OR INADEQUATE MENS REA LANGUAGE

Traditionally, the blameworthiness principle required a violation of the criminal law to consist of both “an evil-doing hand” and an “evil-meaning mind.”<sup>35</sup> Generally, this meant that a criminal defendant would be found guilty only if he acted for the purpose of doing harm, or at least with knowledge that harm would naturally follow from his voluntary act. The minimum level of *mens rea* traditionally required for criminal conviction is known as “criminal negligence,” which is usually defined as a “gross deviation” from the standard of care that a reasonable person would take to avoid doing serious harm to another person.<sup>36</sup>

Most federal criminal statutes include terms such as “purposely,” “knowingly,” “willfully,” and “recklessly” that specify what level of *mens rea* the enacting legislature chose to require for conviction. Some federal statutes, however, have been enacted without these crucial terms. The U.S. Food, Drug, and Cosmetic Act, for example, provides at 21 U.S.C.S. §333(a) in part:

- (1) Any person who violates a provision of section 301 shall be imprisoned for not more than one year or fined not more than \$1,000, or both.
- (2) Notwithstanding the provisions of paragraph (1) of this section, if any person commits such a violation after a conviction under this section has become final, or commits such a violation with the intent to defraud or mislead, such person shall be imprisoned for not more than three years or fined not more than \$10,000 or both.<sup>37</sup>

Enhanced penalties are available under 21 U.S.C. §333(a)(2) in cases in which prosecutors prove “intent to defraud or mislead” in connection with a regulatory violation. But no *mens rea* language appears at all in 21 U.S.C. §333(a)(1), which prescribes up to a year in federal prison for single violations of this lengthy and complex statute. Unlike the laws that Holmes thought could properly give rise to strict liability—those for which a defendant’s act alone provided overwhelming evidence of a guilty mind—the Food, Drug, and

Cosmetic Act, like many other federal laws aimed at regulating business, has many picayune requirements that can be misunderstood or inadvertently violated by a well-intentioned defendant.

The U.S. Supreme Court has interpreted the absence of *mens rea* language in federal criminal laws in two ways. In the case of laws that proscribe *malum in se* conduct—the kind of intrinsically wrongful acts that are traditionally prohibited by the criminal law—the Court generally assumes that Congress intended to incorporate a *mens rea* element into its codification of the offense, even if it neglected to include specific language to that effect.<sup>38</sup>

The Court has taken a strikingly different approach to interpreting the *mens rea* requirements of statutes that turn the blameless behavior of individuals into criminal offenses in order to enforce an “effective regulatory scheme” (by which the courts often mean “a statutory scheme”) for the general public benefit. These statutes, labeled “public welfare” statutes, criminalize individuals who discharge wastewater without the correct permit<sup>39</sup> or ship cosmetics or pharmaceuticals with labeling that fails to comply with all regulations promulgated under the authority of the Food, Drug, and Cosmetic Act.<sup>40</sup> The Court has decided not to interpret these statutes as implying the presence of *mens rea* elements. The result is that many federal crimes are now strict-liability offenses.

*United States v. Ellison* illustrates the danger posed by criminal statutes that lack *mens rea* language. Ellison, the owner of a small tour company in Colorado called Lazy Double FF Outfitting, was convicted of three federal misdemeanor counts of violating the terms and conditions of a U.S. Department of Agriculture special-use permit for activities that occurred at the business while he was traveling outside the state, and of which he had no knowledge.<sup>41</sup> Ellison’s permit allowed his business to lead small groups of tourists into various national parkland areas for fishing and camping, if the itineraries had been approved by the department. The guides were also required to maintain a trip log. While Ellison was traveling out of state to purchase a new horse, his adult daughter booked three tourists for a fishing trip to Trout Creek, an area

that did not appear as an approved tour location on Ellison's permit. An employee of Ellison's led the trip, for which \$397.50 was collected.

Despite Ellison's uncontradicted testimony that he had no knowledge of the trip and prosecutors' failure to allege negligent supervision, the court sustained Ellison's conviction, holding that because the law under which he was prosecuted lacked *mens rea* language, he was strictly liable for the illegal actions of his employees or agents. Although a prison sentence was possible under the law, the court imposed only a modest fine. However, his three misdemeanor convictions (one for each of the three tourists on the trip) prevented Ellison from renewing his special-use permit, and he was forced to close the doors of his small business.<sup>42</sup> The injustice of Ellison's conviction and others like it is made possible by Congress's too-frequent rejection of, or indifference to, traditional *mens rea* requirements.

Despite injustices like the one experienced by Ellison, Congress continues to propose laws with criminal penalties attached that lack any or adequate *mens rea* language. For example, H.R. 3047, titled Balancing Act of 2009, establishes a new federal family-leave program. It also creates a strict-liability federal criminal provision under which any person who "makes or causes to be made any false statement in support of an application for leave benefits" can be convicted of a felony and imprisoned for up to five years, apparently even if the incorrect information was provided as the result of an innocent mistake.<sup>43</sup>

### PART 3. VAGUELY OR AMBIGUOUSLY DEFINED CRIMES

In 1939, the U.S. Supreme Court stated: "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids."<sup>44</sup> In the decades since then, however, the Court has increasingly tolerated a proliferation of federal statutes that impose criminal penalties for vague and ambiguous offenses. These statutes are sometimes drafted broadly because the

efforts of federal lawmakers and law-enforcement agencies to regulate complex commercial conduct have been frustrated by rapid technological progress. Unfortunately, the result has been the erosion of traditional due-process principles and the criminal conviction of people who reasonably believed that their conduct was legal. The Supreme Court has allowed this trend to continue by declining to impose meaningful constitutional limits on the tendency of Congress to enact vague and ambiguous laws.

The federal mail- and wire-fraud statutes, for example, assign guilt for any "scheme or artifice to defraud" as long as the defendant could have foreseen that someone would use either the U.S. Postal Service or any form of electronic communication, such as telephone or e-mail, in (perhaps inadvertent) furtherance of the scheme as it unfolded. Under state fraud laws, the object of the fraudulent scheme has to have suffered some sort of damage as a result of the scheme, or no crime can have been committed.<sup>45</sup> The federal mail- and wire-fraud laws, by contrast, lack any explicit language requiring a showing of harm, and the courts have not inferred or supplied such a requirement.

Moreover, the interests protected by the mail- and wire-fraud laws were not specified by Congress and were therefore broadly defined by courts in the years following their enactment to include the intangible right to honest services, a category that plausibly includes almost any fiduciary duty owed by any government official or private employee to citizens or employers.<sup>46</sup> The U.S. Supreme Court responded to the lower courts' broad reading of the mail- and wire-fraud laws by attempting to impose a clear limitation on their reach in *McNally v. United States*, in which it held that the statutes did not criminalize "schemes to defraud citizens of their intangible rights to honest and impartial government" and thus, by implication, schemes to defraud companies of analogous intangible rights.<sup>47</sup>

Rather than accepting a limited role for the federal mail- and wire-fraud statutes, Congress acted quickly to restrict the application of the *McNally* decision by passing a law<sup>48</sup> that assigned criminal liability to "any scheme or artifice to deprive another of the intan-

gible right of honest services” as long as that scheme makes some use of either the postal service or electronic communications technology.<sup>49</sup> Yet again, Congress declined to include language incorporating the common-law requirement of a showing of actual harm suffered by the object of a criminal fraud. This omission, combined with the vague “honest services” language—undefined in the statute—has allowed courts to interpret the law to cover “a staggeringly broad swath of behavior, including misconduct not only by public officials and employees but also by private employees and corporate fiduciaries.”<sup>50</sup>

*United States v. Weyhrauch* illustrates the danger of the vague “honest services” language in the federal mail- and wire-fraud laws.<sup>51</sup> Bruce Weyhrauch, a state legislator in Alaska, was arrested and indicted under the honest-services provision of the federal mail-fraud law. Federal prosecutors alleged that Weyhrauch had a cozy relationship with lobbyists employed by Veco Corporation, a company involved in the oil and gas industry in Alaska. At some point in 2006, Weyhrauch allegedly mailed a resumé to an executive at Veco in pursuit of employment by the company after the end of his term in the state legislature. Around the same time, prosecutors alleged, Weyhrauch cast legislative votes affecting Veco’s interests without disclosing his possible conflict of interest to his colleagues or to the public.

As Weyhrauch pointed out, however, and the trial court hearing his case agreed, nothing in either Alaska law or the Uniform Rules of the Alaska state legislature requires legislators to disclose such conflicts.<sup>52</sup> In fact, Alaska law imposes a detailed “comprehensive scheme” of ethical duties on elected officials, including many duties to disclose other types of activities in which Weyhrauch had never engaged, but it does not require lawmakers to disclose possible or actual conflicts of interest, which suggests that the omission was a deliberate policy choice on the part of the state.<sup>53</sup>

The trial court held that Weyhrauch could not be guilty of honest-services fraud against the state of Alaska or its voters in view of the fact that he had complied with every duty enunciated by the state

as applying to lawmakers.<sup>54</sup> Federal prosecutors appealed, however, and the Ninth U.S. Circuit Court of Appeals reversed, holding that the federal honest-services provision imposed duties on lawmakers—and, by extension, private-sector employees—in addition to those duties issuing from the articulated expectations of the entities to which, or the individuals to whom, the “honest services” are supposedly owed.<sup>55</sup>

Detailed rules regarding what must be disclosed and what need not be disclosed are frequently complex, as they are in Alaska, and the conduct they proscribe is not necessarily intrinsically wrongful. While a lawmaker can reasonably be expected to know that selling out constituents’ interests for private gain is blameworthy, Weyhrauch was never charged with selling favors. Rather, he was prosecuted for a failure to disclose a conflict of interest that may never have culminated in a breach of the public trust. A rule requiring such disclosures is prophylactic rather than substantive, which may be why the state of Alaska declined to apply a rule of that nature to its lawmakers.

Weyhrauch’s case is one of three honest-services fraud cases that the U.S. Supreme Court has agreed to hear this term.<sup>56</sup> If the Ninth Circuit’s interpretation of the law is affirmed, scrupulous compliance with all of a private employer’s or the government’s express expectations will not, by itself, protect against a charge of failing to provide “honest services.” Instead, the employee or official will have to guess what additional requirements federal prosecutors and courts might impose after the fact.

Until the U.S. Supreme Court limits or strikes down the undefined crime of honest-services fraud, any work-related untrue or incomplete statement communicated via telephone or e-mail between colleagues is potentially punishable by up to twenty years in prison.<sup>57</sup> Justice Scalia has observed that the terms of this statute make a federal crime out of “a salaried employee’s phoning in sick to go to a ball game.”<sup>58</sup>

Such vague statutes violate the blameworthiness principle by obliterating the distinction between criminal conduct—which traditionally marked the perpetrator as having violated society’s basic social contract—and

the kind of mendacious or otherwise morally questionable behavior that many of us are occasionally guilty of in our ordinary lives.<sup>59</sup>

U.S. Supreme Court watchers predict that the justices will narrow and clarify the scope of the law this term and may even strike down the honest-services provision entirely for being unconstitutionally vague.<sup>60</sup> Congress, however, continues unabashedly to propose new, vaguely defined, federal crimes. H.R. 2129, titled the Federal Price Gouging Prevention Act, for example, would make it a federal crime punishable by up to ten years in prison to charge “unconscionably excessive” prices for gasoline during “energy emergencies,” but the bill contains no explanation of how gasoline sellers can tell in advance whether the prevailing market price in a given geographic area is “unconscionably excessive,” or will be deemed so, save for the vague admonition that gas prices during an emergency of unspecified depth should not “grossly exceed” those charged prior to the beginning of that emergency.<sup>61</sup> Worse, a separate offense accrues with each day of excessive pricing. As a result, several days of selling gasoline at the wrong price could result in a life sentence for an unlucky defendant if this bill, as written, becomes law.<sup>62</sup>

#### PART 4. INCORPORATION OF FEDERAL REGULATORY REQUIREMENTS

The common law governing crimes was long ago superseded in most American jurisdictions by an exclusively statute-based criminal law.<sup>63</sup> The motivation for this historical shift was twofold: first, the belief that, as a matter of fairness, there ought to be an authoritative text that citizens can consult to find out what the criminal law prohibits; and second, the belief that the authors of this text should be statewide legislative bodies rather than unelected judges, often of limited jurisdiction. Unfortunately, Congress has undermined both objectives by criminalizing violations of vast swaths of the obscure and ever-changing Code of Federal Regulations, which is promulgated by unelected bureaucrats, sometimes pursuant to older statutory authority that did not contemplate criminal enforcement.

The Resource Conservation and Recovery Act provides for criminal penalties, including up to five years’ imprisonment, for any person who “knowingly treats, stores, or disposes of any hazardous waste identified or listed under this subchapter without a permit under this subchapter ... in knowing violation of any material condition or requirement of any applicable interim status regulations or standards.”<sup>64</sup> In order to determine whether something is “hazardous waste” according to this provision, one must consult the lengthy and frequently amended regulatory definition of the term promulgated by the Environmental Protection Agency at 40 C.F.R. §261 et seq., and then determine what might be an “applicable interim status regulation.”

*United States v. White*, a federal district court case involving a pesticide company, illustrates the extreme perilousness of this regulatory environment.<sup>65</sup> The defendant small businessmen in *White* operated a company called Puregro, Incorporated. Among other activities, its business involved rinsing out empty containers that had formerly contained agricultural pesticide to remove any remaining pesticide residue. The defendants placed the “rinseates,” water that had been used to clean the containers, into an evaporator tank. The defendants hired an environmental consultant to tell them what they were legally required to do with the remaining rinseates, which, while lower in volume, were still diluted with water. The consultant told them that the rinseates would not have to be disposed of as hazardous waste under 40 C.F.R. §261.2(c)(1)(ii), which states that “commercial chemical products listed in §261.33 are not ... wastes if they are applied to the land and that is their ordinary manner of use.” Therefore, they could be legally sprayed as a pesticide on the same kind of field to which it was ordinarily applied. On the strength of this advice, the *White* defendants sprayed the rinseates on a field in the usual manner of a pesticide and were subsequently indicted on four counts involving illegal storage, transportation, and disposal of hazardous waste under the Resource Conservation and Recovery Act as well as on one count of applying a pesticide in a manner inconsistent with its labeling, in violation of the Federal Insecticide, Fungicide, and Rodenticide Act.<sup>66</sup>

A nonlawyer reading the criminal provisions of the Resource Conservation and Recovery Act might con-

clude that the *White* defendants' apparently good-faith misinterpretation of the requirements of federal regulations would be a defense to the charge that they "knowingly" violated those regulations. But the word "knowingly" provides no such defense.<sup>67</sup> Instead, regulatory tribunals and courts have consistently limited the term's meaning to awareness of the actions that make up the regulatory violation—in this case, defendants' knowledge that at their direction, diluted pesticides had been applied to a field. Because, however, the *White* defendants' belief that their conduct was legal was a mistake of law rather than a mistake of fact, the prevailing definition of "knowingly" deprived them of any defense to criminal liability, despite the court's own characterization of the regulations at issue as "dense, turgid, and a bit circuitous."<sup>68</sup>

The wholesale incorporation of federal regulatory schemes into the federal criminal law has seriously undermined the traditional blameworthiness principle. While the social goals of environmental statutes are worthy, the regulations intended to achieve them have become so lengthy and complex that the best efforts of law-abiding citizens to steer clear of criminal liability are often inadequate. As Justice Potter Stewart observed, criminalizing the honest misinterpretation of federal regulations amounts to "a species of strict liability for violation of the regulations despite the 'knowingly' requirement."<sup>69</sup>

By criminalizing regulatory violations, Congress has ceded the power to determine the reach of the criminal law to the unelected officials who promulgate regulations in the various federal agencies. While the kind of power that judges exercise involves setting boundaries for the criminal law, the power that Congress has delegated to regulators involves forever extending its reach. It is this latter tendency that threatens a classically liberal political system.

Nonetheless, Congress continues to propose new laws that criminalize violations of federal regulations. For example, H.R. 500, titled Great Lakes Collaboration Implementation Act, would authorize the U.S. Department of Homeland Security to promulgate regulations establishing performance requirements for vessels in order to curtail the introduction of invasive species

into the United States.<sup>70</sup> "Knowing" violations of these regulations, even if they derive from a good-faith misinterpretation of their requirements, will be punishable as felonies if the bill becomes law as written.<sup>71</sup>

## PART 5. WHAT CONGRESS SHOULD DO

First, Congress should include appropriate *mens rea* language in all new criminal statutes and amend existing laws to include such language. By declining to specify *mens rea* requirements for federal crimes, Congress has invited prosecutors to indict businesspeople and others for unwitting conduct and innocent mistakes. Since such defendants are not blameworthy, criminal sanctions are inappropriate. Congress should also adopt the *mens rea* guidelines in the Model Penal Code so as to reduce courts' current confusion about how to interpret the law.<sup>72</sup> The Model Penal Code establishes, in descending order of seriousness, four clear levels of culpability—namely, those showing purpose, knowledge, recklessness, and criminal negligence—and calls for the assignment of one of these levels of *mens rea* to each element of a criminal offense.<sup>73</sup> The Model Penal Code also provides courts with guidelines for construing statutes featuring ambiguous *mens rea* language or none at all. These guidelines generally call for a more stringent *mens rea* standard when the statutory language is ambiguous.<sup>74</sup>

Second, Congress should clarify the scope of liability that federal fraud statutes impose. These statutes provide inadequate warning to the parties in question of the nature and breadth of the behavior proscribed, thereby inviting these laws' arbitrary application by law enforcement and the courts, by failing to define adequately important elements of the crime, including whether the law in question is intended to apply only to certain categories of persons, such as elected officials or participants in the securities markets, and whether a person charged with fraud must be engaged in or planning a transaction with the person who is allegedly the object of the deceit.

Third, Congress should altogether refrain from criminalizing violations of the Code of Federal Regula-

tions, either regulations promulgated under existing statutes or those that some new piece of legislation authorizes. Criminal sanctions are only one of several possible ways to regulate a complex industry or marketplace. Civil enforcement, in addition to being less abusive of inadvertent violators of complex regulatory schemes, may actually be more effective.<sup>75</sup>

Finally, Congress should include “sunset clauses” in all federal criminal laws. From the 1933 Securities Act to the Sarbanes-Oxley Act of 2002, new federal criminal laws have tended to follow hard on the heels of crises provoked by commercial malfeasance. When the crisis subsides, the flaws and costs of these new prohibitions often become apparent, but there is no comparable political momentum for curtailing or eliminating them. The federal criminal law therefore functions as a “one-way ratchet,” expanding during periods of crisis but never contracting in calmer times, though there is evidence that some new criminal laws, such as sections of Sarbanes-Oxley, are excessively burdening legitimate and productive business activities.<sup>76</sup>

This well-understood phenomenon suggests that political awareness alone will not alter our natural political tendency to overcriminalize business conduct. Congress should therefore adopt the practice of including sunset clauses in all federal criminal laws, providing that they will automatically expire after a stated period unless Congress votes in a less politically fraught environment to extend the prohibitions.

## PART 6. WHAT COURTS CAN DO

First, federal courts should end the practice of applying to so-called public-welfare offenses rules of statutory interpretation different from those that they apply to other criminal laws. Because often the overriding reason for enacting a piece of legislation is to produce an overall social benefit, and the criminal sanctions attached to certain forms of conduct contrary to it are chiefly aimed at conducting to that benefit by deterring that conduct rather than stigmatizing it and punishing the person who carried it out, courts have often put aside their usual

insistence on a finding of criminal intent.<sup>77</sup> This is extremely perverse reasoning from the perspective of the blameworthiness principle, which holds that the criminal law should extend only to persons who freely violate an aspect of a community’s basic social contract. Even those unaware that their intrinsically wrongful conduct violates the positive law are blameworthy because they should have known that their conduct was harmful.

Society, however, can’t reasonably expect ordinary citizens, faced with the necessity of making a decision on whether or how to proceed with a particular course of action, to engage in the elaborate balancing of costs and benefits that characterizes the policymaking process, and then to reach the same conclusion as some session of Congress. To deal with the fundamental unfairness of this expectation, the U.S. Supreme Court should adopt a single interpretative standard that imputes an appropriate *mens rea* requirement to all federal criminal statutes that lack explicit language regarding criminal intent.

Because citizens deserve fair notice of what the criminal law prohibits, the courts should reinvigorate the rule of lenity—a principle of statutory construction that says that “if there [is] reasonable and articulable doubt over the interpretation of a criminal statute, the defendant [has] to be given the benefit of that doubt.”<sup>78</sup> Thus, the rule of lenity parallels, in the realm of legal interpretation, the rule that a defendant must be proved guilty “beyond a reasonable doubt.”

Unfortunately, courts today usually rebuff arguments based on the rule of lenity.<sup>79</sup> Courts have decided that the rule may be invoked only if exhaustive analysis of the legislative history fails to provide a rationale for resolving a textual ambiguity in a criminal statute.<sup>80</sup> The analysis of legislative history may be an appropriate interpretative technique in some contexts; but in the context of a criminal case, it makes a mockery of the traditional principle of fair notice. Few citizens can be reasonably expected to research the legislative history of any laws that they might be charged with violating in an effort to resolve ambiguities in overbroad or poorly drafted statutes, or to reach in advance the same conclusion as the court hearing the question.



The First U.S. Circuit Court of Appeals, sitting *en banc*, went even further to avoid applying the rule of lenity in a 2005 case involving the president of a technology-services company charged with criminal violations of the Wiretap Act because his company's servers automatically created backup copies of e-mail messages and then stored them.<sup>81</sup> The defendant, Bradford Councilman, pointed out that the relevant passage of the Wiretap Act prohibited actions to "intercept" communications over wires. The word "intercept" implies that communications must be moving through the wires at the time that the act in question is committed, a likely qualification of the law's scope, since Congress was probably trying to prohibit unauthorized monitoring of ongoing communications. Despite the fact that a series of federal courts around the country had reached varying conclusions about the proper interpretation of the act, the First Circuit declined to apply the rule of lenity because, it held, the rule was appropriate only in cases of "grievous ambiguity in the penal statute," whereas the Wiretap Act suffered from only "garden variety ambiguity."<sup>82</sup>

Congress has a responsibility to avoid even garden-variety ambiguity in the federal law when the consequences for the defendant are so great. The first

thought in judges' minds when interpreting a criminal law or regulation should be whether the rule of lenity applies.

## PART 7. CONCLUSION

During the twentieth century, Congress dramatically expanded the reach of federal criminal laws applicable to business conduct, often during times of perceived crisis and public discontent. That trend has continued unabated into the new millennium. New criminal laws, including the Sarbanes-Oxley Act, were passed in the wake of the Enron scandal, and the 111th Congress is considering several bills to create or expand criminal provisions in response to the recent financial crisis. While dangerous criminals have certainly been successfully prosecuted under the federal criminal laws, Congress's decision to abandon the blameworthiness principle has resulted in an excessively wide criminal net that captures the good as well as the bad and chills constructive conduct. Congress and the courts should take steps to roll back the reach of criminal laws and refocus them on those who truly deserve society's harshest condemnation and punishment.

## ENDNOTES

---

1. See "Legislative Update," Heritage Foundation, available at <http://overcriminalized.com/Legislation.aspx>.
2. See Megan Meier Cyberbullying Prevention Act, H.R. 1966 (111th Congress).
3. See Consumer Cellphone Number Distribution Protection Act of 2009, H.R. 428 (111th Congress).
4. John S. Baker, Jr., "State Police Powers and the Federalization of Local Crime," 72 TEMP. L. REV. 673, 674–75 (1999).
5. See American Bar Association, *The Federalization of Criminal Law* (1998).
6. See 15 U.S.C. §24.
7. *Ibid.*, §77.
8. See, e.g., 42 U.S.C. §6928.
9. *United States v. Dotterweich*, 320 U.S. 277 (1943).
10. See Sally S. Simpson, *Corporate Crime, Law, and Social Control* (Cambridge: Cambridge University Press, 2002).
11. *Ibid.*, pp. 151–52.
12. Chad Bray, "Madoff Pleads Guilty to Massive Fraud," *Wall Street Journal*, March 12, 2009.
13. Criminal complaint in *United States v. Bernard L. Madoff*, available at <http://www.usdoj.gov/usao/nys/madoff.html>.
14. See *United States v. Dotterweich*, 320 U.S. 277 (1943).
15. See *United States v. Ellison*, 112 F. Supp. 2d 1234 (Dist. Co. 2000).
16. See *United States v. Councilman*, 245 F. Supp. 2d 319 (Dist. Mass. 2003).
17. See *United States v. Carpenter*, 791 F. 2d 1024 (2d Cir. 1986).
18. See *United States v. Stewart*, 323 F. Supp. 2d 606 (S.D.N.Y. 2004).
19. See *United States v. Condolon*, 600 F. 2d 7 (4th Cir. 1979).
20. Sanford Kadish, "Some Observations on the Use of Criminal Sanctions in Enforcing Economic Regulations," 30 UNIV. OF CHICAGO L. REV. 423, 425–26 (1963).
21. Noeleen G. Walder, "Criminal Prosecutions Predicted to Surge over Financial Crisis," *New York Law Journal*, October 9, 2008.
22. Wayne Morrison, ed., *Blackstone's Commentaries on the Laws of England* (4 vols.), 9th ed. (London: Cavendish, 2001), 2:17.

23. See, e.g., O. W. Holmes, Jr., *The Common Law* (1881), p. 3 (observing that “even a dog distinguishes between being stumbled over and being kicked”).
24. See, e.g., *Morissette v. United States*, 342 U.S. 246, 252 (1952).
25. Henry M. Hart, Jr., “The Aims of the Criminal Law,” 23 *LAW AND CONTEMP. PROBS.* 401 (1958), p. 413.
26. *Ibid.*
27. See Arthur Leavens, “Beyond Blame: *Mens Rea* and Regulatory Crime,” 46 *U. LOUISVILLE L. REV.* 1, 12 (2007) (“Moral blameworthiness, the necessary, common law predicate to criminal conviction and punishment, thus boiled down to a failure to conform one’s conduct to consensus behavioral norms in circumstances in which the average person would understand that the behavior was wrong”).
28. See Richard A. Posner, ed., *The Essential Holmes: Selections from the Letters, Speeches, Judicial Opinions, and Other Writings of Oliver Wendell Holmes, Jr.* (Chicago: University of Chicago Press, 1992), p. 253.
29. *Ibid.*
30. See Abraham S. Goldstein, *The Insanity Defense* (New Haven, Conn.: Yale University Press, 1967).
31. See Craig L. Carr, “Duress and Criminal Responsibility,” 10 *LAW AND PHIL. J.* 161 (1991).
32. See Leavens, *supra* n. 27, p. 12.
33. See *Cheek v. United States*, 498 U.S. 192 (1991).
34. See, e.g., *Lambert v. California*, 355 U.S. 225 (1957).
35. *Morissette v. United States*, 342 U.S. 246, 251 (1952).
36. Michael L. Seigel, “Bringing Coherence to *Mens Rea* Analysis for Securities-Related Offenses,” 2006 *WISC. L. REV.* 1563, 1573 (2006).
37. 21 U.S.C. §333(a).
38. 342 U.S. at 251.
39. 33 U.S.C. §1251 et seq.
40. *United States v. Dotterweich*, 320 U.S. 277 (1943).
41. *United States v. Ellison*, 112 F. Supp. 2d 1234 (Dist. Co. 2000).
42. 112 F. Supp. 2d at 1237.
43. H.R. 3047, Balancing Act of 2009 §118(b)(1).
44. *Lanzatta v. New Jersey*, 306 U.S. 451, 453 (1939).
45. See, e.g., *Schnellmann v. Roettger*, 373 S.C. 379, 382 (2007).

46. See *United States v. Williams*, 441 F. 3d 716, 721–22 (9th Cir. 2006).
47. *McNally v. United States*, 483 U.S. 350, 355 (1987).
48. In 1988, Congress reacted to *McNally v. United States*, 483 U.S. 350 (1987), by enacting 102 Stat. 4508, codified at 18 U.S.C. §1346 (1988).
49. 18 U.S.C. §1346.
50. *Sorich v. United States*, 555 U.S. \_\_\_, 129 S. Ct. 1308 (2009) (Scalia, J., dissenting).
51. *United States v. Weyhrauch*, 548 F. 3d 1237 (2008).
52. *United States v. Kott*, 2007 U.S. Dist. LEXIS 66125 (2007).
53. *Ibid.*
54. *Ibid.*
55. *United States v. Weyhrauch*, 548 F. 3d 1237, 1245–46 (2008).
56. See *Conrad M. Black et al. v. United States*, 556 U.S. \_\_\_ (May 18, 2009) (granting certiorari); *Bruce Weyhrauch v. United States*, 557 U.S. \_\_\_ (June 29, 2009) (granting certiorari); *Jeffrey K. Skilling v. United States*, 558 U.S. \_\_\_ (October 13, 2009) (granting certiorari).
57. 18 U.S.C. §1343.
58. 555 U.S. \_\_\_, 129 S. Ct. 1308 at 1309 (Scalia, J., dissenting).
59. Alex Kozinski and Misha Tseytlin, “You’re (Probably) a Federal Criminal,” in *In the Name of Justice: Leading Experts Reexamine the Classic Article “The Aims of the Criminal Law”*, ed. Timothy Lynch (Washington, D.C.: Cato Institute, 2009), p. 49.
60. Adam Liptak, “A Question of When Dishonesty Becomes Criminal,” *New York Times*, October 12, 2009.
61. H.R. 2129, Federal Price Gouging Prevention Act, §2(a)(1)(A) and §2(a)(3)(A)(1) (111th Congress).
62. H.R. 2129, Federal Price Gouging Prevention Act, §3(b)(3)(A).
63. See Ben Rosenberg, “The Growth of the Federal Criminal Common Law,” 29 AM. J. CRIM. L. 193, 194 (2002).
64. 42 U.S.C. §6928(d)(2)(C).
65. *United States v. White*, 766 F. Supp. 873 (1991).
66. 766 F. Supp. at 877.
67. Paul Rosenzweig, “Features: The Overcriminalization of Social and Economic Conduct,” 27 CHAMPION 28, 34 (2003) (“[P]roof that one in fact lacked knowledge of the regulatory requirement at issue is, uniformly, no defense to the prosecution”).

68. 766 F. Supp. at 880.
69. *United States v. International Minerals and Chemical Corp.*, 402 U.S. 558, 569 (1971) (Stewart, J., dissenting).
70. H.R. 500, Great Lakes Collaboration Implementation Act (111th Congress).
71. *Ibid.*
72. See Seigel, *supra* n. 36.
73. See MODEL PENAL CODE §2.02(2) (1962).
74. Seigel, *supra* n. 36, p. 1576.
75. See Simpson, *supra*, n. 10.
76. See Henry N. Butler, *The Sarbanes-Oxley Debacle: What We've Learned; How to Fix It* (Washington, D.C.: American Enterprise Institute, 2006), p. 96.
77. See *Staples v. United States*, 511 U.S. 600, 606 (1994).
78. Harvey A. Silverglate, "Federal Criminal Law: Punishing Benign Intentions—A Betrayal of Professor Hart's Admonition to Prosecute Only the Blameworthy," in Lynch, *supra* n. 59, p. 77.
79. See, e.g., *United States v. Nofziger*, 878 F. 2d 442, 456 (D.C. Cir. 1989) (Edwards, J., dissenting) ("Although the rule is a widely accepted theoretical notion, my review of the nearly one hundred federal cases in which reviewing courts in the last ten years have paid lip service to the principle reveals that, almost without exception, courts have found the rule to be altogether inapplicable").
80. Silverglate, *supra* n. 78, p. 76.
81. See *United States v. Councilman*, 418 F. 3d 67 (1st Cir. 2005).
82. Silverglate, *supra* n. 79, p. 77.





**DIRECTOR**

James R. Copland

**FELLOWS**

Marie Gryphon

Peter W. Huber

Walter K. Olson

The **Center for Legal Policy (CLP)** works to advance the principled, long-term reform of our nation's civil justice system by offering incisive, rigorous, and sound analysis of the system's problems as well as effective practical solutions. For over twenty years, CLP has provided the intellectual underpinnings for various reform efforts.

CLP's web magazine, [PointofLaw.com](http://PointofLaw.com), brings together information and opinion on the U.S. litigation system from leading academics and practitioners, and features an archive of books and downloadable articles central to understanding the debate over legal reform. CLP also produces Trial Lawyers, Inc., a series of reports that shed light on the size, scope, and inner workings of the litigation industry.

[www.Manhattan-Institute.org/html/clp.htm](http://www.Manhattan-Institute.org/html/clp.htm)

[www.PointofLaw.com](http://www.PointofLaw.com)

[www.TrialLawyersInc.com](http://www.TrialLawyersInc.com).

The Manhattan Institute is a 501(C)(3) nonprofit organization. Contributions are tax-deductible to the fullest extent of the law. EIN #13-2912529