

# The Criminalization of Almost Everything

When laws grow so voluminous and vague that they oppress those who live under them, society can become as unlivable as if it were lawless. Subject to the arbitrary scrutiny of prosecutors overcome by ambition for their own 15 minutes of fame, ordinary citizens face the horrors of becoming criminal defendants. At a Cato Book Forum in October, Harvey Silverglate, author of *Three Felonies a Day*, and Tim Lynch, editor of *In the Name of Justice* and director of Cato's Project on Criminal Justice, discussed the growing threat of federal criminal law.

**HARVEY SILVERGLATE:** An average, busy professional gets up in the morning, gets the kids to school, goes to work, uses the telephone or e-mail, has meetings, works on a prospectus or bank loan, goes home, puts the kids to bed, has dinner, reads the newspaper, goes to sleep, and has no idea that, in the course of that day, he or she has very likely committed three felonies. Three felonies that some ambitious, creative prosecutor can pick out from that day's activities and put into an indictment.

In his foreword to my book, Alan Dershowitz discusses his time litigating cases in the old Soviet Union. He was always taken by the fact that they could prosecute anybody they wanted because some of the statutes were so vague. Dershowitz points out that this was a technique developed by Beria, the infamous sidekick of Stalin, who said, "Show me the man and I'll find you the crime." That really is something that has survived the Soviet Union and has arrived in the good old USA. "Show me the man," says any federal prosecutor, "and I can show you the crime." This is not an exaggeration.

How does this play out in the United States? To some extent, the weapon is aimed at unpopular citizens and groups. It isn't the primary impetus, but it is certainly a tool, for

example, for going after Muslims or any political opponents who seem to be standing in the way of a prosecutor's political ambitions. For the most part, though, these prosecutions are random. They sometimes have to do with the ambitions of prosecutors and sometimes there are prosecutors who think it's their job to clean up the world or country. But, fundamentally, I don't understand the motives behind the use of these weapons. I'm not a sociologist, I'm not a psychiatrist or psychologist, I can just tell you that these weapons are sprung with alarming and increasing frequency.

I predict that we will see, in the next couple of years, a tidal wave of prosecutions growing out of the financial crisis. Different people from different perspectives have different explanations of why we had a crash. But the Department of Justice is going to have figured it out: fraudulent individuals caused all this. It had nothing to do with government regulation. It had nothing to do with culture. It was individuals who have committed crimes that caused all our woes.

Take an example of what I think is comic: During the height of the crash, bank officers, bank presidents, and brokerage officers talked to the press around the clock, because the press was inquiring: "Is your bank about

to go?" "Are you sufficiently liquid?" These bank officers and presidents kept saying, "As far as I can tell right now we are liquid, we'll make it through this, I think we're going to be okay." There will be a lot of prosecutions of bank officials because they had the temerity to predict that their bank was going to make it through okay—when, of course, it didn't.

Think about a bank president being asked, "Are you liquid? If your depositors wanted to withdraw money tomorrow would they get it?" What's he supposed to say? If he says "No," then there's an immediate rush on the bank. No officer of a bank can possibly get up there and say, "We're gone." Because then they are gone. If he can maintain confidence then the bank *will* make it through. Watch for these prosecutions. They're coming.

How do I know this? Because it has already happened. Everybody knows about Martha Stewart. She was indicted not for insider trading, because what she did probably was not insider trading. Martha Stewart had one count in her indictment, which charged that when she was under investigation for insider trading she had a press conference in which she released a statement saying she was not guilty of insider trading. So, in addition to indicting her for false statement to the Feds, they indicted her for falsely denying her guilt at a press conference. In other words, her crime was her failure to make an abject plea of guilty on national television, in front of the entire press, when asked about whether she had committed insider trading fraud. We're living in a world that's a mixture of Orwell and Kafka.

The solution to this problem is going to arise from an energized response from those people who love and value liberty. Cato, of course, is part of that group, which is why I'm so pleased to be here today. I think the coalitions that Cato is building and partici-

pating in, which are nonpartisan (left, right, and center) in the criminal justice arena are very useful and lead the way. We all have to work together on this. Perhaps we can beat back Leviathan.

**TIMOTHY LYNCH:** It is my unhappy responsibility to inform you that things are even worse than Harvey Silverglate says.

But let me back up and ask a basic question. What do we want from our criminal justice system? Boiled down, we want the government to have enough power to identify and remove criminals from peaceful civil society, but not so much power that it oppresses the rest of us. But that seems to be what is happening today.

The power wielded by police and prosecutors is immense. We have to remember that all it takes is one raid on a home or a business, one high profile arrest, or an indictment that's announced on the steps of a courthouse, and a person's life can be changed forever. Reputation gone. Jobs gone. Friends gone. And that's even before one gets the opportunity to defend himself in a court of law. And once you find out how much it's going to cost you to defend yourself in a court these days, you'll find that you're facing financial ruin. Retirement savings gone. Children's college fund gone. And, most likely, house gone.

If you combine the situation that Harvey Silverglate described with a system where our constitutional rights have been watered down, you'll begin to see how dangerously powerful the government has become. And how vulnerable all of us are to agencies like the IRS and all the others in the federal government, as well as the local law enforcement bureaucracies. There was a time where you could live your life and order your affairs in such a way that you could drastically reduce your exposure to arrest and indictment. Those days are gone. This is an issue that should concern people from all points along the political spectrum.

We are drifting away from the basic constitutional and legal principles that have made the American justice system the best one in the world. Let me begin with the constitutional principle of federalism. In this city, it is considered almost impertinent to

remind Senators, and people who work on the White House staff, that the powers of the federal government are actually limited to those spelled out in the Constitution. For much of our history, crime-fighting was understood to be an issue for local govern-



Harvey Silverglate

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ment. But, over the years, Congress continued to pass more and more federal criminal laws. Those laws are based on a dubious reading of the Commerce Clause of the Constitution.

One of the most recent proposals that has been in the news lately is a ban on so-called “hate crimes.” They call it the “Hate Crimes Prevention Act.” But if you think about it for just a moment, you’ll realize that this law isn’t going to prevent anything. A criminal who is already inclined to shoot another person, or stab another human being, is not going to stop because Congress has passed the Hate Crimes Prevention Act. That idea is pure fantasy.

It’s not going to prevent any hate crime from happening. These pieces of legislation simply give members of Congress the opportunity to posture as problem solvers.

Closely related is the constitutional safeguard against double jeopardy, the idea that nobody should be tried twice for the same offense. But every time Congress federalizes something that’s already on the books at the state or local level, the double jeopardy protection is weakened because of legal precedents that say that the federal government and state governments are separate sovereigns. Those precedents allow federal prosecutors to come back with a federal indictment even after someone has been tried in the state court system. In the beginning this wasn’t much of a problem because there were only a handful of federal crimes. But as the number of federal crimes increases, the double jeopardy protection is weakened.

The next safeguard under assault is the jury trial. The Sixth Amendment to the Constitution says that in all criminal prosecutions, the accused shall have the right to trial by jury. Reading this, you could easily get the misleading impression that most of our criminal cases are adjudicated by juries, but that’s not the system that we have. We’ve moved over to a system of charge and sentence bargaining. You do see the occasional trial on TV, but those are the exceptional cases. More than 95 percent of the criminal cases in America do not go to trial but are instead resolved through plea bargains.

Our courthouses are filled with majestic courtrooms but they’re vacant most of the day. The real action is out in the hallways where prosecutors bargain with defense counsel in plea negotiations. Plea bargaining rests upon the legal fiction that the government does not retaliate against people who want to take their case to trial. What they do say is: “Look, if you take the deal and plead guilty you’ll get a year. If you insist on going to trial, we’re going to throw the book at you—you’ll be looking at 20 years.” With that kind of pressure, most people cave in and plead guilty. A federal judge in Massachusetts, William Young, wrote in one of his rulings, “Criminal trial rates in Massachusetts and the country at

large are plummeting due to the simple fact that nowadays we punish people—and punish them severely—simply because they want to take their case to trial.”

The Sixth Amendment also guarantees our right to a speedy trial. But this is another protection that is being watered down. There was a case in North Carolina a few years ago where a man pointed out to the courts that he'd been in jail for four years and had not yet had a trial. Surely, he said, four years is a blatant violation of the speedy trial guarantee. The government attorneys came back and said, “Not so fast. Our courthouses are clogged with cases and we've had some staffing shortages. Because we've been experiencing these problems—and haven't acted with any particular vindictiveness against this particular guy—the Constitution was not violated.” The appellate court agreed—but two justices on the North Carolina Supreme Court filed a strong dissent. They said that the speedy trial guarantee goes all the way back to Magna Carta, and that no one in the state would consider a four-year delay acceptable if their spouse had been involved or if their son or daughter had been involved. They asked, “What happens if the congestion in our courts continues or gets even worse? Where are we going to be in ten years? Are eight-year delays going to become an acceptable norm in our jurisprudence?” The majority of the North Carolina Supreme Court did not respond. The Fifth Amendment says that no one can be deprived of their liberty without due process of law. But there are very harsh theories of “strict liability” that have been creeping into our law, which, boiled down, mean that the circumstances don't matter. If certain basic facts can be shown, then the defendant is guilty and cannot bring any additional facts into court to show the jury.

A few years ago a man was replacing carpeting in a room he was renting. As he was ripping up the carpet, he found a bullet. So he took it, put it in a dish on the dresser, and forgot about it. Months later he got into a dispute with his ex-girlfriend. She had called the police and accused him of taking some of her personal possessions. He let the police into his room so he could

show them that he didn't have whatever property she'd accused him of having. As the police were looking around, they found the bullet in the dish in his bedroom. He is now serving a 15-year mandatory sentence for possessing the bullet, because there is a



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federal law that says felons cannot possess ammunition. He had a felony record, but was back in the community trying to re-establish himself.

He had a felony record—there's no disputing that—and he explained to the police the circumstances in which he'd found the bullet and why he'd put it on the dresser. But he was a felon and the bullet was in his bedroom. There was nothing more he could tell the jury to escape liability. That's how harsh these theories of strict liability are. People cannot show the jury that they acted in good faith, or explain the circumstances in which things happen. This is another disturbing legal trend.

Finally, we can't have a discussion at the Cato Institute about the criminal justice system without talking, at least briefly, about drug policy. It seems to me that policymakers today are making all the same mistakes we made with alcohol prohibition. Alcoholism was, and is, a serious problem, but the ban was totally counterproductive. People continued to drink, gangster organizations got rich off the black market, and all we got was a lot of crime and corruption. We're seeing the same thing today with drug crimes. Drug addiction is a problem, but the drug war is counterproductive. We're pouring billions of dollars every year into this war, but it hasn't stopped drugs from coming into the country, hasn't stopped people using drugs, and hasn't kept drugs away from our schools. What we have experienced is a lot of crime, corruption, and curtailment of our civil and constitutional rights.

The drug laws have created a cruel lottery system of arrest and incarceration. Some people, like our own President Barack Obama, have won the drug enforcement lottery in that they've escaped arrest and gone on to live successful lives. But thousands of others have lost the drug enforcement lottery, and they are the ones who get a criminal record and often serve jail time. Their lives are fundamentally altered. The conservative William F. Buckley Jr. and the economist Milton Friedman were right: the sooner we end the drug war, the better.

To conclude, let me express my agreement with those who say that America has the best criminal justice system in the world. But we have to take a sober, clear-eyed view of the trends that are underway. We are drifting away from our basic constitutional principles. The key question is what the American justice system is going to look like 20 or 30 years from now. The principles I've been discussing—federalism, jury trial, speedy trial, double jeopardy—are as important today as they were 200 years ago. It is imperative that we come to the defense of these principles, because, if we don't, we're going to lose them. And if we lose these procedural guarantees, then we will lose the free society that they were designed to secure.