Quantifying and Remedying Overcriminalization in Federal Law

Testimony Before
U.S. House Judiciary Subcommittee on Crime and Federal Government Surveillance

United States House of Representatives

May 7, 2025

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My name is GianCarlo Canaparo, and I am a senior legal fellow at The Heritage Foundation. Thank you for inviting me to testify.

Everyone is familiar with the line "ignorance of the law is no excuse." The roots of that famous maxim stretch back through the English common law and Roman law, all the way to Aristotle.[2] This rule makes eminent sense when the law prohibits things that are morally wrong like murder, battery, theft, fraud, kidnapping, and arson. Lawyers call these crimes *malum in se*, which is Latin for "wrong in itself." Every reasonable person knows that acts that are *malum in se* are inherently wrong, and so we can fairly presume knowledge that such things are also illegal. We can also fairly presume knowledge of some laws that target morally neutral behavior, like staying in a federal park past closing hour, smoking in a government building, or violating traffic laws. Lawyers call these crimes *malum prohibitum*, Latin for "wrong because prohibited." When these crimes are well-publicized, not too numerous, and based on common sense, we can fairly presume knowledge of them too. For example, consider the prohibition on smoking in this building. There are signs posted near every door that tell you that you can't smoke here. And it is, at this point, common knowledge that smoking is prohibited in federal buildings. So if someone was arrested for smoking in the hallway, we would not think it

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[2] *See* Edwin R. Keedy, *Ignorance and Mistake in the Criminal Law*, 22 Harv. L. Rev. 75, 76–80 (1908); Ronald A. Cass, Ignorance of the Law: A Maxim Reexamined, 17 Wm. & Mary L. Rev 671 (1976).

unjust to punish him even if, somehow, he didn't know that smoking was illegal.

But what if *malum prohibitum* crimes are not well-publicized, number in the thousands or tens of thousands, and prohibit things that are not based on common sense? What if, for example, we made it a crime to sell Swiss cheese that didn't have holes in it? And what if we divided that crime among four different statutory and regulatory provisions and scattered them throughout hundreds of thousands of pages of federal laws? Would it then be just to say that ignorance of the law is no excuse? America has, in fact, done exactly that. It is a federal crime to sell Swiss cheese without holes in it, and to figure that out, you'd need to consult three statutes and a federal regulation.[3]

Swiss cheese is only one example. There are so many examples of crimes spread throughout the United States Code and Code of Federal Regulations that American criminal law is now the subject of justly deserved ridicule. Lawyer and author Mike Chase published the informative and amusing book *How to Become a Federal Criminal*,[4] that chronicles some of the most absurd of the countless crimes hidden throughout American law.

- It is a crime to sell a tufted mattress unless you have burned 9 cigarettes on the tufted part of it.[5]
- It is a crime to sell a package of bacon unless the packaging includes a transparent window that "shall be designed to reveal at least 70 percent of the length (longest dimension) of the representative slice, and this window shall be at least 1½ inches wide."[6]
- It is a crime to submit a design to the Federal Duck Stamp contest if your design does not primarily feature "eligible waterfowl."[7]
- It is a crime to sell a toy marble across state lines unless it is marked with a warning that says "this toy is a marble," and it is also a crime to sell a small ball across state lines unless it is marked with a warning that says, "this toy is a small ball."[8]

These examples are ridiculous, and that is the first problem with the proliferation of *malum prohibitum* crimes. The criminal law should not be ridiculous. The criminal law is meant to be society's most powerful censure against the worst behavior, but these criminal laws are picayune. It brings the criminal law, indeed the whole system of law, into disrepute. And it brings our lawmakers into disrepute—Congress, which authorizes regulatory agencies to make so many of these crimes, and the agencies themselves, which are supposed to be reasonable and competent defenders of public safety, not pedantic nannies.

The second problem is that it has forever been a bedrock principle of the rule of law that the law be *actually* knowable, but our law is not. The rule "ignorance of the law is no excuse" was not meant to be a convenient legal fiction to facilitate the prosecution of *malum prohibitum* crimes. It was

[3] *See* 21 U.S.C. § 331; 21 U.S.C. § 333; 21 U.S.C. § 343(g); 21 C.F.R. § 133.195(a)(1).

[4] Mike Chase, How to Become a Federal Criminal: An Illustrated Handbook for the Aspiring Offender (2019).

[5] 15 U.S.C. §1192(a), §1196; 16 C.F.R. §1632.3(c), §1632.4(d)(2)(iv).

[6] 21 U.S.C. § 676; 9 C.F.R. 217.8(b)(5)(ii).

[7] 16 U.S.C. § 707(a); 50 C.F.R. §91.14.

[8] 15 U.S.C. §1263, §1265; 16 C.F.R. §1500.19(b)(4)(i).

meant as a reflection of reality. The law was, in fact, supposed to be actually knowable. In ancient republican Rome, the plebian citizens walked out of the city in part to protest the promulgation of too many laws.[9] In imperial Rome, the Emperor Caligula was disdained for displaying new tax laws at the top of high pillars where no one could read them.[10] In pre-constitutional America, James Madison warned that "it will be of little avail to the people that laws are made by men of their own choice if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood."[11]

If knowledge of the law is no longer a reality, then the very system of laws itself is liable to fail. Everyone will know that they cannot actually know the law. Everyone will know, therefore, that they cannot obey the law. And all the while, everyone will remember that they cannot justly be expected to do the impossible, and that it is impossible to know thousands of laws. From these premises, they will rightly conclude that such a system of laws is unjust.

And everyone will find a great deal of evidence for the injustice of a system of vast and unknowable laws. They will see that the laws are enforced unequally. One of these ticky-tacky laws will be used against one person today, but not against a different person tomorrow. Perhaps that's because law enforcement lacks the resources to enforce all these rules. That is a problem in itself. But perhaps it's because of bias or favoritism—a much worse problem that, again, undermines the rule of law. Even the perception of bias undermines the rule of law, and a vast and unknowable code of laws always creates that perception. For a fuller discussion of the damage that too many laws does to the rule of law and to the body politic, I refer you to Justice Neil Gorsuch and Janie Nitze's book, *Over Ruled: The Human Toll of Too Much Law*.[12]

My more modest task today is to show you that America's criminal laws really are so numerous that these fears are not merely hypothetical.

There have been several attempts since the 1980s to count the number of crimes in the United States Code.[13] Until 2022, all of those attempts failed for various reasons—lack of manpower, lack of a reliable counting method, or assumptions that made the counts only very rough estimates. In 2022, however, I partnered with Patrick McLaughlin, Liya Palagashvili, and Jonathan Nelson of the Mercatus Center to deploy an algorithm to count the crimes in the 2019 U.S. Code. We used carefully selected search terms, refined over a long iterative process, to reliably identify code sections that

[9] John Chipman Gray, The Nature and Sources of the Law 162–70 (2d ed. 1921).

[10] Gaius Suetonius Tranquillus, The Twelve Caesars ¶ IV.37 (Robert Graves trans., 1957).

[11] The Federalist No. 62 (James Madison).

[12] Neil Gorsuch & Janie Nitze, Over Ruled: The Human Toll of Too Much Law (2024). For related readings on this topic consider Lon L. Fuller, The Morality of Law 49–51 (3d ed. 1969); Ronald L. Gainer, Report to the Attorney General on Federal Criminal Code Reform, 1 Crim. L.F. 99, 100 (1989); Paul J. Larkin, Jr., Public Choice Theory and Overcriminalization, 36 Harv. J.L. & Pub. Pol'y 715 (2013); Edwin Meese III & Paul J. Larkin, Jr., Reconsidering the Mistake of Law Defense, 102 J. Crim. L. & Criminology 725 (2012); Julie R. O'Sullivan, The Federal Criminal "Code" Is a Disgrace: Obstruction Statutes as Case Study, 96 J. Crim. L. & Criminology 643, 643 (2006).

[13] GianCarlo Canaparo, Patrick McLaughlin, Jonathan Nelson and Liya Palagashvili, *Count the Code: Quantifying Federalization of Criminal Statutes*, Heritage Found. Special Report No. 251 (Jan. 2022), https://www.heritage.org/crime-and-justice/report/count-the-code-quantifying-federalization-criminal-statutes#_ftnref46.

created at least one crime.[14] We found 1,510 such statutes. One statute does not mean one crime; each statute could create any number of crimes. Congress is not consistent in its crime-writing practices. Accordingly, we developed a way to estimate the number of crimes created in various statutes. The final number we reached as 5,199 federal crimes in the United States Code as of 2019.

This number is still only an estimate, but it is the most reliable one to date. We also compared the 2019 Code to older versions, and we were able to confirm that the number of crimes has consistently risen.

If there were only 5,199 federal crimes (to say nothing of all the state crimes), that would be far too many for any person to know. But that is not the total number of federal crimes because there are many more in the Code of Federal Regulations. Nobody knows how many such crimes there are, but one estimate from the 1990s put that number somewhere around 300,000.[15] When my co-author, Patrick McLaughlin, testified before this committee last year, he ran our algorithm through the Code of Federal Regulations (CFR) and found that it identified 719 provisions that created at least one crime.[16] That number, however, is far smaller than the actual number of CFR provisions that create crimes.

The reason our algorithm won't give an accurate number of crimes in the CFR is because the CFR creates crimes in a different way than the U.S. Code does. When the U.S. Code creates a crime, it says something amounting to, "It shall be a crime to do *X*." And it will very often say something like, "*X* includes violating any and all regulations promulgated under this chapter." A federal agency, thereafter, merely promulgates a regulation setting certain requirements. It is a crime to violate those requirements, but the operative language that our algorithm identifies is not present in the CFR. The CFR is, in effect, referring to the operative language in the U.S. Code. That's why you need to consult at least two provisions of law to identify regulatory crimes. The Swiss cheese crime is a good example. You will not find any of our search terms in the CFR provision that says Swiss cheese must have holes throughout the cheese. But you will, however, find the phrase "shall be imprisoned" in the related U.S. Code provisions, which make it a crime to violate the Food and Drug Administration's regulatory requirements for Swiss cheese.

In sum, the number of crimes in the federal law is enormous and growing and applies to so many things that no reasonable person would think are crimes.

It would be bad enough if our criminal laws were merely ridiculous even if nobody was ever prosecuted for violating them. Unfortunately, however, people are prosecuted for violating them. As Dr. McLaughlin testified last year, "the expansion of federal criminal laws over the past few decades

[14] Those search terms included "shall be fined under this title," "imprisonment for not more than," "sentenced to imprisonment or death," "shall be fined," "shall be punished," and similar phrases that were commonly used to create criminal liability.

[15] John C. Coffee, Jr., Does "Unlawful" Mean "Criminal"?: Reflections on the Disappearing Tort/Crime Distinction in American Law, 71 B.U. L. Rev. 193, 216 (1991) (citing Thomas B. Leary, *The Commission's New Option That Favors Judicial Discretion in Corporate Sentencing*, 3 Fed. Sentencing Rep. 142, 144 n.10 (1990)); *see also* Harvey Silverglate, Three Felonies a Day: How the Feds Target the Innocent (2011).

[16] Patrick A. McLaughlin, *Quantifying Criminalization in Federal Law*, Testimony before the U.S. House Judiciary Subcommittee on Crime and Federal Government Surveillance, April 30, 2024.

has been linked to an increase in federal incarceration rates, especially for drug-related offenses, reflecting broader trends towards more extensive criminalization and harsher penalties."[17] A number of these prosecutions have made national news, and I'll recount just a few here. More can be found in The Heritage Foundation booklet *USA v. You: The Flood of Criminal Laws Threatening Your Liberty*, which was endorsed by several organizations across the political spectrum including the American Civil Liberties Union, the National Association of Criminal Defense Lawyers, Right on Crime, and the American Center for Law and Justice.[18]

In 2009, Eddie Leroy Anderson of Idaho was camping with his son on federal lands.[19] While there, they looked for arrowheads but did not find any. A federal agent somehow found out that they had tried to find arrowheads and had them criminally charged with *attempted* violation of a law against stealing antiquities. Facing felony convictions punishable by two years in prison, the Andersons plead guilty to misdemeanors, did a year of probation, and paid a $1,500 fine each.[20]

In 2003, the Court of Appeals for the Eleventh Circuit upheld the conviction of Abbie Schoenwetter for violating the Lacey Act, which makes it a crime to violate the laws of other nations when importing fish and wildlife.[21] Schoenwetter imported lobsters into the United States in apparent violation of size and packaging requirements set by a Honduran regulation.[22] It was difficult for the American courts to figure out just what the Honduran law required and whether it was valid. The Honduran government provided conflicting opinions on it, although it eventually decided that the regulation was invalid. The Eleventh Circuit, however, disregarded this final judgment of Honduran officials. The court said that if it had to figure out which interpretation of Honduran law was correct, or if it had to defer to the final judgment of the Honduran officials rather than their first assessment, it "would be caught up in the endless task of redetermining foreign law." That Schoenwetter's liberty depended on the court getting the right answer didn't matter to the Eleventh Circuit. Accordingly, it upheld Schoenwetter's sentence of 97 months in prison.[23]

Perhaps most famously, race car legend Bobby Unser was convicted of abandoning a snowmobile in a protected wilderness area.[24] He and a friend were caught in a blizzard in the woods and were forced to abandon the snowmobile to seek shelter. They barely survived two days and two nights trapped in the blizzard, fighting hypothermia. When they were finally saved, they went to the authorities for help to recover the lost snowmobile, but rather than help them find it, the U.S. Forest

[17] *Id.*

[18] *USA vs You: The Flood of Criminal Laws Threatening Your Liberty*, The Heritage Foundation, http://static.heritage.org/2013/pdf/USAvsYOU.pdf

[19] Gary Fields & John R. Emshwiller, *As Criminal Laws Proliferate, More Are Ensnared*, Wall Street Journal, July 23, 2011, https://www.wsj.com/articles/SB10001424052748703749504576172714184601654.

[20] *Id.*

[21] United States v. McNab, 331 F.3d 1228 (11th Cir. 2003), as amended (May 29, 2003).

[22] *Id.*

[23] *Id.*

[24] Conn Carroll, *Bobby Unser vs the Feds*, Daily Signal, Mar. 14, 2011, https://www.dailysignal.com/2011/03/14/bobby-unser-vs-the-feds/.

Service had them prosecuted.[25]

It used to be the case that the danger of being prosecuted for violating an arcane *malum prohibitum* crime was lessened by the requirement of what lawyers call *mens rea*.[26] *Mens rea*, Latin for "guilty mind," is the intent element of a crime. For example, to be guilty of first-degree murder, you must premeditate, and to be guilty of battery, you must intend to touch your victim. The intent element of a crime is an ancient requirement of the criminal law because the criminal law is meant to punish morally blameworthy conduct, and we recognize that accidents are not morally blameworthy.[27] They may, of course, lead to civil liability—even an accidental injury entitles the victim to compensation—but they have not historically led to criminal liability. In his characteristically vivid style, Justice Robert Jackson put the point this way:

> "A relation between some mental element and punishment for a harmful act is almost as instinctive as the child's familiar exculpatory 'But I didn't mean to,' and has afforded the rational basis for a tardy and unfinished substitution of deterrence and reformation in place of retaliation and vengeance as the motivation for public prosecution."[28]

Justice Oliver Wendell Holmes, Jr., put it even more simply: "even a dog distinguishes between being stumbled over and being kicked."[29] Unfortunately, America's criminal law often doesn't make that distinction.

With the rise of *malum prohibitum* offenses, came the fall of *mens rea*. Many of these thousands of crimes have no *mens rea* element of any kind, so you can be guilty of violating them even though you don't know that these laws exist and even if you don't intend to break them.[30] The Swiss cheese crime is, again, a good example. It has no intent element, so even if you don't know that it's a crime to sell Swiss cheese that lacks "holes or eyes developed throughout,"[31] and even if you don't know that your Swiss cheese lacks such holes, you can still be prosecuted. The case of Bobby Unser is another good example. He and his friend did not intend to abandon their snowmobile on federal lands. They intended, in the moment, only to save their lives, and they intended, later, to retrieve it. But their intent did not matter.

Crimes without *mens rea* requirements are called strict liability crimes. These crimes have existed in the past but, to quote legal theorist Lon Fuller, they have "never achieved respectability in

[25] Fields & Emshwiller, *supra* note 19.

[26] *See generally*, John G. Malcolm, *Morally Innocent, Legally Guilty, The Case for Mens Rea Reform*, 18 Federalist Soc'ty Rev., (Sept. 2017), https://fedsoc.org/fedsoc-review/morally-innocent-legally-guilty-the-case-for-mens-rea-reform.

[27] Francis Bowes Sayre, *Mens Rea*, 45 Harv. L. Rev. 974 (1932).

[28] Morissette v. United States, 342 U.S. 246, 250 (1952).

[29] Oliver Wendell Holmes, Jr., The Common Law 3 (1881).

[30] *See* Zack Smith and Nathan Pysno, *Without Intent Revisited: Assessing the Intent Requirement in Federal Criminal Law 10 Years Later*, Heritage Found. Special Rep., (Dec., 2021), https://www.heritage.org/without-intent-revisited.

[31] 21 C.F.R. § 133195(a).

our law."[32] Even so, they have proliferated.[33] Sometimes they happen simply because Congress forgets to add a *mens rea* requirement into a statute. Sometimes they happen because Congress wants to make it easy for people to be imprisoned. This is often the case with "social welfare" crimes—crimes that forbid conduct that is not immoral but that contravenes policy preferences. As President Barack Obama explained, putting *mens rea* elements in social welfare crimes "could undermine public safety and harm progressive goals."[34]

With due respect to former President Obama, his argument perverts the criminal law. It reduces it from a serious guardian against terrible behavior into a petty tool of policy making. But what President Obama seems to have forgotten is that in either case, the outcome remains the same: someone is going to prison. If the criminal law is limited to intentional bad acts, then that person probably deserves to go to prison. But if the criminal law extends to accidental violations of arcane policy rules, the person probably doesn't. Worse, Obama's argument implies that individual liberty can and should be taken away to advance policy preferences. Those conclusions do not sit well within America's legal tradition. The criminal law was not meant to be a tool of policy engineering. It should be used only on morally blameworthy behaviors, and intent is a central part of moral blameworthiness.

So where do we go from here? For years now, my colleagues and I have asked the federal government to count, review, and cut the excess federal crimes in both the U.S. Code and in the CFR.[35] Likewise, we have asked the government to adopt a default *mens rea* law that would apply some default intent requirement to any federal crime that lacks one.[36] My colleagues, former Attorney General Ed Meese and Paul Larkin, have also asked the courts or Congress to create a limited mistake-of-law defense.[37] Because the maxim "ignorance of the law is no defense" no longer makes sense in America, people charged with certain *malum prohibitum* crimes should be able to raise ignorance of

[32] Fuller, *supra* note 12 at 77 ("Strict criminal liability has never achieved respectability in our law."); *see also* Morissette, 342 U.S. at 250 (1952) (Jackson, J.) ("The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil."); H.L.A. Hart, *Negligence, Mens Rea, and Criminal Responsibility*, *in* H.L.A. Hart, Punishment and Responsibility: Essays in Philosophy of Law 136, 152 (1968) ("strict liability is odious").

[33] *See* Malcolm, *supra* note 26; Smith & Pysno, *supra* note 29.

[34] Barack Obama, *The President's Role in Advancing Criminal Justice Reform*, 130 Harv. L. Rev. 811, 829 n. 89 (2017).

[35] Canaparo, *et al.*, *supra* note 13; John S. Baker, Jr., Corporations: Measuring the Explosive Growth of Federal Crime Legislation, 5 Engage 23 (2004); John S. Baker, Jr., Revisiting the Explosive Growth of Federal Crimes (Heritage Found., Legal Memo. No. 26, June 16, 2008); Hearing Before the Subcomm. on Employer-Employee Relations of the House Comm. on Educ. and the Workplace, 107th Cong. (2002) (testimony of Paul Rosenzweig, Senior Legal Research Fellow, Center for Legal and Judicial Studies, The Heritage Foundation).

[36] *See, e.g.*, Malcolm, *supra* note 26; Smith & Pysno, *supra* note 29; *see also* GianCarlo Canaparo, Paul Larkin, & John Malcolm, *Four Ways The Executive Branch Can Advance Mens Rea Reform*, Heritage Found. Legal Memo. No. 258, Jan. 28, 2020, https://www.heritage.org/courts/report/four-ways-the-executive-branch-can-advance-mens-rea-reform (providing options to the executive branch).

[37] Paul J. Larkin & Edwin Meese, *Reconsidering the Mistake of Law Defense*, 102 J. Crim. L. & Criminology 725 (2012). Their proposal is cabined in many ways—for example, it would only be available against social welfare crimes—so that the defense does not become a *de facto* get-out-of-jail free card.

the law as a defense.[38] All of these are good options, and we hope that Congress considers them. Thank you for giving me the opportunity to testify today.

[38] The Supreme Court has already created a small exception to the rule. In *Lambert v. California*, 355 U.S. 225 (1957), the Court held that ignorance of the law was an excuse when there was no probability that the defendant could have knowledge of the law.