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Taking Stock of Federal Regulatory Crimes

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Abstract

Lawmakers face a constitutional duty to notify the public of all conduct that they define as criminal, yet no one knows all of the federal criminal laws and regulations, how many exist today, or even exactly where to find them. “All are entitled to be informed as to what the State commands or forbids” is one entitlement that the Constitution requires. Congress should direct the executive branch to prepare such a list. The White House can start this project by directing the heads of executive agencies, with supervision and review within the Office of Management and Budget, to compile a complete list of their regulations that carry criminal penalties. Either course would ameliorate the problems that overcriminalization imposes on society.

Introduction

Lawmakers face a constitutional duty to notify the public of all conduct that they define as criminal.¹ In turn, the public is held to the dubious presumption that they know all criminal law.² Yet no one knows all of the federal criminal laws and regulations, how many exist today, or even exactly where to find them.³ Congress has tried to remedy the problem by proposing that the Executive Branch provide a list of all federal crimes. So far, no such law has been passed.⁴

Congress may wish to change course slightly. It can direct the Office of Information and Regulatory Affairs (OIRA), a component of the White House Office of Management and Budget (OMB), to list all federal crimes on a government website.⁵ Or the executive branch can start the list by having the heads of all executive departments and agencies identify all regulations within their purview that carry criminal penalties and then publish that information in

KEY POINTS

- Congress incorrectly presumes that publishing a statute in the U.S. Code or a regulation in the *Federal Register* gives the public sufficient notice of its commands.
- The government should once again accept its moral and constitutional duty to produce a list for the public's review.
- Congress can direct the Office of Information and Regulatory Affairs (OIRA), a component of the White House Office of Management and Budget (OMB), to list all federal crimes on a government website.
- Alternatively, the heads of all executive departments and agencies can be required to identify all regulations within their purview that define crimes (or elements of crime) and can be used in criminal prosecutions and then publish that information in one online database.
- Either course would ameliorate some of the problems of overcriminalization by giving a “fair warning” of the contents of the criminal code.

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one online database.⁶ That would ameliorate some of the problems of overcriminalization by giving a “fair warning” of the contents of the criminal code.⁷

Countless Crimes

Congress incorrectly presumes (to the extent that Congress gives the matter any thought at all) that publishing a statute in the U.S. Code or a regulation in the *Federal Register* gives the public sufficient notice of its commands.⁸ Justice Antonin Scalia once wrote that:

[I]n most cases the proposition that the words of the United States Code or the Statutes at Large give adequate notice to the citizen is something of a fiction...albeit one required in any system of law; but necessary fiction descends to needless farce when the public is charged even with knowledge of Committee Reports.⁹

The same point can be made about the public’s knowledge of federal regulations. As Justice Lewis Powell once noted, it “is totally unrealistic to assume that more than a fraction of the persons and entities affected by a regulation...would have knowledge of its promulgation or familiarity with or access to the Federal Register.”¹⁰ Further descent is needed to find, untangle, and understand the mare’s nest of federal regulatory crimes.

Consider this: The Library of Congress compiles data from the House and Senate to publish all committee reports in a readily searchable online database.¹¹ Its staff maintains that information along with 70 million manuscripts, 38 million books and printed materials, 14 million photographs, 8.1 million pieces of sheet music, 5.5 million maps, and 3.6 million recordings.¹² Yet even they cannot say how many federal crimes exist or precisely where they can be read.¹³

Counting Crimes

In the early 1980s, officials in the U.S. Department of Justice tried for two years to identify all federal crimes, only to abandon the effort after finding 3,000 of them. A senior Justice Department official concluded that “[y]ou will have died and [been] resurrected three times” before you discover them all.¹⁴ As other groups tried in the 1990s, one found 10,000 federal regulations that carry criminal or civil penalties;¹⁵ another, an estimated “300,000

federal regulations that may be enforced criminally.”¹⁶ However long it may be, the government should once again accept its moral and constitutional duty to produce a list for the public’s review.¹⁷

The Founders of the Pennsylvania colony not only mandated that their criminal laws be hung on display in all public courts and at provincial Council, but also required that they be read annually “at the opening of every provincial Council and General Assembly, and court of justice.”¹⁸ Can our imagination for new crimes have grown so powerful that we cannot use modern technologies—in particular, the Justice Department’s Internet website—to accomplish what colonists did routinely in the 17th century?

Some Members of Congress consider this breakdown of due process dire enough to do something about it.¹⁹ In January 2014, the Senate Judiciary Committee voted to send to the Senate floor the Smarter Sentencing Act of 2013.²⁰ That bill would have tasked the heads of executive agencies to do the following:

1. Within one year, report a list of all federal criminal offenses issued by each agency, the authorized punishment for a violation of each offense, the *mens rea* elements required by each offense, and the number of cases that the agency referred to the Justice Department for prosecution for each offense within the past 15 years.
2. Within two years, publish a freely accessible list of those offenses online.²¹

Congress failed to enact those requirements into law, although virtually identical provisions appeared in the subsequent Congress²² and may reappear again in 2017.²³

If Congress fails to pass those measures, it has other means of realizing those goals. Specifically, it could sever those reporting requirements from the rest of any omnibus criminal justice bill and move to enact them as stand-alone measures. Or it could require OIRA to see to the compilation of such a compendium by the heads of executive and independent agencies.

Congress created OIRA in 1980,²⁴ and President Ronald Reagan and his successors have used OIRA as the executive branch component responsible for reviewing all proposed regulations. Congress could

easily “lay [that] burden down” there.²⁵ Doing so would implement the Senate Judiciary Committee’s attempt to create a list of regulatory offenses²⁶ by virtue of OIRA’s responsibility for regulatory review.²⁷ It would also further President Donald Trump’s executive order requiring a review of existing regulations and elimination of unnecessary rules as new ones are issued.²⁸

OMB has already twice proven that it is up to the task. In 2006, Congress enacted the Federal Funding Accountability and Transparency Act²⁹ telling OMB “to create an extensive search engine and database accessible to the public,” one that “provides information about most government grants, loans, and contracts in excess of \$25,000.”³⁰ OMB created a single website, *www.USAspending.gov*, to account for trillions of dollars in financial awards, including their amounts, purposes, and recipient organizations.³¹ OMB has also partnered with government agencies—both independent and executive—to create two separate websites that provide a wealth of information about federal regulations.³² By making grant information “available to the public via a single, searchable website,” Congress intended “to empower every American with the ability to hold the government accountable for each spending decision”³³ and, by bringing data on proposed and final regulations to the public, sought to lower the barriers to meaningful citizen participation in regulatory processes.

Yet none of those resources inform the public of all the rules that may impose criminal liability. That crucial detail has been lost in the fray.³⁴ Congress can remedy that by tasking OMB to work with other agencies to give regulatory offenses similar treatment.

Alternatively, the President could order that this project be accomplished without any need for new

legislation. The President could order the OIRA Administrator to ensure that each executive branch agency submits all regulations within its purview that carry criminal penalties, or that could be used in a criminal prosecution, and then publish that list in an accessible format.³⁵ All of OIRA’s regulatory review activities “are based upon a recognition that, like any other outside review, executive oversight can make regulation more reasoned by forcing articulation of the basis of proposals.”³⁶

Listing regulatory offenses within the executive branch would force its officers to confront directly the ways that they may have misused the criminal sanction to undermine its moral credibility.³⁷ They, Congress, and the public would have the opportunity to decide whether various rules merit criminal penalties and, in turn, whether the agencies have earned a continuation of their delegated legislative authority to define crimes.³⁸

Conclusion

“All are entitled to be informed as to what the State commands or forbids.”³⁹ That is one entitlement that Congress has struggled to supply, although it is one that the Constitution requires.⁴⁰ Congress should continue its efforts to meet that demand. The White House can start the project by directing the heads of executive agencies, with supervision and review within OMB, to compile a list of all of their regulations that carry criminal penalties. Either course would ameliorate the problems that overcriminalization imposes on society.⁴¹

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Endnotes

1. See *Connally v. Gen. Const. Co.*, 269 U.S. 385, 391 (1926); *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939) (“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.”); *Rogers v. Tennessee*, 532 U.S. 451, 459 (2001) (identifying “core due process concepts of notice, foreseeability, and, in particular, the right to fair warning as those concepts bear on the constitutionality of attaching criminal penalties to what previously had been innocent conduct”).
2. See Edwin Meese III & Paul J. Larkin, Jr., *Reconsidering the Mistake of Law Defense*, 102 J. CRIM. L. & CRIMINOLOGY 725 (2013); Paul Rosenzweig, *Ignorance of the Law Is No Excuse, But It Is Reality*, HERITAGE FOUNDATION BACKGROUNDER No. 2812 (June 17, 2013), http://thf_media.s3.amazonaws.com/2013/pdf/bg2812.pdf; Livingston Hall & Selig J. Seligman, *Mistake of Law and Mens Rea*, 8 U. CHI. L. REV. 641 (1940).
3. See, e.g., Glenn Harlan Reynolds, *Ham Sandwich Nation: Due Process When Everything Is a Crime*, 113 COLUM. L. REV. SIDEBAR 102 (2013) (“[A]ny reasonable observer would have to conclude that actual knowledge of all applicable criminal laws and regulations is impossible, especially when those regulations frequently depart from any intuitive sense of what ‘ought’ to be legal or illegal. Perhaps placing citizens at risk in this regard constitutes a due process violation; expecting people to do (or know) the impossible certainly sounds like one.”); William J. Stuntz, *Self-Defeating Crimes*, 86 VA. L. REV. 1871, 1871 (2000) (“Ordinary people do not have the time or training to learn the contents of criminal codes; indeed, even criminal law professors rarely know much about what conduct is and isn’t criminal in their jurisdictions.”); Robert H. Joost, *Simplifying Federal Criminal Laws*, 14 PEPP. L. REV. 1 (1987).
4. See S. 1410, 113th Cong. § 7 (as reported by S. Comm. on the Judiciary, Mar 11, 2014); S. 2123, 114th Congress (as reported by S. Comm. on the Judiciary, Oct. 26, 2015); Press Release, Sen. Chuck Grassley, Senators to Reintroduce Landmark Criminal Justice Reform Package (Sept. 19, 2017), <http://bit.ly/2xwqngf>.
5. There is a precedent for making that assignment. The Federal Funding Accountability and Transparency Act of 2006 directed OMB to create an online database of most federal financial awards. ROBERT D. LEE, RONALD W. JOHNSON & PHILIP G. JOYCE, PUBLIC BUDGETING SYSTEMS 351 (9th ed. 2013).
6. John G. Malcolm, *Criminal Law and the Administrative State: The Problem with Criminal Regulations*, HERITAGE FOUNDATION LEGAL MEMORANDUM No. 130 (Aug. 6, 2014), http://thf_media.s3.amazonaws.com/2014/pdf/LM130.pdf.
7. “[A] fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed.” *McBoyle v. United States*, 283 U.S. 25, 27 (1931). Unfortunately, a list of every statute and regulation will not solve every overcriminalization problem. Particular laws may require more knowledge than the average person can be expected to have, and the number of such laws may be so great that no one could remember them all. See, e.g., Paul J. Larkin, Jr., *The “Waters of the United States” Rule and the Void-for-Vagueness Doctrine*, HERITAGE FOUNDATION LEGAL MEMORANDUM No. 207 (June 22, 2017), http://www.heritage.org/sites/default/files/2017-06/LM-207_0.pdf.
8. Pub. L. No. 90-620, 82 Stat. 1276 (1968) (codified at 44 U.S.C. § 1507 (2012)); see *Williams v. Mukasey*, 531 F.3d 1040, 1042 (9th Cir. 2008) (“As a general rule, ‘publication in the Federal Register is legally sufficient notice to all interested or affected persons regardless of actual knowledge or hardship resulting from ignorance.’”); *Taylor v. Huerta*, 856 F.3d 1089, 1094 (D.C. Cir. 2017). But see Paul J. Larkin, Jr., & John-Michael Seibler, *Sturgeon v. Frost: Alaska’s Wild Lands and Wild Laws Prove the Need for a Mistake-of-Law Defense*, 72 WASH. & LEE L. REV. ONLINE 376 (2016), <http://scholarlycommons.law.wlu.edu/wlulr-online/vol72/iss3/1> (arguing against that presumption).
9. *United States v. R.L.C.*, 503 U.S. 291, 309 (1992) (Scalia, J., concurring in part and concurring in the judgment); see also Stephanos Bibas, *Justice Scalia’s Originalism and Formalism: The Rule of Criminal Law as a Law of Rules*, in THE LEGACY OF JUSTICE ANTONIN SCALIA: REMEMBERING A CONSERVATIVE LEGAL TITAN’S IMPACT ON THE LAW, HERITAGE FOUNDATION SPECIAL REPORT No. 186 (2016), <http://thf-reports.s3.amazonaws.com/2016/SR186.pdf>.
10. *Adamo Wrecking Co. v. United States*, 434 U.S. 275, 290 (1978) (Powell, J., concurring).
11. See <https://www.congress.gov/search?q={%22source%22:%22comreports%22}> (accessed Sept. 26, 2017).
12. LIBRARY OF CONGRESS, *Fascinating Facts*, <https://www.loc.gov/about/fascinating-facts/> (accessed Sept. 26, 2017).
13. Shameema Rahman, *Frequent Reference Question: How Many Federal Laws Are There?*, IN CUSTODIA LEGIS, Mar. 12, 2013, <https://blogs.loc.gov/law/2013/03/frequent-reference-question-how-many-federal-laws-are-there/>.
14. Gary Fields & John R. Emshwiller, *Many Failed Efforts to Count Nation’s Federal Criminal Laws*, WALL ST. J., July 23, 2011, <https://www.wsj.com/articles/SB10001424052702304319804576389601079728920>; see also Ronald L. Gainer, *Federal Criminal Code Reform: Past and Future*, 2 BUFF. CRIM. L. REV. 45 (1998).
15. CRIMINAL LAW DIVISION, AMERICAN BAR ASSOCIATION, THE FEDERALIZATION OF CRIMINAL LAW 10 (1998).
16. 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 the remarks of criminal law practitioner Stanley Arkin); see also John S. Baker, Jr., *Revisiting the Explosive Growth of Federal Crimes*, HERITAGE FOUNDATION LEGAL MEMORANDUM No. 26 (June 16, 2008), <http://bit.ly/2xJttGN>.
17. See *Connally*, 269 U.S. at 391; *Lanzetta*, 306 U.S. at 453; *Rogers*, 532 U.S. at 459.

18. THE FRAME OF GOVERNMENT OF PENNSYLVANIA § XXXVIII (1682). Part of the reason for the public reading was to give those present an opportunity to assent to those laws by standing or dissent by remaining seated. *Id.* Regardless of the utility of that device, the public reading certainly gave notice of the laws to everyone who was present.
19. See Paul J. Larkin, Jr., *Supplying the Information Required by Law: Directing the Federal Government to Identify All Federal Criminal Laws*, HERITAGE FOUNDATION ISSUE BRIEF No. 4143 (Feb. 10, 2014), http://thf_media.s3.amazonaws.com/2014/pdf/IB4143.pdf.
20. See *id.* (citing *Results of Executive Business Meeting—January 30, 2014*, U.S. SENATE JUDICIARY COMMITTEE, <http://www.judiciary.senate.gov/hearings/hearing.cfm?id=138603a26950ad873303535a630d2e0b>).
21. The bill demanded the same information with respect to federal statutes. *Id.*
22. See S. 2123, 114th Congress (as reported by S. Comm. on the Judiciary, Oct. 26, 2015).
23. See Press Release, Sen. Chuck Grassley, Senators to Reintroduce Landmark Criminal Justice Reform Package (Sept. 19, 2017), <http://bit.ly/2xwqnGf>.
24. See the Paperwork Reduction Act of 1980, Pub. L. No. 96-511, 94 Stat. 2812 (codified at 44 U.S.C. Ch. 35 (2012)). See generally HAROLD C. RLYEA, CONG. RES. SERV., RL30590, PAPERWORK REDUCTION ACT REAUTHORIZATION AND GOVERNMENT INFORMATION MANAGEMENT ISSUES (2007).
25. BUCKWHEAT ZYDECO, *Lay Your Burden Down* (2009), <https://www.youtube.com/watch?v=mNjoKcm7rkY>.
26. S. 2123, 114th Congress (as reported by S. Comm. on the Judiciary, Oct. 26, 2015), available at <https://www.gpo.gov/fdsys/pkg/BILLS-114s2123rs/pdf/BILLS-114s2123rs.pdf>; S. 1410, 113th Congress (2013), available at <https://www.govtrack.us/congress/bills/113/s1410/text>.
27. Exec. Order No. 12866, 58 Fed. Reg. 51735 (Sept. 30, 1993), available at https://www.reginfo.gov/public/jsp/Utilities/EO_12866.pdf; Exec. Order No. 13563, 76 Fed. Reg. 3821 (Jan. 18, 2011), available at https://www.reginfo.gov/public/jsp/Utilities/EO_13563.pdf.
28. See Exec. Order No. 13771, § 2, 82 Fed. Reg. 9339 (Jan. 30, 2017), <http://bit.ly/2obOxhW>. “You should throw out whatever offenses no longer make sense in light of today’s needs, whatever crimes should not be enforced through the criminal law, and whatever offenses impose more cost than benefit on America, its criminal justice system, and its people.” Principles for Revising the Criminal Code: Hearing before the Subcomm. on Crime, Terrorism and Homeland Security of the H. Comm. on the Judiciary, 112th Cong. (Dec. 13, 2011) (testimony of Ed Meese).
29. Pub. L. No. 109-382, 120 Stat. 1186 (2006).
30. LEE ET AL., *supra* note 5, at 351.
31. *Id.*
32. See <https://www.reginfo.gov/public/> (accessed Sept. 28, 2017); <https://www.regulations.gov/> (accessed Sept. 28, 2017).
33. THE FEDERAL FUNDING ACCOUNTABILITY AND TRANSPARENCY ACT SUBAWARD REPORTING SYSTEM (FSRS), <https://www.fsr.gov/> (accessed Sept. 26, 2017).
34. “[I]t is important to recognize that there is a significant difference between regulations that carry civil or administrative penalties for violations and regulations that carry criminal penalties for violations.” See Malcolm, *supra* note 6. Those include stigma, loss of constitutional rights, and loss of potentially manifold government benefits and employment opportunities. See John G. Malcolm & John-Michael Seibler, *Collateral Consequences: Protecting Public Safety or Encouraging Recidivism?*, HERITAGE FOUNDATION LEGAL MEMORANDUM No. 200, (Mar. 7, 2017), <http://www.heritage.org/sites/default/files/2017-03/LM-200.pdf>.
35. See CURTIS W. COPELAND, CONG. RES. SERV., RL32397, FEDERAL RULEMAKING: THE ROLE OF THE OFFICE OF INFORMATION AND REGULATORY AFFAIRS (2009); Nicholas Bagley & Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 COLUM. L. REV. 1260, 1305 (2006) (“[OIRA] is firmly under the control of a nationally accountable Chief Executive who is less sensitive to the kinds of parochial preferences that dominate single-mission agencies.”); see also, e.g., Exec. Order No. 12,291, 3 C.F.R. 127 (1981), reprinted in 5 U.S.C. § 601, at 431 (1982).
36. Harold H. Bruff, *Presidential Management of Agency Rulemaking*, 57 GEO. WASH. L. REV. 533, 557 (1989).
37. Consider the list now being generated on Twitter by @CrimeADay, <https://twitter.com/crimeaday?lang=en> (accessed Sept. 26, 2017). The list identifies gimcracks like “7 USC §7734 & 7 CFR §330.402(b)(1) make it a federal crime to import loose household garbage from Hawaii into the continental U.S.” ((Sept. 25, 2017, 5:55 PM), <https://twitter.com/CrimeADay/status/912480780168908800>); and “21 USC §§610, 676 & 9 CFR §319.307 make it a federal crime to sell ‘spaghetti sauce with meat’ if it’s less than 6% meat.” ((Sept. 11, 2017, 6:58 PM), <https://twitter.com/CrimeADay/status/907423243459579904>).
38. See *United States v. Grimaud*, 220 U.S. 506 (1911). “As a general matter, unelected bureaucrats in scores of federal agencies should not be in the business of creating new crimes without vigilant congressional oversight. Very simply, if a matter is serious enough to brand someone a criminal and potentially send him to prison, it is serious enough to be considered by those whom we have elected to represent us.” Malcolm, *supra* note 6.
39. *Lanzetta*, 306 U.S. 451, 453.
40. See, e.g., *Rogers*, 532 U.S. 451, 459.
41. See Michael B. Mukasey & Paul J. Larkin, Jr., *The Perils of Overcriminalization*, HERITAGE FOUNDATION LEGAL MEMORANDUM No. 146 (Feb. 12, 2015), http://thf_media.s3.amazonaws.com/2015/pdf/LM146.pdf.