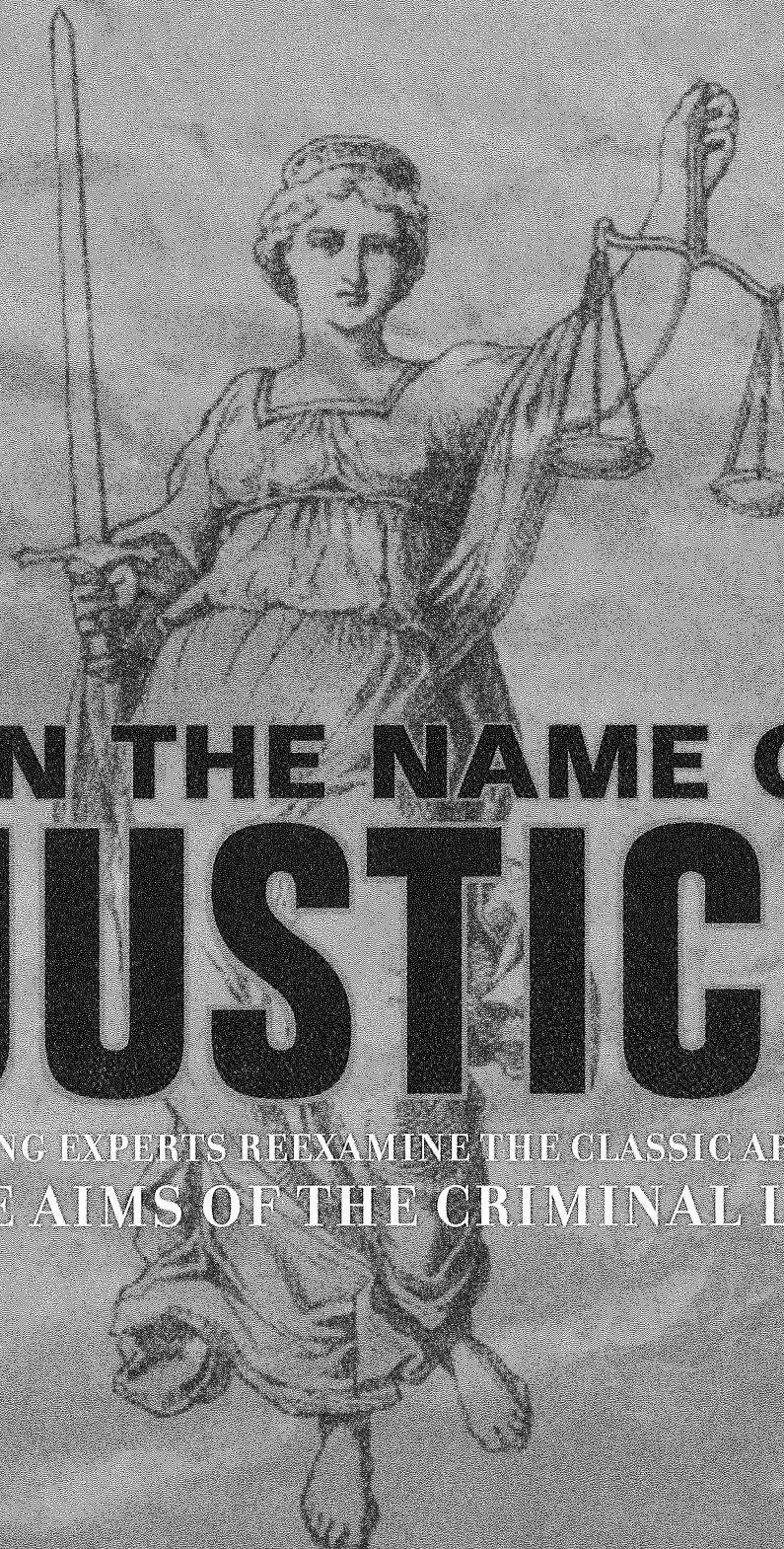




IN THE NAME OF JUSTICE

LEADING EXPERTS REEXAMINE THE CLASSIC ARTICLE
"THE AIMS OF THE CRIMINAL LAW"

EDITED BY TIMOTHY LYNCH

2. You're (Probably) a Federal Criminal

*Alex Kozinski and Misha Tseytlin**

"When he was president of the Board of New York City Police Commissioners, Theodore Roosevelt decided to fully enforce New York's prohibition against selling alcohol on Sundays. He directed officers to make no exceptions and to arrest saloon keepers who had long counted on their political connections to protect them. Answering the ensuing public outcry, Roosevelt explained, "You have got to be law-abiding citizens, or free government will disappear and anarchy will follow."¹ Forty-five years later, Attorney General Robert Jackson took a different view of enforcing the law and explained, "Law enforcement is not automatic.... No prosecutor can even investigate all of the cases in which he receives complaints." For Jackson, this was not merely a problem of resources-there were so many laws that "a prosecutor stands a fair chance of finding at least a technical violation of some act on the part of almost anyone."²

Roosevelt and Jackson represent two starkly different visions of the criminal law and its enforcement. For Roosevelt, the law proscribes serious antisocial activities that government officials must suppress and punish in all instances. For Jackson, it is a broad-brush combination of prohibitions that officials should not try to fully enforce, lest they put everyone in jail. Under Roosevelt's view, the ideal law-enforcement agent nabs every lawbreaker; under Jackson's, he acts without personal or invidious considerations in choosing whom to target from among the criminalized citizenry.

Henry Hart's understanding of the criminal law dovetails with Roosevelt's approach. As Hart explained in the essay that is the subject of this symposium, the proper reach of criminal law "is not simply antisocial conduct which public officers are given a responsibility to suppress. It is not simply any conduct to which a legislature

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chooses to attach a 'criminal' penalty. It is conduct which, if duly shown to have taken place, will incur a formal and solemn pronouncement of the moral condemnation of the community."³ Since criminal law reaches only actions that the community rightly condemns as seriously immoral, only those who deserve to be behind bars will violate its prohibitions. Hart and Roosevelt's understanding is intuitively appealing because it is woven into the logic of criminal law. Most of us assume that we've nothing to fear from the police because we're not like those nefarious criminals who have broken the social compact.

Unbeknownst to most people, Robert Jackson paints a more accurate picture of America's criminal law system. Violations are so common that any attempt to go after all criminals would sweep up untold millions of people. While Americans vote for politicians who pass laws that make most people criminals, they also support harshly punishing and socially ostracizing those convicted of crimes. In sum, most people think of criminals as bad people, who deserve punishment, while not realizing that they are criminals themselves.

While ubiquitous criminality has not undermined the criminal law's moral force, it has changed the identity of those who make the law, in the practical sense. Since most people have committed at least one crime carrying serious consequences, police and prosecutors choose who'll actually suffer for their crimes. Under the best circumstances, most targets will be unlucky schmoe who happen to catch the authorities' attention or people the prosecutors or the public think are particularly "bad." At worst, a ubiquitous criminal law becomes a loaded gun in the hands of any malevolent prosecutor or aspiring tyrant.

Are You a Federal Criminal?

It is impossible to know how many Americans are federal criminals. There are thousands of federal crimes and hundreds of thousands of federal regulations that can be criminally enforced.⁴ Some criminals are murderers, rapists, gangsters, and other profoundly immoral people. These fit easily into Hart's understanding that criminals are people who have committed acts deserving the community's serious moral condemnation and punishment. However, these antisocial individuals are a minuscule fraction of America's criminal class. In fact, most Americans are criminals and don't know it, or

suspect they are but believe they'll never get prosecuted. As you read this section, ask yourself whether you're a federal criminal. And if you decide you're not, consider whether the criminals described are more worthy of your community's solemn moral condemnation than you are—on your worst day. Also, keep in mind that these are only federal crimes, so they are just the tip of the iceberg since most criminal prohibitions in America are made at the state level.

Without further ado, have you ever ...

Done Your Job Poorly?

There are thousands of laws and regulations that make people criminals for unwittingly breaking complex environmental, shipping, and worker-safety rules. In one typical case, a director of a public works project became a federal felon because he incorrectly thought the town he was supervising had a permit for disposing leftover road paint.⁵ In another case, the defendant mailed some chemicals without abiding by regulations requiring the shipping papers to note the contents. As Justice Potter Stewart pointed out, "A person who had never heard of the regulation might make a single shipment of an article covered by it in the course of a lifetime. It would be wholly natural for him to assume that he could deliver the article to the common carrier and depend upon the carrier to see that it was properly labeled and that the shipping papers were in order. Yet today's decision [upholding the conviction] holds that a person who does just that is guilty of a criminal offense punishable by a year in prison."⁶ Could you imagine yourself shipping something potentially dangerous while accidentally failing to follow one of the technical regulations about how to label, package, and ship the item?

Merely negligently supervising employees who do their jobs poorly can also make you an outlaw. In one such case, an employee accidentally ruptured a heating oil pipe while trying to clean up some fallen rocks during a railroad-building project. The jury convicted the employee's boss for negligent supervision under the Clean Water Act (CWA). The supervisor got six months in prison, six months in a halfway house, six months of supervised release, and had to pay a \$5,000 fine. It didn't matter that he had no reason to learn about the CWA's labyrinth of regulations, since he was merely

a railroad-construction supervisor.⁷ Have you ever supervised employees who violated some environmental or public-safety regulation? Are people who have conducted such poor supervision far worse than you?

Done Your Job Dishonestly?

The federal mail and wire fraud statutes prohibit depriving someone of the "intangible right to honest services." This provision makes criminals out of some professionals who violate their duties of loyalty to employers or their fiduciary duties to clients.⁸ In one early case, an attorney sent two letters in connection with his representation of a client who was trying to gain a city contract. The problem was the attorney knew his firm was representing another client competing for that same contract. A jury convicted the attorney of mail fraud, without finding he misused the information for personal gain or even that his failure to disclose the conflict of interest harmed anyone.⁹

Courts have had little success limiting the "intangible right to honest services" doctrine. Most require that the government prove that the defendant's conduct could have influenced the behavior of his employer or client or that the defendant could reasonably have foreseen that his dishonesty would pose a financial risk. Yet, professionals still become criminals for breaching fiduciary duties if they foolishly believe their breach will not influence conduct or cause any harm.¹⁰ It is unsurprising that courts have been unable to successfully confine this doctrine, since any number of actions could reasonably be seen as depriving an employer or agent of the "intangible right to honest services." As Chief Judge Dennis Jacobs has explained, it is plausible that the following people are federal criminals: "an employee who violates an employee code of conduct; a lawyer who provides sky-box tickets to a client's general counsel; a trustee who makes a self-dealing investment that pays off...."¹¹ Have you ever violated your employee code of conduct? Maybe you should reach into the very bottom of your desk drawer and take a look

Tried Illegal Drugs?

There's a good chance you have, since nearly half of American adults try illegal drugs during their lives.¹² Luckily for you, you're extremely unlikely to face any federal charges, because the federal

government convicts fewer than 400 people per year for drug possession. But keep in mind that those who lose this prosecution lottery don't always get off so easy. Among simple drug possessors with little or no criminal history, those receiving jail time get an average of 8.6 months in prison.¹³ Wouldn't that have ruined your junior year of college?

Cheated on Your Taxes?

When the Internal Revenue Service began requiring taxpayers to list the social security numbers of dependents, 7 million children suddenly vanished.¹⁴ It's not surprising that tax evasion is one of the most popular federal felonies. Beyond the thousands who use abusive tax schemes to avoid paying taxes, tens of millions of Americans take improper deductions, don't report some money they won in Las Vegas, or decide to ignore some tips they made at work. Many of these people know they're breaking the law and may even be vaguely aware that they're committing a federal felony, punishable by up to five years in prison.¹⁵ Of course, they'll likely never get caught, and if they do get nabbed, they almost certainly won't be prosecuted. Still, are you sure you've never cut any corners in filling out your tax returns?

Lied to a Government Bureaucrat?

Your mom taught you not to lie, but she probably didn't tell you that making a false statement to any federal official dealing with any matter in his jurisdiction will make you a federal criminal.¹⁶ Not only that, lying to a private person who repeats this lie to a federal agent is also a crime, even if you had no idea the person was going to pass on the lie.¹⁷ Be honest, have you always told the whole truth on every federal form you've ever completed?

This prohibition against making false statements also prohibits inaccurately claiming you've done nothing wrong. In one case, federal agents had ironclad proof that a union rep had taken an illegal cash gift. They showed up at his home anyway and asked him if he had taken this gift. When he denied any wrongdoing, it was easy as pie to convict him for making false statements to federal agents, even though his statements did nothing to impede the investigation. Justice Ruth Bader Ginsburg explained the problem: "Because the questioning occurs in a noncustodial setting, the suspect is not informed of the right to remain silent. Unlike proceedings in which

a false statement can be prosecuted as perjury, there may be no oath, no pause to concentrate the speaker's mind on the importance of his or her answers."¹⁸ If a federal agent came to your house and confronted you about your recent visit to the Mayflower Hotel in Washington, D.C., would you fess up immediately?

Put Money in a Bank, Bought Expensive Things, or Worked with Others?

Four businessmen decided to import some lobster tails. Unfortunately for them, among other transgressions, they transported the tails in plastic bags, rather than cardboard boxes, and some of the tails were less than 5.5 inches long. The jury found they violated Honduran fishing law, which was elevated to a federal crime under the Lacey Act. The appellate court upheld the conviction, even though the Honduran government explained that its fishing regulations were invalid. But that wasn't the end of it. Because these hardened criminals worked together and placed their money in a bank, the jury found them guilty of conspiracy and money laundering.¹⁹ This issue illustrates how prosecutors can take dubious crimes and multiply the number of convictions and length of sentences defendants will face.

One useful way to turn a single offense into multiple offenses, while increasing a defendant's sentence, is to charge him with money laundering. After proving a defendant has committed a lucrative crime, the prosecutor merely has to show that he tried to conceal the profits through any financial transaction. For example, because the fishermen hid in a bank the money they made from selling their lobsters, they were guilty of multiple counts of money laundering. Of course, since the regulations they broke were invalid in Honduras, there was likely absolutely nothing wrong with their financial transactions. Nor is that all. If one of them had used \$10,000 of the money he earned from selling lobsters to buy a car, with no intent to hide the source of the funds, he would be guilty of yet another count of money laundering.²⁰

Another easy way to turn someone from a one-time criminal into a multiple felon is by charging that person with conspiracy. To add conspiracy to an already proven crime, the prosecutor merely needs to show that at least two people committed the crime together. Our fishermen were guilty of conspiracy because several of them were

involved. A conspiracy conviction can severely increase a defendant's punishment, especially since the sentences for substantive and conspiracy offenses can run consecutively.²¹

* * *

How'd you do? If you're like most people, you probably committed at least one of these crimes. You should count your blessings that no one was looking when you became a federal criminal. Admittedly, breaking fiduciary duties, badly supervising employees, doing drugs, and lying to the feds aren't what you'd teach your kids. But it is striking that a system designed to allow the community to separate out those who commit serious anti-social acts makes most of that same community a bunch of crooks.

The Moral Force of Criminal Law

Yet, ubiquitous criminalization has done little to diminish the public's belief in the moral force of law. Most Americans continue to believe that those convicted of crimes have done something seriously wrong and should be treated far differently from the rest of us supposedly law-abiding folks.

Far from believing the law has lost its moral force, most people continue to support laws treating criminals, or at least felons, as distinctly different. Most states don't allow felons the right to serve as jurors and deny them the right to vote, sometimes permanently. In many states, a felony conviction serves as grounds for divorce and can play an important role in terminating parental rights. Federal law prevents felons from owning guns, and most states put additional restrictions on felon firearm possession. Some states require all felons to register with law-enforcement agencies.²²

Many of us treat criminals as pariahs who have transgressed serious moral commitments. For example, many employers require job applicants to disclose whether they've been convicted of a crime and often don't read beyond a "yes" answer. This is especially true for white-collar criminals, who may lose their professional licenses and find themselves unable to get permits to work in other fields. Even if they don't work in a licensed field, their reputations are often so destroyed that they can't find even meager work in their chosen profession. Indeed, even being charged with a crime will often lead to being fired.²³

It seems paradoxical that, even though most of us have committed crimes, we continue to support laws and social conventions that treat those convicted of these same acts as pariahs. The solution to this puzzle is that we have internalized Hart's understanding that "a criminal conviction carries with it an ineradicable connotation of moral condemnation and personal guilt."²⁴ If our government has deprived someone of his liberty, he *must* be a truly bad person. But do we ever ask ourselves why we haven't been convicted for our own crimes?

Enforcement of a Ubiquitous Criminal Law

Hart understood that criminals should be a small minority of antisocial actors who deserve to suffer serious consequences. Theodore Roosevelt is the ideal police officer for such a criminal law regime—the man who dispassionately goes after every criminal. Consider how you'd expect an officer to respond when hearing a credible murder or rape allegation. Under a system of law that only criminalized these sorts of serious offenses, a rogue officer would retain some authority to allow criminals to escape justice. However, this officer's ability to do harm would be limited to helping nefarious characters; he'd have no lawful authority to go after the law-abiding populace. These people would be shielded by their innocence, along with the constitutional and statutory protections that prevent the authorities from hassling them without good cause.

The situation is far different when most people have committed some crime carrying serious consequences. Under such a system, the authorities necessarily have vast discretion to choose who will remain free, well-respected members of society and who will be tossed in jail and lose their rights, their family, and their job. As Hart aptly explained, since there is no pretense that most criminal laws are seriously enforced, "The breadth of discretion we entrust to the police and prosecuting attorneys in dealing with individuals is far greater than that entrusted to any other kinds of officials and less subject to effective control." Indeed, this transfers "from the legislature to enforcement officials the *defacto* power of determining what the criminal law in action shall be."²⁵

Recall that under Hart's view of criminal law, the dutiful officer's role was to nab every criminal and the rogue officer had no lawful authority over the law-abiding majority. Enforcement is far more

problematic under a system of broad criminalization, especially one that accepts the moral force of law and, thus, imposes harsh penalties. Even the dutiful prosecutor will drift from randomly punishing whoever commits the most conspicuous crimes to trying to nab only the "worst" criminals to responding to the public's demand for enforcement of some laws or for prosecution of some individuals. And that is just the good news. The malevolent prosecutor, empowered by ubiquitous criminal penalties and harsh sentences, will have broad authority to punish almost anyone he chooses. This power will be especially dangerous if seized upon by an aspiring tyrant.

Dutiful Enforcement

A sprawl of criminality puts even the most dedicated officers and prosecutors in an untenable dilemma. Do they go after every criminal they can find, or do they prioritize crimes and targets? If they do prioritize, do they follow their own moral sense of who deserves punishment, or do they try to enforce laws in a way they think will please the public?

Random Enforcement. Since police and prosecutors only have the time and resources to go after a small percentage of the criminalized populace, they could try to enforce the law randomly. That is, they could catch and prosecute as many criminals, of any type, as their time and resources permit. This is an adaptation of Roosevelt's notion that officials should blindly enforce the law because everyone's "got to be law-abiding citizens."

When government agents randomly enforce sprawling criminal prohibitions, guilt becomes only a very minor factor in determining whether someone will remain a free person. Instead, ability to hide one's crime and luck will play the dominant roles. If police and prosecutors are busy catching and prosecuting every conspicuous violator, they'll never have time to bother with those who are hiding their criminality. Similarly, if the number of people who commit crimes dwarfs the number held accountable, anyone who ends up in jail will be extraordinarily unfortunate. You'd probably have to walk under three ladders and kick five black cats to get prosecuted for cheating on your taxes or smoking some pot.

Needless to say, conspicuousness and luck shouldn't be the most important factors in deciding whether a person gets locked up, loses his rights, and becomes a social pariah. Indeed, a society of criminals

that randomly locks up the unlucky or indiscreet can hardly claim it operates under a just system that respects lawfulness.

Selective Enforcement. Of course, police and prosecutors don't randomly enforce all criminal laws. As Attorney General Robert Jackson explained, conscientious prosecutors usually select those cases "in which the offense is the most flagrant, the public harm the greatest, and the proof the most certain."²⁶ That is, they choose which violators and crimes they will pursue within the confines of their limited resources. In doing so, they have to decide between listening to their own moral sense and trying to intuit which crimes and criminals the public wants them to target. Under either approach, they'll target the worst of the worst—the murderers and rapists—but deciding who else to go after will be extremely problematic.

On the one hand, the subjective judgment of authorities could serve as the determining factor in deciding which members of a criminalized populace will be punished. Under such a system, whether a person has his life torn apart will not depend primarily on his guilt, since everyone is guilty of something. Rather, it will turn on whether government officials believe that the person's crimes are particularly serious or that he is an especially bad person. For example, some government agents decided that Al Capone was a bad guy, and since they couldn't prove he committed murder or extortion, they threw him in prison for tax evasions. If that hadn't worked, perhaps they could have considered whether he negligently supervised the way some of his garbage businesses disposed of their trash. In short, allowing officers and prosecutors to use their judgment to select targets out of a criminalized population transforms the rule of law into the rule of men.

On the other hand, a government agent may realize that he can't simply rely on his own judgment, and so he may choose to use public opinion as his guide. Since prosecutors, police, and their supervisors are accountable to the people, this approach is sensible. Yet publicly responsive enforcement will simply end up targeting crimes the populace gets suddenly excited about enforcing. Consider the increase in white-collar prosecutions after the Enron scandal or the promises to crack down on new categories of criminals during state attorney general election campaigns. Even more troubling, the public often wants law enforcement to target particular individuals, because they are either famous or "bad" people. Consider this the

next time you read about a celebrity or politician being investigated for tax fraud or lying to government agents or about a prosecutor's office pouring endless resources into a high-profile case. Ironically, a brash prosecutor can become so famous for catering to the public's desires that he may find himself the authorities' next target.²⁷

Law enforcement officials trying to cater to the public's preferences will run into many of the same problems as those trying to enforce their own subjective judgments. Again, the most important factor in deciding whether someone ends up in jail will not be that he committed an objectively defined criminal offense; after all, we all do that. Rather, it will be whether the public finds him or his crime particularly distasteful at a given moment.

The pitfalls of selective enforcement exist under any system where government officials have discretion. However, these problems are far more serious when most people violate sweeping criminal prohibitions. Giving even the most well-intentioned officials power to select who they believe are the most morally culpable or publicly displeasing destroys the link between the impartial rule of law and the reality of criminal law-enforcement. It makes each person's claim to liberty and rights turn on the opinions of other people, rather than on objectively defined rules of conduct.

Malevolent Enforcement

The most common justification for broad criminal laws is that government officials will use good faith and sound judgment in discharging their massive authority. Besides leaving government agents no good way to enforce criminal prohibitions while respecting the rule of law, this grant of authority ignores America's time-tested distrust of vesting vast power in government officials in the hope that they'll use this authority judiciously. Accordingly, it's important to consider the damage malevolent prosecutors and would-be tyrants could do when empowered by ubiquitous criminal law.

Bad Apples. You stole a federal prosecutor's girlfriend. He's ticked and decides to snoop around your life. Maybe you failed to report some income or took a deduction you weren't entitled to; broke a fiduciary duty or negligently supervised some workers; or tried some drugs with people who are willing to talk. Even if he can't find sufficient evidence to prove all the elements of any crime, he can come to your house in the middle of the night and ask you

sharp questions. If you figure he's got it in for you and lie, he's got you on the hook for the lie-which is itself a federal crime. Since your family and friends are probably federal criminals as well he can give them the same treatment. Then he can offer them a pass if you'll plead guilty. In addition, once he's nailed you for one crime, he might be able to add money laundering and conspiracy charges to increase your sentence. Facing this, you'll likely plead guilty. And after you get out of jail, you won't be able to vote, sit on a jury, find a decent job, or exercise your rights under the Second Amendment. Meanwhile, he'll steal back his girlfriend, who'll likely want nothing to do with a criminal such as yourself.

Hopefully, few police and prosecutors behave this way. Yet, it is important to understand that a system of law that makes most everyone a criminal, also makes all its citizens *lawful* targets for malicious officers and prosecutors. Under such a system, substantive and procedural safeguards no longer protect citizens from official harassment. For example, the Fourth Amendment shields citizens from being hassled, searched, and arrested unless the authorities have good reason to believe they've committed crimes. However, if lots of inadvertent and common activities are crimes, this apparent protection actually empowers malevolent government officials to arrest citizens on the street, to search them because of that arrest, and then to search their homes for more evidence. Similarly, the guarantee that the government must prove every element of a crime beyond a reasonable doubt provides little protection for a criminalized populace, except by shielding those who hide their crimes particularly well or make friends with police and prosecutors.

Bad Leaders. A Russian oil executive got the authorities angry by supporting opposition parties and wanting to sell oil to foreign countries. Soon after, he found himself convicted of fraud, embezzlement, and tax evasion, and he was sentenced to 9 years in prison. Just when he was about to become eligible for parole, the prosecutors charged him with money laundering and embezzlement, and they began targeting his former associates for tax evasion. Defending his government's hard-line stance against one such associate, Russian President Vladimir Putin channeled Theodore Roosevelt and explained, "Everyone must understand once and for all-the law must be followed always."²⁸

Nothing like this scenario is likely in America's near future. Nevertheless, it is noteworthy that post-Soviet Russia's return to autocratic rule was not inevitable. Using the moral force *of* law to justify cracking down on regime opponents has been one of Vladimir Putin's most effective tools in crushing his country's nascent democracy. Of course, all oppressive regimes cloak themselves with the imprimatur of law. But a society that criminalizes most of its members through a legitimate democratic process gives an incredibly valuable gift to an aspiring autocrat. He doesn't have to answer the argument that he created laws to put down his opponents; he can merely channel Theodore Roosevelt and turn the moral force of criminal law into a chain around his people's necks. He can deploy all of the powers that the bad-apple prosecutor has - from targeted investigations to stacking charges to multiplying sentences - only writ large.

* * *

The overwhelming majority *of* police and prosecutors try to enforce the law dutifully. After catching the few obvious hard-core crooks, they vacillate between randomly enforcing laws and selectively enforcing them based on their own judgment and the public's demands. This approach undermines the rule of law and makes luck, conspicuousness, and the subjective opinions of government officials the most important factors in determining whether someone ends up in jail. And that's just what happens in the best case. When malicious prosecutors or would-be tyrants get hold of a ubiquitous criminal law, fortified by the public's belief in the moral force of that law, they can go after pretty much anyone they choose.

Conclusion

Hart implied that constitutional amendments limiting the scope of the criminal law were the cure.²⁹ After 50 years of new criminal laws, long sentences, and post-incarceration consequences, he'd likely hold to this same position today. Yet, political support remains small for passing constitutional amendments and repealing federal laws. Indeed, if people don't believe that the ubiquity of criminal law is a significant enough problem to urge their public officials to stop enacting new criminal laws, they're unlikely to demand constitutional amendments to curtail criminalization.

So the question is not about the institutionq} method for change, but whether people think there's a problem. Do you believe well-intentioned police officers and prosecutors should have the freedom to select from among a criminalized citizenry based on their own judgments or the fleeting desires of the public? Do you think malicious officers and would-be tyrants are likely to abuse the power ubiquitous criminality gives them? Are you willing to accept that, if we limit the number of crimes, some bad people will be able to evade prosecution? In deciding how to answer these questions, recall that you're (probably) a federal criminal.

Chapter 2

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