

Testimony

of

**Tim Lynch,
Director, Project on Criminal Justice,
Cato Institute**

before the

**Subcommittee on Crime, Terrorism, and Homeland Security
Judiciary Committee
United States House of Representatives**

H.R. 1823

Criminal Code Modernization and Simplification Act of 2011

December 13, 2011

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I. Introduction and Background

My name is Tim Lynch. I am the director of the Cato Institute's Project on Criminal Justice. I appreciate the invitation to testify this morning on H.R. 1823, which aims to modernize and simplify the federal criminal code. I am supportive of this undertaking because the federal code is a mess. As one writer has observed, the federal code is a

loose assemblage of criminal law components that were built hastily to respond to perceptions of need and to perceptions of the popular will, and that were patterned more upon hindsight than foresight. Of the 3,000 provisions carrying criminal penalties, each was produced at a different time by different draftsmen with different conceptions of law, the English language, and common sense. Any relationship of one to another is more often than not accidental. The criminal statutes have never been subjected to a substantive reform, only a minor paring and partial rearrangement into a peculiar form of alphabetical order.¹

Justice Antonin Scalia recently noted that Congress has unwisely expanded the federal criminal system in a manner that allows drug prosecutions to burden the judiciary.² In an attempt to address that burden, Congress expanded the number of federal judgeships, but that has resulted in a reduction in the quality of judicial appointments according to Justice Scalia.

I should note at the outset that since H.R. 1823 runs more than one thousand pages, I have not yet had sufficient time to study all of its provisions and thus all of the consequences (both intended and unintended). To assist the committee in its deliberations, however, I will first outline some general principles which I think ought to guide federal code reform. I will then offer a preliminary analysis of H.R. 1823. Last, if there are any questions that I am unable to answer today, I will endeavor to develop an answer following the hearing and respond with a letter to the committee.

II. Principles to Guide Federal Code Reform

A. Constitutional Basis for Federal Statutes

The American Constitution created a federal government with limited powers. As James Madison noted in the Federalist no. 45, “The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite.” Most of the federal government’s “delegated powers” are specifically set forth in article I, section 8. The Tenth Amendment was appended to the Constitution to make it clear that the powers not delegated to the federal government “are reserved to the States respectively, or to the people.”

Crime is a serious problem, but under the Constitution, it is a matter to be primarily handled by state and local government. Unfortunately, as the years passed, Congress eventually assumed the power to enact a vast number of criminal laws pursuant to its power “to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”³

In recent years, Congress has federalized the crimes of gun possession within a school zone, carjacking, wife beating, and church arsons. All of those crimes and more have been rationalized under the Commerce Clause.⁴ In *United States v. Lopez*, the Supreme Court finally struck down a federal criminal law, the Gun-Free School Zone Act of 1990, because the connection between handgun possession and interstate commerce was simply too tenuous.⁵ In a concurring opinion, Justice Clarence Thomas noted that if Congress had been given authority over matters that simply “affect” interstate commerce, much, if not all, of the enumerated powers set forth in article I, section 8 would be unnecessary. Indeed, it is difficult to dispute Justice Thomas’ conclusion that an interpretation of the commerce power that “makes the rest of §8 surplusage simply cannot be correct.”⁶

Whether or not the Supreme Court adopts a more narrow interpretation of the Commerce Clause, Congress can and should acknowledge constitutional limits on federal jurisdiction and repeal federal statutes that merely duplicate local crimes.

B. No Delegation of Lawmaking Power to Administrative Agencies

Beyond the thousands of federal criminal statutes enacted by the Congress, there are also thousands of federal regulations that carry criminal penalties. (And what is worse is that some of those regulations contain vague terms; others carry inadequate *mens rea* terminology.) Members of Congress are busy, but it is their responsibility to carefully consider what infractions can result in a criminal conviction and prison time.

The case law that has thus far allowed delegation has drawn criticism. Federal Judge Roger Vinson, for example, has observed:

A jurisprudence which allows Congress to impliedly delegate its criminal lawmaking authority to a regulatory agency such as the Army Corps—so long as Congress provides an “intelligible principle” to guide that agency—is enough to make any judge pause and question what has happened. Deferent and minimal judicial review of Congress’ transfer of its criminal lawmaking function to other bodies, in other branches, calls into question the vitality of the tripartite system established by our Constitution. It also calls into question the nexus that must exist between the law so applied and simple logic and common sense. Yet that seems to be the state of the law. Since this court must apply the law as it exists, and cannot change it, there is nothing further that can be done at this level.⁷

As noted above, whether or not the Supreme Court chooses to revisit and restrict the ability of Congress, on constitutional grounds, to delegate the lawmaking power, Congress can and should recognize that federal law—especially federal *criminal* law—ought to be made by the people’s elected representatives.⁸

C. Ignorance of the Law is Now a Valid Excuse

The sheer volume of modern law makes it impossible for an ordinary American household to stay informed. And yet, prosecutors vigorously defend the old legal maxim that “ignorance of the law is no excuse.”⁹ That maxim may have been appropriate for a society that simply criminalized inherently evil conduct, such as murder, rape, and theft, but it is wholly inappropriate in a labyrinthine regulatory regime that criminalizes activities that are morally neutral. As Professor Henry M. Hart opined, “In no respect is contemporary law subject to greater reproach than for its obtuseness to this fact.”¹⁰

To illustrate the rank injustice that can and does occur, take the case of Carlton Wilson, who was prosecuted because he possessed a firearm. Wilson’s purchase of the firearm was perfectly legal, but, years later, he didn’t know that he had to give it up after a judge issued a restraining order during his divorce proceedings. When Wilson protested that the judge never informed him of that obligation and that the restraining order itself said nothing about firearms, prosecutors shrugged, “ignorance of the law is no excuse.”¹¹ Although the courts upheld Wilson’s conviction, Judge Richard Posner filed a dissent: “We want people to familiarize themselves with the laws bearing on their activities. But a reasonable opportunity doesn’t mean being able to go to the local law library and read Title 18. It would be preposterous to suppose that someone from Wilson’s milieu is able to take advantage of such an opportunity.”¹² Judge Posner noted that Wilson would serve more than three years in a federal penitentiary for an omission that he “could not have suspected was a crime or even a civil wrong.”¹³

It is absurd and unjust for the government to impose a legal duty on every citizen to “know” all of the mind-boggling rules and regulations that have been promulgated over the years. Policymakers can and should discard the “ignorance-is-no-excuse” maxim by enacting a law that would require prosecutors to prove that regulatory violations are “willful” or, in the alternative, that would permit a good-faith belief in the legality of one’s conduct to be pleaded and proved as a defense. The former rule is already in place for our complicated tax laws—but it should also shield unwary Americans from all of the laws and regulations as well.¹⁴

D. Vague Statutes are Unacceptable

Even if there were but a few crimes on the books, the terms of our criminal laws ought to be drafted with precision. There is precious little difference between a secret law and a published regulation that cannot be understood. History is filled with examples of oppressive governments that persecuted unpopular groups and innocent individuals by keeping the law’s requirements from the people. For example, the Roman emperor Caligula posted new laws high on the columns of buildings so that ordinary citizens could not study the laws. Such abominable policies were discarded during the Age of Enlightenment, and a new set of principles—known generally as the “rule of law”—took hold. Those principles included the requirements of legality and specificity.

“Legality” means a regularized process by which crimes are designated and prosecuted by the government. The Enlightenment philosophy was expressed by the maxim *nullum crimen sine lege* (there is no crime without a law). In other words, people can be punished only for conduct previously prohibited by law. That principle is clearly enunciated in the ex post facto clause of the Constitution (article I, section 9). But the purpose of the ex post facto clause can be subverted if the legislature can enact a criminal law that condemns conduct in general terms, such as “dangerous and harmful” behavior. Such a law would not give people fair warning of the prohibited conduct. To guard against the risk of arbitrary enforcement, the Supreme Court has said that the law must be clear:

A criminal statute cannot rest upon an uncertain foundation. The crime, and the elements constituting it, should be so clearly expressed that an ordinary person can intelligently choose, in advance, what course it is lawful for him to pursue. Penal statutes prohibiting the doing of certain things, and providing a punishment for their violation, should not admit of such a double meaning that the citizen may act upon the one conception of its requirements and the courts upon another.¹⁵

The principles of legality and specificity operate together to reduce the likelihood of arbitrary and discriminatory application of the law by keeping policy matters away from police officers, administrative bureaucrats, prosecutors, judges, and members of juries, who would have to resolve ambiguities on an ad hoc and subjective basis.

Although the legality and specificity requirements are supposed to be among the first principles of American criminal law, a “regulatory” exception has crept into modern jurisprudence. The Supreme Court has unfortunately allowed “greater leeway” in regulatory matters because the practicalities of modern governance supposedly limit “the specificity with which legislators can spell out prohibitions.”¹⁶ During the past 50 years, fuzzy legal standards, such as “unreasonable,” “unusual,” and “excessive,” have withstood constitutional challenge.

Justice Scalia recently acknowledged that this trend has gone too far and ought to be halted:

We face a Congress that puts forth an ever-increasing volume of laws in general, and of criminal laws in particular. It should be no surprise that as the volume increases, so do the number of imprecise laws. And no surprise that our indulgence of imprecisions that violate the Constitution encourages imprecisions that violate the Constitution. Fuzzy, leave-the-details-to-be-sorted-out-by-the-courts legislation is attractive to the Congressman who wants credit for addressing a national problem but does not have the time (or perhaps the votes) to grapple with the nitty-gritty. In the field of criminal law, at least, it is time to call a halt.¹⁷

The Framers of the American Constitution understood that democracy alone was no guarantor of justice. As James Madison noted, “It will be of little avail to the people that the 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; if they be repealed or revised before they are promulgated, or undergo such incessant changes that no man, who knows what the law is today, can guess what it will be tomorrow.”¹⁸

The first step toward addressing the problem of vague and ambiguous criminal laws would be for the Congress to direct the courts to follow the rule of lenity in all criminal cases.¹⁹ Legal uncertainties should be resolved in favor of private individuals and organizations, not the government.

E. Abolish Strict Liability Offenses

Two basic premises that undergird Anglo-American criminal law are the requirements of *mens rea* (guilty mind) and *actus reus* (guilty act).²⁰ The first requirement says that for an act to constitute a crime there must be “bad intent.” Dean Roscoe Pound of Harvard Law School writes, “Historically, our substantive criminal law is based upon a theory of punishing the vicious will. It postulates a free agent confronted with a choice between doing right and doing wrong and choosing freely to do wrong.”²¹ According to that view, a man could not be prosecuted for leaving an airport with the luggage of another if he mistakenly believed that he owned the luggage. As the Utah Supreme Court noted in *State v. Blue* (1898), *mens rea* was considered an indispensable element of a criminal offense. “To prevent the punishment of the innocent, there has been ingrafted into our system of jurisprudence, as presumably in every other, the principle

that the wrongful or criminal intent is the essence of crime, without which it cannot exist.”²²

By the same token, bad thoughts alone do not constitute a crime if there is no “bad act.” If a police officer discovers a diary that someone mistakenly left behind in a coffee shop, and the contents include references to wanting to steal the possessions of another, the author cannot be prosecuted for a crime. Even if an off-duty police officer overhears two men in a tavern discussing their hatred of the police and their desire to kill a cop, no lawful arrest can be made if the men do not take action to further their cop-killing scheme. The basic idea, of course, is that the government should not be in the business of punishing “bad thoughts.”

When *mens rea* and *actus reus* were fundamental prerequisites for criminal activity, no person could be branded a “criminal” until a prosecutor could persuade a jury that the accused possessed “an evil-meaning mind with an evil-doing hand.”²³ That understanding of crime—as a compound concept—was firmly entrenched in the English common law at the time of the American Revolution.

Over the years, however, the moral underpinnings of the Anglo-American view of criminal law fell into disfavor. The *mens rea* and *actus reus* requirements came to be viewed as burdensome restraints on well-meaning lawmakers who wanted to solve social problems through administrative regulations. As Professor Richard G. Singer has written, “Criminal law . . . has come to be seen as merely one more method used by society to achieve social control.”²⁴

The change began innocently enough. To protect young girls, statutory rape laws were enacted that flatly prohibited sex with girls under the age of legal consent. Those groundbreaking laws applied even if the girl lied about her age and consented to sex and if the man reasonably believed the girl to be over the age of consent. Once the courts accepted that exception to the *mens rea* principle, legislators began to identify other activities that had to be stamped out—even at the cost of convicting innocent-minded people.

The number of strict liability criminal offenses grew during the 20th century as legislators created scores of public welfare offenses relating to health and safety. Each time a person sought to prove an innocent state-of-mind, the Supreme Court responded that there is “wide latitude” in the legislative power to create offenses and “to exclude elements of knowledge and diligence from [their] definition.”²⁵ Those strict liability rulings have been sharply criticized by legal commentators. Professor Herbert Packer argued that the creation of strict liability crimes was both inefficacious and unjust.

It is inefficacious because conduct unaccompanied by an awareness of the factors making it criminal does not mark the actor as one who needs to be subjected to punishment in order to deter him or others from behaving similarly in the future, nor does it single him out as a socially dangerous individual who needs to be incapacitated or reformed. It is unjust because

the actor is subjected to the stigma of a criminal conviction without being morally blameworthy. Consequently, on either a preventative or retributive theory of criminal punishment, the criminal sanction is inappropriate in the absence of *mens rea*.²⁶

A dramatic illustration of the problem was presented in *Thorpe v. Florida* (1979).²⁷ John Thorpe was confronted by a thief who brandished a gun. Thorpe got into a scuffle with the thief and wrested the gun away from him. When the police arrived on the scene, Thorpe was arrested and prosecuted under a law that made it illegal for any felon to possess a firearm. Thorpe tried to challenge the application of that law by pointing to the extenuating circumstances of his case. The appellate court acknowledged the “harsh result,” but noted that the law did not require a vicious will or criminal intent. Thus, self-defense was not “available as a defense to the crime.”²⁸

True, *Thorpe* was a state case from 1979. The point here is simply to show the drift of our law. As Judge Benjamin Cardozo once quipped, once a principle or precedent gets established, it is usually taken to the “limit of its logic.” For a more recent federal case, consider what happened to Dane Allen Yirkovsky. Yirkovsky was convicted of possessing one round of .22 caliber ammunition and for that he received minimum mandatory *15-year sentence*.²⁹ Here are the reported circumstances surrounding his “crime.”

In late fall or early winter of 1998, Yirkovsky was living with Edith Turkington at her home in Cedar Rapids, Iowa. Instead of paying rent, Yirkovsky agreed to remodel a bathroom at the home and to lay new carpeting in the living room and hallway. While in the process of removing the old carpet, Yirkovsky found a Winchester .22 caliber, super x, round. Yirkovsky put the round in a small box and kept it in the room in which he was living in Turkington’s house.

Subsequently, Yirkovsky’s ex-girlfriend filed a complaint alleging that Yirkovsky had [some of] her property in his possession. A police detective spoke to Yirkovsky regarding the ex-girlfriend’s property, and Yirkovsky granted him permission to search his room in Turkington’s house. During this search, the detective located the .22 round. Yirkovsky admitted to police that he had placed the round where it was found by the detective.³⁰

The appellate court found the penalty to be “extreme,” but affirmed Yirkovsky’s sentence as consistent with existing law.³¹

Strict liability laws should be abolished because their very purpose is to divorce a person’s intentions from his actions. But if the criminal sanction imports blame—and it does—it is a perversion to apply that sanction to self-defense and other acts that are not blameworthy. Our criminal law should reflect the old Latin maxim, *actus not facit reum nisi mens sit rea* (an act does not make one guilty unless his mind is guilty).³²

F. Abolish Vicarious Liability Offenses

Everyone agrees with the proposition that if a person commands, pays, or induces another to commit a crime on that person's behalf, the person should be treated as having committed the act.³³ Thus, if a husband hires a man to kill his wife, the husband is also guilty of murder. But it is another matter entirely to hold one person criminally responsible for the *unauthorized* acts of another. "Vicarious liability," the legal doctrine under which a person may be held responsible for the criminal acts of another, was once "repugnant to every instinct of the criminal jurist."³⁴ Alas, the modern trend in American criminal law is to embrace vicarious criminal liability.

Vicarious liability initially crept into regulations that were deemed necessary to control business enterprises. One of the key cases was *United States v. Park* (1975).³⁵ John Park was the president of Acme Markets Inc., a large national food chain. When the Food and Drug Administration found unsanitary conditions at a warehouse in April 1970, it sent Park a letter demanding corrective action. Park referred the matter to Acme's vice president for legal affairs. When Park was informed that the regional vice president was investigating the situation and would take corrective action, Park thought that was the end of the matter. But when unsanitary warehouse conditions were found on a subsequent inspection, prosecutors indicted both Acme and Park for violations of the Federal Food, Drug and Cosmetic Act.

An appellate court overturned Park's conviction because it found that the trial court's legal instructions could have "left the jury with the erroneous impression that [Park] could be found guilty in the absence of 'wrongful action' on his part" and that proof of that element was constitutionally mandated by due process.³⁶ The Supreme Court, however, reversed the appellate ruling. Chief Justice Warren Burger opined that the legislature could impose criminal liability on "those who voluntarily assume positions of authority in business enterprises" because such people have a duty "to devise whatever measures [are] necessary to ensure compliance" with regulations.³⁷ Thus, under the rationale of *Park*, an honest executive can be branded a criminal if a low-level employee in a different city disobeys a supervisor's instructions and violates a regulation—even if the violation causes no harm whatsoever.³⁸

In 1994, Edward Hanousek was employed as a roadmaster for a railroad company. In that capacity, Hanousek supervised a rock quarrying project near an Alaska river. During rock removal operations, a backhoe operator accidentally ruptured a pipeline—and that mistake led to an oil spill into the nearby river. Hanousek was prosecuted under the Clean Water Act even though he was off duty and at home when the accident occurred. The case prompted Justice Clarence Thomas to express alarm at the direction of the law: "I think we should be hesitant to expose countless numbers of construction workers and contractors to heightened criminal liability for using ordinary devices to engage in normal industrial operations."³⁹

Note that vicarious liability has *not* been confined to the commercial regulation context.⁴⁰ Pearlie Rucker was evicted from her apartment in a public housing complex

because her daughter was involved with illicit drugs. To stem drug dealing in public housing, Congress enacted a law that was so strict that tenants could be evicted if one of their household members or guests used drugs. The eviction could proceed even if the drug activity took place outside the residence. Also under that federal law, it did not matter if the tenant was totally *unaware* of the drug activity.⁴¹

Vicarious liability laws are unjust and ought to be removed from the federal criminal code.

III. H.R. 1823

One of the most serious problems with the current code is that there is no readily accessible list of federal crimes. Title 18 is a collection of criminal statutes, but it is not comprehensive. Scores of other federal crimes can be found in the other forty-nine titles of the U.S. Code. H.R. 1823 helps to bring some order to the haphazardness by grouping offenses into a more rational arrangement and pruning federal offenses that are duplicative and unnecessary. However, I do have reservations about several aspects of the bill that I will outline below.

A. H.R. 1823 does not improve procedural justice for persons facing federal criminal prosecution. The bill would retain those provisions in federal law that allow for the imposition of strict liability and vicarious liability. Further, H.R. 1823 does not codify the rule of lenity which could ameliorate the problem of vagueness in the statutes and regulations.

B. H.R. 1823 does not address the problem of agency rule-making, but retains the current arrangement where unelected officials can promulgate rules that would carry criminal penalties.

C. H.R. 1823 alters the terms of existing federal offenses in ways that are problematic. Take, for example, the revised obstruction provision:

§1135. Obstruction of Criminal Investigations

Whoever, being an officer of a financial institution, with the intent to obstruct a judicial proceeding, notifies any other person about the existence or contents of a subpoena for records of that financial institution, or information that has been furnished in response to that subpoena, shall be imprisoned not more than 5 years.

The immediate effect of the revision is to extend the restriction beyond grand jury subpoenas to *any* subpoena. And if this provision is considered desirable, will a future Congress extend its logic beyond subpoenas to search warrants as well? This provision raises several more questions, such as whether the financial institution may consult with legal counsel with regard to the content of the subpoena. The provision would nullify private contractual arrangements between customers and their financial institutions. And

there is a basic issue of free speech here.⁴² And how will Congress be able to exercise oversight when the organizations and persons affected cannot come forward freely? For these reasons, this provision should be removed.

Another problematic change concerns the interference with federal employees:

§113. Interference with Federal officers and employees

Whoever interferes with any officer or employee of the United States or of any agency in any branch of the United States Government (including any member of the uniformed services) while such officer or employee is engaged in or on account of the performance of official duties, or any individual assisting such an officer or employee in the performance of such duties or on account of that assistance while that person is engaged in, or on account of, the performance, official duties shall be imprisoned not more than one year.

The sweeping language employed here—undefined “interference”—raises several questions. First, what problem is this provision seeking to address? The preexisting offense was more clearly about criminalizing assaults and other types of forcible resistance. And is it necessary to cover every employee of the federal government? If an employee at the Department of Labor is suspected of child abuse, for example, can the local child protective services people run afoul of this provision because they want to interview a reluctant and evasive suspect during work hours? What if the ex-spouse of a postal carrier confronts the employee about missing another pre-arranged drop-off of a child in a joint-custody situation? If the postal employee would rather not be bothered, is the brief confrontation a criminal offense? It is not clear how far federal agents will interpret the “interference” term. For this reason, this provision ought to retain the language from the preexisting section, 18 USC §111.

D. Some of the offenses that H.R. 1823 would eliminate ought to be retained. Here are three statutes concerning the execution of federal warrants.

§2234. Authority exceeded in executing warrant

Whoever, in executing a search warrant, willfully exceeds his authority or exercises it with unnecessary severity, shall be fined under this title or imprisoned not more than one year, or both.

§2235. Search warrant procured maliciously

Whoever maliciously and without probable cause procures a search warrant to be issued and executed, shall be fined under this title or imprisoned not more than one year, or both.

§2236. Searches without warrant

Whoever, being an officer, agent, or employee of the United States or any department or agency thereof, engaged in the enforcement of any law of the United States, searches any private dwelling used and occupied as such dwelling without a warrant directing such search, or maliciously and without reasonable cause searches any other building or property without a search warrant, shall be fined under this title for a first offense; and, for a subsequent offense, shall be fined under this title or imprisoned not more than one year, or both.

Since all three provisions limit the authority of federal agents, there is no problem with respect to a constitutional basis for congressional authority. And since all three provisions are statutes, there is no problem with respect to agency rule-making. These statutes do not duplicate state crimes and they advance an important interest—that abuses concerning the procurement and execution of warrants are not only unprofessional, but criminal.

E. In addition to substantive offense changes and reorganization, H.R. 1823 also seeks to make changes to federal sentencing. These sentencing changes, whatever their respective merits may be, make an already ambitious endeavor unnecessarily complex. Sentencing changes should be considered and scrutinized in a separate legislative proposal.

F. As previously noted, the U.S. Code is much too complex for the average person to understand. As a result, it is too often a trap for innocent persons. H.R. 1823 falls short with respect to addressing this serious problem. In fact, wherever the term “willfully” is replaced by the term “knowingly,” the code is actually made worse.⁴³ Every federal regulation that entails conduct that is not intrinsically wrongful should include a willfulness element—and, crucially, “willfulness” must be explicitly defined so that it covers both the law and the facts. To reinforce that safeguard, federal law should also make two defenses available to all defendants in all cases: (1) a good faith belief in the legality of one’s conduct; and (2) an inability to comply with any legal requirement. These safeguards exist with respect to our complicated tax code but they ought to be expanded to the rest of the U.S. Code as well.

IV. Conclusion

The federal criminal code has become so voluminous that it not only bewilders the average citizen, but also the most able attorney. Our courthouses have become so clogged that there is no longer adequate time for trials. And our penitentiaries are now operating beyond their design capacity—many are simply overflowing with inmates. These developments evince a criminal law that is adrift. To get our federal system back “on track,” Congress should take the following actions:

- Discard the old maxim that “ignorance of the law is no excuse.” Given the enormous body of law presently on the books, this doctrine no longer makes any sense.

- Minimize the injustice of vaguely written rules by restoring traditional legal defenses such as diligence, good-faith, and actual knowledge.
- Restore the rule of lenity for criminal cases by enacting a statute that will explicitly provide for the “strict construction” of federal criminal laws.
- Abolish the doctrine of strict criminal liability as well as the doctrine of vicarious liability. Those theories of criminal liability are inconsistent with the Anglo-American tradition and have no place in a free society.

These reform measures should be only the beginning of a fundamental reexamination of the role of the federal government, as well as the role of the criminal sanction, in American law.

¹ Ronald L. Gainer, “Report to the Attorney General on Federal Criminal Code Reform,” *Criminal Law Forum* (1989).

² Mark Sherman, “Scalia: Judges ‘Aint What They Used to Be,’” Associated Press, October 5, 2011.

³ See Robert Suro, “Rehnquist: Too Many Offenses Are Becoming Federal Crimes,” *Washington Post*, January 1, 1999. See also Timothy Lynch, “Dereliction of Duty: The Constitutional Record of President Clinton,” *Capital University Law Review* 27 (1999): 783, 832—38.

⁴ See American Bar Association, *The Federalization of Criminal Law* (Chicago: American Bar Association, 1998); John S. Baker, *Measuring the Explosive Growth of Federal Crime Legislation* (Washington: The Federalist Society for Law and Public Policy Studies, 2005).

⁵ *United States v. Lopez*, 514 U.S. 549 (1995).

⁶ *Ibid.*, pp. 657—58 (1995) (Thomas, J., concurring). See also John Baker, “Nationalizing Criminal Law: Does Organized Crime Make It Necessary or Proper?” *Rutgers Law Journal* 16 (1985): 495.

⁷ *United States v. Mills*, 817 F. Supp. 1546, 1555 (1993).

⁸ Robert A. Anthony, “Unlegislated Compulsion: How Federal Agency Guidelines Threaten your Liberty,” *Cato Institute Policy Analysis*, no. 312 (August 11, 1998).

⁹ See Timothy Lynch, “Ignorance of the Law: Sometimes a Valid Defense,” *Legal Times*, April 4, 1994.

¹⁰ Henry Hart, “The Aims of the Criminal Law,” reprinted in *In the Name of Justice* (Washington, D.C.: Cato Institute, 2009), p. 19.

¹¹ *United States v. Wilson*, 159 F.3d 280 (1998).

¹² *Ibid.*, p. 296 (Posner, J., dissenting).

¹³ *Ibid.* The Wilson prosecution was *not* a case of one prosecutor using poor judgment and abusing his power. See, for example, *United States v. Emerson*, 46 F.Supp. 2d 598 (1999).

¹⁴ See, generally, Ronald A. Cass, “Ignorance of the Law: A Maxim Reexamined,” *William and Mary Law Review* 17 (1976): 671.

¹⁵ *Connally v. General Construction Company*, 269 U.S. 385, 393 (1926) (internal quotation marks omitted).

¹⁶ *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162-163 (1972).

¹⁷ *Sykes v. United States*, 131 S. Ct. 2267, 2284.

¹⁸ James Madison, “Federalist Paper 62,” in *The Federalist Papers*, ed. Clinton Rossiter (New York: New American Library, 1961), p. 381.

¹⁹ Pennsylvania has protected its citizens from overzealous prosecutors with such a law for many years. See 1 Pa.C.S.A. 1208.

²⁰ Wayne R. LaFare and Austin W. Scott Jr., *Criminal Law*, 2nd. ed. (St. Paul, MN: West Publishing Co., 1986), pp. 193–94.

²¹ Quoted in *Morissette v. United States*, 342 U.S. 246, 250 n. 4 (1952).

²² *Utah v. Blue*, 53 Pac. 978, 980 (1898).

²³ *Morissette v. United States*, 342 U.S. 246, 251 (1952).

²⁴ Richard G. Singer, “The Resurgence of *Mens Rea*: III—The Rise and Fall of Strict Criminal Liability,” *Boston College Law Review* 30 (1989): 337. See also *Special Report: Federal Erosion of Business Civil Liberties* (Washington: Washington Legal Foundation, 2008).

²⁵ *Lambert v. California*, 355 U.S. 225, 228 (1957).

²⁶ Herbert Packer, “Mens Rea and the Supreme Court,” *Supreme Court Review* (1962): 109. See also Jeffrey S. Parker, “The Economics of Mens Rea,” *Virginia Law Review* 79 (1993): 741; Craig S. Lerner and Moin A. Yahya, “‘Left Behind’ After Sarbanes-Oxley,” *American Criminal Law Review* 44 (2007): 1383.

²⁷ *Thorpe v. Florida*, 377 So.2d 221 (1979).

²⁸ *Ibid.*, p. 223.

²⁹ See *United States v. Yirkovsky*, 259 F.3d 704 (2001).

³⁰ *Ibid.*, pp. 705-706.

³¹ In my view, Congress should not stand by secure in the knowledge that such precedents exist. Justice Anthony Kennedy has made this point quite well: “The legislative branch has the obligation to determine whether a policy is wise. It is a grave mistake to retain a policy just because a court finds it constitutional.... Few misconceptions about government are more mischievous than the idea that a policy is sound simply because a court finds it permissible. A court decision does not excuse the political branches or the public from the responsibility for unjust laws.” Anthony M. Kennedy, “An Address to the American Bar Association Annual Meeting,” reprinted in *In the Name of Justice* (Washington, D.C.: Cato Institute, 2009), p. 193.

³² See Wayne R. LaFare and Austin W. Scott Jr., *Criminal Law*, 2nd. ed. (St. Paul, MN: West Publishing Co., 1986), p. 212.

³³ Francis Bowes Sayre, “Criminal Responsibility for the Acts of Another,” *Harvard Law Review* 43 (1930): 689, 690.

³⁴ *Ibid.*, p. 702.

³⁵ *United States v. Park*, 421 U.S. 658 (1975). Although many state courts have followed the reasoning of the *Park* decision with respect to their own state constitutions, some courts have recoiled from the far-reaching implications of vicarious criminal liability. For example, the Pennsylvania Supreme Court has held that “a man’s liberty cannot rest on so frail a reed as whether his employee will commit a mistake in judgment.” *Commonwealth v. Koczvara*, 155 A.2d 825, 830 (1959). That Pennsylvania ruling, it must be emphasized, is an aberration. It is a remnant of the common law tradition that virtually every other jurisdiction views as passé.

³⁶ *United States v. Park*, 421 U.S. 658, 666 (1975).

³⁷ *Ibid.*, p. 672.

³⁸ “[T]he willfulness or negligence of the actor [will] be imputed to him by virtue of his position of responsibility.” *United States v. Brittain*, 931 F.2d 1413, 1419 (1991); *United States v. Johnson & Towers, Inc.*, 741 F.2d 662, 665 n. 3 (1984). See generally Joseph G. Block and Nancy A. Voisin, “The Responsible Corporate Officer Doctrine—Can You Go to Jail for What You *Don’t* Know?” *Environmental Law* (Fall 1992).

³⁹ *Hanousek v. United States*, 528 U.S. 1102 (2000) (Thomas, J., dissenting from the denial of certiorari).

⁴⁰ See Susan S. Kuo, “A Little Privacy, Please: Should We Punish Parents for Teenage Sex?” *Kentucky Law Journal* 89 (2000): 135.

⁴¹ *Department of Housing and Urban Development v. Rucker*, 535 U.S. 125 (2002).

⁴² See *Doe v. Ashcroft*, 334 F.Supp.2d 471 (2004).

⁴³ See Brian W. Walsh and Tiffany M. Joslyn, *Without Intent* (April 2010), p. 43, note 77.