12-2018

Crime Follies: Overcriminalization, Independent Prosecutors, and the Rule of Law

Glenn Harlan Reynolds

Crime Follies: Overcriminalization, Independent Prosecutors, and the Rule of Law

Glenn Harlan Reynolds

9

Crime Follies

Attempt no more good than people can bear.

—Thomas Jefferson

Time was, people understood what would be criminally wrong about a defendant's alleged misconduct in a high-profile prosecution. This is no longer so. From Iran-contra to Whitewater, from the celebrated prosecutions of sports agents in Chicago and a lobbyist in Massachusetts, to the trials of a local Republican Party chairman in New York and Democratic Party officials in Kentucky, people are left confused, not enlightened. Too often cases lack coherence. And any positive message that might be communicated is frequently drowned out by charges that the prosecution does not represent the rule of law, but rather mere politics disguised as law. ("Don't your mommy and daddy know I'm a convicted felon?" one subject of a recent corruption case asked a friendly high-school student. The not atypical reply: "My folks don't care. They said it's just politics.")[1]

One might have thought that the increased civil regulation of ethics (and greater attention to the "ethics" of public officials) would have made it less necessary to use *criminal* laws to enforce *ethical* behavior. In fact, the opposite has proved true. The increase in federal prosecutions

for breaches of ethical standards after the Big Bang is commonly described as "an explosion," accompanied by "a period of inflation" in the definition of conduct prosecutable as a federal crime.[2] Inflation, of course, involves the devaluing of a currency even as its supply is increased. This chapter discusses how, by so expanding the universe of federal crimes, we have dissipated one of our most precious resources for moral instruction.

At the same time, perhaps trying to get more educational bang for our diminishing bucks, we have increasingly used the criminal law for symbolic gestures (making flag burning a crime or enacting a mandatory death sentence for killing a federal poultry inspector). These pronouncements are calculated to give the appearance of toughness on crime. But what they've done is further devalue the criminal law's moral currency, as well as divert us from seeking hard solutions to difficult social problems. Moreover, as we've become more accustomed to approaching problems from the standpoint of how they *appear,* we've tended to develop appearance-oriented solutions, like the War on Drugs, which eschew cost-effective and achievable goals in favor of imagery and special effects.

Setting the Stage

Public-corruption prosecutions "exploded" soon after Watergate, when newly installed President Gerald Ford directed federal prosecutors to target political corruption at the state and local levels,[3] and the Justice Department established its Public Integrity Section. Jimmy Carter nonetheless attacked Ford during the 1976 presidential debates for not adequately addressing white-collar crime.[4] Once elected, President Carter intensified the federal effort to prosecute government officials.

In 1970, before Watergate, federal prosecutors indicted forty-five federal, state, and local officials. By 1980, when President Carter left office, this annual figure had increased about tenfold (to 442); by 1990, more than twentyfold (to 968).[5] The concentrated federal digging into official

misconduct initially uncovered activities (such as bribery and extortion) rich in criminality. It became increasingly difficult over time, however, to extract pure criminal ore from the mine. The prosecutorial machinery nonetheless continued to drill, justifying the cost of deeper exploration with more exotic criminal theories for assaying various samples of unethical behavior.

We began expending our criminal resources in this profligate way just as social research was underscoring the need for frugality. People obey the criminal law largely because of its moral legitimacy.[6] Since the power to stigmatize and concentrate public blame is a scarce resource, Columbia University law professor John Coffee and others have argued that the criminal law must use that power sparingly if it is to perform its socializing role as a system for moral education. Unfortunately, the more complicated and detailed our civil regulation of ethics has become, the more we have delegitimized civil ethics rules and diluted their educational benefits, and the more we have felt we needed the criminal law to teach right from wrong. The criminal law, we learned in Watergate, can be a powerful moral stimulant. But, like true stimulants, its effects too have been diminishing with overuse.

By the end of the 1970s, federal courts had recognized the Hobbs Act (an extortion statute),[7] the federal mail and wire fraud statutes,[8] and the Racketeer Influenced and Corrupt Organizations Act (RICO)[9] as major weapons against various types of unethical behavior.[10] Each statute has its own separate, but parallel, story of expansion. The following discussion selects mail fraud, largely because of its enormous popularity with federal prosecutors. The discussion then pulls back and widens the focus to provide a more panoramic view of the pervasiveness of federal criminal laws. From there it is rather easy to see why today's strategy of appointing an independent investigator to explore whether a particular person committed a crime is so problematic. We conclude with a few observations about the election-year practice of passing criminal laws that merely give the appearance of coming to grips with problems confronting America.

Mail-Fraud Fraud

When Tom Cruise decides to help the FBI bring down the corrupt Mafia law firm of Bendini, Lambert & Locke in the film version of John Grisham's novel *The Firm,* the federal crime he settles upon is mail fraud. This might seem like a strange way to go after lawyers who had engaged in criminal money laundering, blackmail, and (at least as accessories) murder. And indeed it is. (In the book the Tom Cruise character furnishes the FBI with proof of hard-core criminality, but this was a messy ending from Hollywood's perspective because it left Cruise exposed to possible Mafia retaliation.) Still, the legal theory underlying the film's mail fraud ending is entirely plausible. If the Bendini, Lambert lawyers had deliberately overbilled their clients in invoices sent through the mail, the lawyers indeed would have been using the postal service "for the purpose of executing" a "scheme or artifice to defraud" in violation of the federal mail fraud statute, 18 United States Code § 1341. Old-fashioned, run-of-the-mill mail fraud.

Today, mail fraud is no longer old-fashioned or run-of-the-mill. In an effort to root out public corruption, we've traveled quite a distance in the past two decades from this prototypical case. To illustrate just how far, consider what *The Firm* would have looked like if Tom Cruise, a young lawyer in the Bendini, Lambert firm, had pursued the sort of expansive mail fraud prosecution one sees in public-corruption cases today.

As the film now runs, Cruise apologizes to the wide-eyed Mafia clients (the Moroltos) for his firm's overbilling in a comical hotel room scene near the end of the movie. Cruise then explains how use of the mail transformed this overbilling into a federal crime (of which the Moroltos were the victims). The point of the scene is to allow Cruise to assure the Moroltos that he hasn't turned *them* in (nor will he if they leave *him* alone); he has simply fingered his old law firm. And he fingered the firm for mail fraud on the conceit that the Bendini, Lambert lawyers had overbilled the Moroltos through the mail.

A revised ending could have had Cruise discover, however, that the

firm had failed its clients in other ways. For example, Cruise might have found out that the firm had not disclosed to its clients important information concerning conflicts of interests—such as the firm's surreptitiously representing an off-shore bank in tax matters while also representing the Moroltos in large transactions with the same bank. But what would audiences or critics have done with a revised hotel room scene in which Cruise goes over the detailed ethical rules governing lawyer conflicts of interest, then explains to the Moroltos how the firm's failure to disclose its work for the off-shore bank violated these rules, then tells the Moroltos how the firm's ethical lapses can be stretched into a "scheme or artifice to defraud," and then elucidates how the sending of (accurate, not padded) invoices could be sufficiently connected to the "scheme" to constitute "mailings" so as to complete the ingredients for a federal felony?

Americans are willing to suspend disbelief to allow a cow to come spinning by within fifteen feet of tornado watchers in *Twister,* a parachuteless James Bond to defy laws of gravity so as to catch up to a falling plane in midair in *GoldenEye,* aliens to invade in *Independence Day,* or the partners and associates in a prestigious Memphis law firm to conspire with mobsters for years in *The Firm* while the FBI looks on helplessly, apparently without subpoena power. But there *are* limits. No employable screenwriter would have dared lay the Cruise film open to the charges of gimmickry, unreality, and confusion that would have followed from Tom Cruise's concocting such a far-fetched federal crime. After the Big Bang, however, federal prosecutors dare to go where screenwriters fear to tread.

Believe it or not, the revised ending would find support in the so-called "intangible rights" theory of mail fraud. The "scheme or artifice to defraud" of mail fraud now can be invoked if someone "deprive[s] another of the intangible right of honest services."[11] The theory has been used primarily to prosecute fiduciaries, persons who are in a position of trust and therefore owe special legal and ethical duties to others. Corporate officers owe such duties to shareholders, lawyers to clients, trustees to beneficiaries, employees to employers. The enforcement of such du-

ties has traditionally been a matter of civil law, with money damages as the remedy. Prosecuting these persons *criminally* based upon their obligation to provide "honest services" creates problems, however. The civil law traditionally has described a fiduciary's responsibility in the loftiest terms. The private fiduciary becomes responsible for any injury to a beneficiary that is caused by the fiduciary's failure to live up to these high standards. Importing these standards into *criminal* prosecutions, in which there is no requirement (as there is in a civil case) that the fiduciary's misconduct must actually cause economic injury to some identifiable beneficiary, has us expending precious criminal resources in cases that a civil judge would dismiss for going too far.

Early troubling sounds could be heard in cases like the 1975 prosecution of then Maryland Governor Marvin Mandel on mail fraud and racketeering charges. The evidence against Governor Mandel revolved around support he had provided to racetrack legislation benefiting various associates who had given him gifts and financial favors. The mail fraud counts charged the Governor with bribery, but the government retreated from this theory at trial, and the jury was not required to find bribery. They were only asked to decide if the Governor had deliberately failed to disclose his relationships and gifts to legislators who were considering the racetrack bill. Thus, what machine politicians once practiced with abandon—pushing for legislation to benefit friends and supporters—became criminal as soon as it formally became unethical, so long as not publicly disclosed. This nondisclosure was criminal, the federal appeals court later concluded, because it was "contrary to public policy and [in] conflict[] with accepted standards of moral uprightness, fundamental honesty, fair play and right dealing."[12]

The prosecutor went so far as to introduce into evidence portions of the Maryland Code of Ethics. The Code admonished state officers to avoid not only impropriety, but the appearance of it.[13] The Code did not apply to the Governor, only to his subordinates. Nor did the Code create *criminal* liability under Maryland law even for those persons who were covered. The federal prosecutor nevertheless used the Code to cross-examine Governor Mandel and made sure jurors could refer to it

in their deliberations. "Read it when you are in the jury room, take a look at it and see what it says," he directed in his closing statement.[14] Presumably they did, before convicting Governor Mandel and his associates on fifteen of twenty mail fraud counts.

In 1990, shortly after the appeals court decision in *Mandel,* federal prosecutors in New York brought a mail fraud prosecution against Jack E. Bronston, a New York lawyer and state senator.[15] Bronston had secretly helped a company that was bidding for a bus-stop-shelter franchise while other partners of his law firm were representing minority investors in a rival company that was seeking renewal of the franchise. Bronston clearly violated the rules of professional ethics—working clandestinely for one client against the interests of another. He just as clearly deserved censure (including disbarment). The case troubled legal commentators, however, because it transformed civil wrongs into criminal conduct in a way that provided little guidance for future cases.

This problem was compounded by the trial court's instructing the jury with language from civil cases discussing the high ethical standards for fiduciaries: "[M]any forms of conduct permissible in a work a day [*sic*] world for those acting at arm's length are forbidden to those bound by fiduciary ties. A fiduciary is in a position of trust and is held to something stricter than the morals of the marketplace."[16] These words were taken from a famous passage in a common law decision by Benjamin Cardozo.[17] It is a terrific statement of what we should expect from lawyers, trustees, public officials, and other fiduciaries.[18] Yet it is hardly a guidepost for determining whether a *federal crime* has been committed.

While legal observers were trying to keep up with the latest expansions in mail fraud doctrine, federal prosecutors in New York made "another quantum leap in the extension of the statute"[19] by applying the "intangible rights" doctrine to a local Republican Party chairman, Joseph Margiotta. Margiotta did not work for any government. He was instrumental, however, in making certain that local government jobs went to friends and supporters.[20] The U.S. Court of Appeals for the Second Circuit affirmed Margiotta's mail fraud conviction on the theory that he had participated enough in the operation of government to be-

come a "de facto" public official and therefore owed a fiduciary duty to the general citizenry of the town of Hempstead and Nassau County, the breach of which could lay the predicate for a criminal mail fraud case.

In 1987, in *McNally v. United States,*[21] the Supreme Court tried to bring the curtain down on "intangible rights" prosecutions—only to have Congress promptly reopen the show. The Supreme Court held in a 7-to-2 decision involving Kentucky Democratic Party leaders that the mail fraud statute did not create a crime for cheating someone out of intangible rights like "good government." The Court's logic was simple: The century-old mail fraud statute clearly protected property rights, but did not refer to the intangible right to good government and should not be construed "in a manner that leaves its outer boundaries ambiguous and involves the Federal Government in setting standards of disclosure and good government for local and state officials" without a clear statement from Congress. "If Congress desires to go further," the Court stated, "it must speak more clearly than it has."[22]

The Supreme Court's conclusion in *McNally* rests upon the bedrock "rule of law" principle that criminal laws should give persons clear and definite notice of the types of misbehavior that rise to the level of a crime. Not because we expect the Moroltos to run to the statute books to see how well they are complying with the blinding array of criminal statutes. But rather primarily because we want *prosecutors* and *judges* and *jurors*—the instruments of criminal punishment, one of the most awesome powers of government—to know what is criminal and what is not. One of the most tangible "intangible rights" we have as citizens is the right to have this fundamental governmental power exercised on a principled, nondiscriminatory basis.[23]

In cases like *Mandel,* courts lavishly describe the obligation of public officials to act in accordance "with accepted standards of moral uprightness, fundamental honesty, fair play and right dealing."[24] Yet that is precisely what we mean by insisting upon the rule of law in criminal cases. Granting prosecutors the largely unreviewable power to make up federal crimes more or less as they go along is to abandon standards of fair play and right dealing where they matter most.

Can there be any doubt, for example, as to which is a worse advertisement for the abuses of governmental power (and therefore greater reason to distrust government and public officials): favoring political friends, disfavoring political enemies, and targeting unpopular groups and certain minorities in the exercise of the state's criminal prosecution powers, or engaging in similarly unethical behavior in the awarding of a $15,000 municipal insurance contract? Even if the question were close, it would obviously make no sense to invite the former abuses in an effort to stem the latter. Yet we plainly do.

McNally triggered an outcry that the Supreme Court was somehow shackling federal prosecutors in their efforts to eradicate corruption.[25] And so, on the last day of the 100th Congress, buried among thirty unrelated provisions that were added to the Omnibus Drug Bill lay a provision (now law) stating that for purposes of the federal mail and wire fraud statutes, "the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services."[26] No one in Congress bothered to explain what this means, other than a return to the uncertainty before *McNally*.

Since many of the ethical rules in "intangible rights" cases address mere appearances of corruption,[27] it was inevitable that defense lawyers would attack the paradoxes of appearance ethics. And so they did. A great example occurred in the 1989 Chicago mail fraud prosecution of sports agents Norby Walters and Lloyd Bloom.

Walters and Bloom (who were by numerous accounts disreputable men) had secretly signed scores of college athletes while the athletes were still playing college football and before NCAA rules allowed the players to hire an agent. These signings made the athletes ineligible under NCAA rules. The students kept the deals quiet, however, and continued to play.

The NCAA has many eligibility rules, just as it has many finely tuned rules regulating such things as the provision of various modes of transportation to recruits during campus visits.[28] The *academic* eligibility rules require that each student-athlete be admitted as a degree-seeking student according to published entrance requirements, be in good academic standing in accordance with standards applied to all students, and

be enrolled as a full-time student and making satisfactory progress toward a degree.[29] The rules are designed, among other things, to maintain the transparently false appearance that the athletes are normal college kids, treated just like other students, in good academic standing and "making satisfactory progress toward a degree."

The mail fraud case against Walters and Bloom was premised on the notion that the two agents had flimflammed four Big Ten colleges—Michigan, Michigan State, Purdue, and Iowa—by prematurely signing some of their football players. These signings made the players ineligible and had the further consequence (here comes the mail) of causing the schools to send letters to the NCAA erroneously confirming the players' continued eligibility.

The trial ended in convictions on some of the mail fraud counts. The forewoman of the jury, University of Chicago administrator Marjorie Benson, conceded that the jury had to do "some stretching" to find that Walters and Bloom had anticipated the subsequent misuse of the mail.[30] But that's par for the mail fraud course. More interesting was Benson's explanation as to why the jury had convicted Walters and Bloom of defrauding Michigan and Purdue but not Michigan State and Iowa. Federal prosecutors, after all, had carefully selected these particular colleges as relative exemplars. When the smoke cleared, however, despite restrictions on the defendants' ability to obtain and present evidence of the schools' own NCAA violations,[31] defense cross-examination of Iowa and Michigan State officials convinced the jury that those colleges were themselves far too enmeshed in NCAA rule violations to have been cheated out of anything by Walters and Bloom.

For example, in a scene reporters described as "painful,"

> the Assistant Athletic Director at the University of Iowa who had earlier praised the school's academic vigilance read through the transcripts of players Ronnie Harmon and Devon Mitchell. By the end of his junior year, Harmon had taken only one class toward his computer science major and was put on academic probation for poor academic performance. Each semester his grade point average was below

> a "C." He was enrolled in many "slide" courses [including teaching gym, officiating football, coaching basketball, bowling, billiards, and watercolor painting]. Despite this record, the University of Iowa certified him as academically eligible—that is, that he was in good academic standing and making satisfactory progress toward his degree. . . . Devon Mitchell's academic record was similar. . . .
>
> Mitchell's curriculum included karate, billiards, bowling, jogging, tennis, ancient athletics, recreational leisure, and advanced slow-pitch softball. . . . Neither Harmon nor Mitchell returned to school after his academic eligibility expired.[32]

On the government's theory of the case, it is hard to see why University of Iowa officials weren't committing mail fraud themselves when certifying these players' academic eligibility in letters to the NCAA. Unless, of course, the NCAA itself didn't really care. In which event the entire case would have collapsed. No one seriously suggested prosecuting Big Ten officials, however, or any of the other 109 colleges and universities that violated NCAA rules during the 1980s.[33]

Defense attorney Dan Webb argued to the jury that it can't be a federal crime to violate NCAA rules any more than it can be a federal crime to violate the rules of a local Elks Club—mail or no mail. But jury interviews suggested that the jury was swayed by testimony (irrelevant to the mail fraud counts) concerning some violent threats by Walters and Bloom and possible connections to organized crime. Government prosecutors, NCAA officials, Big Ten administrators, and jurors were right to be worried about the influence of professional gambling on college athletics. A number of NCAA officials and sportswriters already fear that college point shaving is more common than imagined—especially in basketball, where it is relatively easy to maintain the mere appearance of trying to score. Officials are terrified of what a major scandal—involving, say, the wildly successful "Road to the Final Four"—could do to college sports.

All of the ingredients of a major scandal are there: The athlete sees that colleges have trivialized the governing rules and circumvented them

when it suits their ends. He knows his college is making a fortune on his efforts while he's not allowed to make a dime. He feels exploited and anxious about life after college. And then he catches sight of a gambler waiting in the wings offering money now. No one in Chicago wants another Black Sox scandal. But when disillusioned and embittered athletes start thinking that they should grab what they can while they can, the clock turns back to 1919.

Regardless which combination of substantive reform proposals might work best—whether or not it involves paying the athletes something for their labors (a current hot issue)—plainly something needs to be done. And that something isn't the quick—apparent—fix of a mail fraud prosecution that leaves sportswriters, legal commentators, jurors, and sports fans scratching their heads. "We felt there were no innocent bystanders," forewoman Benson commented after the Walters-Bloom trial. "What was the crime Walters and Bloom committed?" asked the *New York Times.*[34]

Where mail fraud law will end is anybody's guess. In the meantime, we can empathize with Torrance, the FBI agent in *The Firm.* At a point in the novel when FBI investigators cannot locate Tom Cruise and suspect he has double-crossed them, Torrance puzzles over criminal charges the FBI has drafted to justify a warrant for Cruise's arrest. "Torrance was not sure where the mail fraud fit, but he worked for the FBI and had never seen a case that did not include mail fraud."

300,000 Reasons for Caution

The federal mail fraud statute is only one weapon in the federal arsenal. Incredibly powerful, perhaps, like wire fraud, the Hobbs Act, and RICO, but still only one weapon. The number of additional arms we have stockpiled in the federal war against crime is truly staggering: It has been estimated that more than 300,000 regulations at the federal level are criminally enforceable.[35] And there's the high-megaton federal conspiracy statute,[36] which criminalizes agreements to violate federal civil provisions, and the federal false-statement statute (discussed below),

which reaches oral and unsworn false statements in any matter within the jurisdiction of any executive department or regulatory agency.

When state criminal laws are considered, there is more truth than humor in the observation that we have achieved "the criminalization of nearly everything."[37] Indeed, several years ago two *Wall Street Journal* reporters tried to prove that in one sense or another nearly every American is a criminal.[38] The journalists selected twenty-five rather common crimes (petty larceny, possessing illegal drugs, drinking in public, and so forth). The authors themselves admitted, between them, to having committed sixteen crimes on their list. Most of the dozens of people interviewed had committed eight or more crimes. An Episcopal priest confessed to twelve crimes. Today, Diogenes could wear out his sandals looking not for an honest man, but merely for an unindictable one.

We are all saved from some sort of Kafkaesque prosecutorial hell because prosecutors generally exercise common sense and, moreover, can't possibly chase all of us down. They have other fish to fry. A Los Angeles architect who was interviewed for the *Journal* article (and who confessed to a large number of crimes) captured the prevailing attitude. He wasn't overly concerned he'd be prosecuted because "I'm a good guy, and I look honest." But what if he appeared crooked? Or came from Watts? Or what if he were nominated for city council and a political enemy circulated rumors about his possible lawlessness, prompting an inquiry by an independent prosecutor who has no other fish to fry?

Cover-Ups, Lies, and Independent Counsel

In the old days, we would refrain from ringing up the cops until *after* there was fairly clear evidence of a crime, such as Professor Plum lying in a pool of blood in the conservatory. Off everyone would go looking for clues, with the concrete fact of Professor Plum's corpse to focus their energies. Today, though, we frequently summon our sophisticated investigative technicians *before* there is evidence of a crime. We run to the phone as soon as someone suggests Colonel Mustard might have committed some impropriety. We then try to solve the mystery of whether

this or some other past indiscretion of Colonel Mustard just might constitute a crime.

Nowadays, it is more remarkable when the ethics crime laboratory cannot come up with a viable theory of criminality than when it can. Using today's sophisticated equipment, investigators are usually able to tease several potential crimes out of the fibers of a prominent person's life—like mail fraud for violations of certain ethical rules coupled with a few "mailings." This reality gives rise to one of the central problems with using "independent" investigators, such as the Ethics in Government Act's Independent Counsel, to produce the appearance of even-handed justice.

The greatest clash between executive-branch deception and the Office of Independent Counsel occurred in Iran-contra. We grew so weary of Iran-contra that it's hard to recall how it loomed over the nation. The various disclosures—the downing of the Hasenfus flight over Nicaragua, the secret U.S. arms sales to Iran, press reports on a "shredding party" at the White House, the "diversion" of profits from the Iranian arms sales to contra bank accounts, and so on—and the assorted investigations—the Tower Board, the individual Senate and House committee hearings, the joint congressional hearings, the Independent Counsel inquiry—*dominated* the national news for more than a year. And continued to generate stories for years thereafter.

Few people thought the Independent Counsel's work ended satisfactorily. As the *New York Times* commented after President Bush, decrying the "criminalization of policy differences," pardoned six Iran-contra figures in December 1992:

> Many might dispute that dismissive characterization. But few people, even those who most strongly supported the Iran-contra prosecutions and who now deplore the pardons, would argue that the legal process of a criminal investigation has shed light on the affair.[39]

Most Americans seemed to agree that much of the underlying conduct was wrong. But it was difficult to understand what was criminal or what

should be. And the wrongfulness of behavior was obscured by a fog of technical legal arguments surrounding the criminal cases.

As the months passed, more and more people began calculating the costs of the whole investigative enterprise—not merely in raw dollars ($47 million for only the criminal inquiry), but in lost opportunities. As James Fallows observes in *Breaking the News,* during the first year's investigation,

> the federal government went another $200 billion into debt. The crack cocaine epidemic got under way. The savings and loan industry was about to suck incalculable sums from the national treasury. The United States spent nearly a billion dollars a day on the military, and added a billion dollars a week to its trade deficit with Japan. If all the citizens, politicians, journalists, and scholars in the country were working together, they might not have been able to solve any of those problems in a year. But by spending a year goggling at Oliver North, they guaranteed that they could avoid dealing with the issues that really threatened the country.[40]

In many ways Iran-contra became the test "rule of law" case for the Office of Independent Counsel. Everyone seemed to talk about the "rule of law." Columnists wrote about it. Senators talked about it. The authors of the congressional report on Iran-contra devoted a chapter to it. One of the crystallizing moments of the televised congressional hearings occurred when Oliver North's NSC secretary, Fawn Hall, blurted out, "Sometimes you have to go above the written law." There were gasps all around.

It would have seemed under the circumstances, particularly in light of the congressional mandate to promote the appearance of nonpartisan justice, that the Independent Counsel should have used the federal criminal laws so as to maximize their power to teach the importance of the rule of law and to clarify the differences between criminality and immorality. In January 1987, at the beginning of the Iran-contra investigations, Harvard Law School professor (and future Clinton adminis-

tration Deputy Attorney General) Philip Heymann noted Americans' increasing tendency to confuse the two concepts. This confusion leads to "social acceptance of whatever behavior is not forbidden criminally." "I am not a crook" becomes an ethical defense. Professor Heymann ruminated that the Independent Counsel's greatest service in the Iran-contra cases "might be to remind us of the limits of his charge, to speak explicitly of the limits of the criminal law itself as a device for coming to grips with issues of propriety, morality, and wisdom that are central to the nation."[41] Three years later, however, Independent Counsel Lawrence Walsh was offering, as the core justification for his office's work, having *extended* federal criminal law by establishing for the first time in the nation's history the criminality of unsworn lies to Congress by members of the executive branch.[42]

The vehicle for this extension was the federal false-statement statute, 18 United States Code § 1001,[43] discussed in the next paragraph. For more than fifty years, until Iran-contra, no prosecutor had ever applied the false-statement statute to the executive-legislative dialogue. And its scope in traditional cases (lying to federal regulators) had widened to such a degree that no one could possibly have known which categories of false statements by an executive-branch official to a congressman were covered and which were not. In this respect, the false-statement provision stood in marked contrast to the much more clearly defined federal perjury, obstruction, and contempt statutes, which for more than fifty years indisputably had protected Congress's right to receive truthful information from executive-branch officials. Yet these statutes didn't go far enough for the Independent Counsel, who felt that nonperjurious, nonobstructive, noncontemptuous false statements by executive officials should also be criminal.

The false-statement statute criminalizes the concealment of material facts (cover-ups) and the making of unsworn false statements (lies) in any matter within the jurisdiction of any federal "department" or "agency." The statute has existed in its current form since 1934,[44] when it was enacted to cure a problem federal regulators were experiencing in policing New Deal programs. Existing criminal law only protected the

government when people tried to cheat it out of money or property. New Deal legislation, however, required executive departments and regulatory agencies to police all sorts of things (like crude-oil production and timber use) in which the government itself had no direct pecuniary interest. The false-statement statute filled this regulatory gap.

Like the mail fraud statute, the false-statement statute became a darling of federal prosecutors. By 1984, both liberal Supreme Court Justice William Brennan and conservative Justice William Rehnquist were lamenting that the statute had been so extravagantly interpreted that a person's casual misstatement to a neighbor would be criminal if the neighbor, unbeknownst to the speaker, subsequently used that statement in connection with his work for a federal agency.[45] Justices Rehnquist and Brennan were not alone. Law reform groups had long criticized the statute's overbreadth in its traditional application to false statements made *to* executive and regulatory officials.

If false-statement law applied to declarations *by* executive officials, then everything from false statements at presidential news conferences, to misrepresentations in a telephone conversation between a White House aide and a congressional staffer, to misstatements in the presidential budget would constitute felonies. Asking an Independent Counsel under these rules of engagement to see if a law has been broken would be like asking a referee at a professional hockey game to blow his whistle if he spots any player contact. FDR, Eisenhower, Kennedy, Johnson, Reagan, Bush, Clinton—they'd all be felons.[46] Maybe we've shown less than perfect judgment in the Presidents we've elected, but still . . . all felons?

Thankfully, the Supreme Court reined in these excesses in 1995—long after the charges and countercharges over Iran-contra had subsided—in a case that involved false statements to a bankruptcy court. The Supreme Court held that, despite contrary language in a 1955 case, the false-statement statute does not cover false statements made to the courts or to Congress.[47] The Court thereby restored the rule of law to what otherwise would have been a hopelessly confused and undefined crime of political deception delivered to us by an institution that was

supposed to reaffirm the rule of law, not undermine it. In 1996, Congress enacted a narrowed amendment to the statute, which created a crime for false statements made to Congress in the course of an official "investigation" or "review."[48]

There has been no question that the false-statement statute applies to statements an executive official makes before entering federal service. Thus, an Independent Counsel investigates HUD Secretary Henry Cisneros for allegedly lying to the FBI about the *level* (not the fact) of payments he made to a former mistress. The FBI questioning was part of its background check of Cisneros before he came to Washington. Cisneros was clearly wrong to lie, if he did. But isn't something also a bit wrong with a system that demands complete and accurate answers to such intimate questions by federal authorities upon threat of jail?

Federal investigators and agency employees ask Americans about virtually everything these days. And virtually everything we say in response (sworn and unsworn, oral and written) is subject to federal criminal law. We remain relatively secure, however, because, again, federal prosecutors can't be bothered with prosecuting us—any more than they can be troubled with prosecuting each other for lying about such things as prior drug use on personal information forms completed during their office's initial hiring background check. Furnishing false answers on these forms constitutes a felony committed by literally hundreds of Assistant U.S. Attorneys during the last ten to fifteen years. Yet the prosecutors are (and, under the circumstances, should be) safe from prosecution—unless they amble a little further into the public spotlight, questions are raised, and someone demands an independent investigation in order to dispel any appearance of special treatment.

From the Recreational to the Hallucinogenic

The legislative measures supporting this expansion of federal criminal laws have typically been passed as part of Congress's biennial ritual of chest thumping over crime.[49] (As one of us has proposed elsewhere,

Congress would do us all a great favor if it would henceforth pass crime bills only in odd-numbered years.[50]) So, for example, somewhere among the death-penalty and enhanced-sentencing sections of the Violent Crime Control and Law Enforcement Act of 1994—the Crime Bill—lies a provision further broadening "intangible rights" mail fraud to reach not only items sent through the federal mail, but also any "matter or thing whatever to be sent or delivered by any private or commercial interstate carrier" (such as Federal Express, Atlas Van Lines, or Greyhound).

These sorts of provisions are intended to give the appearance of toughness on crime. Yet, as shown above, far too often they weaken the law's effectiveness. Since these provisions are part of larger crime packages aimed at the problem of violent crime, one might wonder whether the crime packages themselves have been crafted primarily to give the *appearance* of solving the violent crime problem. This would be Grand Blifil on a decidedly grand scale. Unfortunately, it turns out to be the case.

There is nothing new about using criminal laws symbolically, of course. We have long had unenforced laws criminalizing a variety of sexual activities, including sexual intercourse between unmarried adults.[51] These old laws, however wrongheaded, are not a grave national problem. But what *is* a national problem is Congress's resort to similarly symbolic criminal measures, like the Flag Protection Act of 1989[52] (the flag-burning crime), which purposefully create "wedge" issues to divide Americans and divert public attention from more pressing problems. Moreover, when such laws *are* directed toward real-world problems—like drugs and crime—they can have staggeringly bad consequences while giving the illusion that we have developed and are implementing a well-thought-out battle plan. And the transparently self-serving character of the congressional sponsorship of these laws undermines the criminal law's claim to moral legitimacy. It's "just politics."

Congress's passage of the self-evidently symbolic flag-burning law reveals much about the forces at work when the stakes are larger. In a nut-

shell, it shows members of Congress throwing proportionality out the window, often against their better judgment, to gain voter respect by appearing morally pure on the issue of patriotism and morally tough on the issue of crime. Like other mere public relations efforts to gain voter confidence, however, the whole effort paradoxically, but predictably, lowered respect for members of Congress in most voters' eyes. Yet again, an appearance-based approach proved to be not even good p.r.

Whatever one's views about the merits of the slippery crime of "flag desecration," it would take a Darrow to defend the proportionality of the congressional response in 1989 to the Supreme Court's decision in *Texas v. Johnson.*[53] This Rehnquist Court decision overturned, on First Amendment grounds, the conviction of Gregory Lee Johnson under a Texas statute criminalizing the desecration of venerated objects. Johnson had set fire to the American flag outside of the Republican National Convention in Dallas in August 1984. The *New York Times* had reported on only one other flag-burning incident in the five years preceding Johnson's display[54]; and in the five years following the great "flag-burning" debate (from 1990 to 1995), the ACLU counted only two.[55] The flag issue nevertheless was analyzed in lengthy congressional hearings, newspaper columns, talk shows, and the presidential campaign (for instance, by President Bush while visiting a flag factory). Why all the fuss? Cartoonists identified one reason: legislators running for cover under a flag-burning umbrella from a pounding rain of difficult national problems. Historians have noted that lawmakers increasingly resort to such symbolic gestures when reality, like violent crime, gets too hard to handle.[56]

Despite reservations, lawmakers fell over one another to pass something they thought would be aesthetically pleasing on a moral level to most Americans. Congressmen repeatedly went off the record to express opposition to a given proposal while simultaneously complaining, "Who can vote against something like this?"[57] Even on-the-record comments were unusually revealing. After former Reagan administration Solicitor General Charles Fried had testified before a House Judiciary subcommittee in opposition to a constitutional amendment, subcommittee chair Don Edwards allowed, "Your point of view is the correct

point of view, but it's such a loser."[58] Then–Senate Minority Leader Bob Dole opined that a vote against a constitutional amendment "would make a pretty good 30-second spot" during the 1990 elections.[59]

The objective may have been to bolster public confidence in Congress's responsiveness to the problems of the day, but over time the pandering had an opposite effect. Sure, Americans might still say they thought flag burners should be flogged, but increasingly they thought the same of members of Congress. The lampoons, cartoons, and Jay Leno jokes seemed to take their toll. As *Time*'s Barbara Ehrenreich counseled House members in the summer of 1995, when they decided to return to the "weighty" subject of flag burning, the legislators "should realize that just because someone does not douse them in kerosene and hold a match to their pants cuffs is no reason to think they are held in respect."[60]

If one credits the public with the modicum of common sense necessary to separate symbolic opportunism from substantive accomplishment, this loss of credibility was eminently predictable. After all, as Medal of Honor recipient Senator Bob Kerrey pointed out at the time:

> When you're all done arguing, what have you got? Have you built a house? Have you helped somebody? Have you created a better world? Have you fought a battle worth fighting? Or are you banging into shadows on the wall of a cave? It seems to me there's nothing produced for it and you've divided the nation.[61]

It is bad enough to use this sort of symbolic legislation recreationally to express moral disapproval while retreating from other problems. But, as they say, casual use can lead to the hard stuff. And here the "gateway drug" of governing ethics according to appearances has led to the more serious vice of attempting to govern the *country* according to appearances. In this case, the hard stuff is socially expensive symbolic legislation on deadly serious subjects, like drugs and crime.

Thoughtful experts hold a wide range of conflicting opinions on how best to tackle violent crime in America. Yet most experts share the belief that the decades-long War on Drugs has been far too long on imagery

and special effects and far too short on trying to find cost-effective and achievable ways to address the complex of problems. There is, of course, no greater special effect, in Hollywood or Washington, than an ersatz war. Even if you knew nothing about how to tackle violent crime in America or discourage drug abuse, a "War on Drugs" should make you nervous, just as it has made our post-Vietnam military leaders nervous when they've been asked to involve branches of the service.

Those favoring drug decriminalization (who now include conservative William F. Buckley) and those opposing it (such as Professor James Q. Wilson, who is about as expert on the subject of drugs and crime as anyone can be) have targeted their criticism on the official war metaphor not because it is easy to make fun of a pretend war, but rather because such symbolism has distorted the entire effort. As Professor Wilson has noted, this problem begins with the declaration of war itself:

> I have watched several "wars on drugs" declared over the last three decades. The wars typically begin with the statement that the time for studies is past and the time for action has come. "We know what to do; let's get on with it." In fact, we do not know what to do in any comprehensive way, and the need for research is never more urgent than at the beginning of a "war." That is because every past war has led, after brief gains, to final defeat. And so we condemn another generation to risk.[62]

Professor Wilson recommends that we withdraw with honor from the war and begin an array of "frankly experimental" programs to see what works and what doesn't.[63]

Instead, we are knee deep in the Big Muddy. And because there can never be a decisive victory (there will always be drug use and violent crime), the war necessarily devolves into "a series of gestures—a drug bust, the capture of a cocaine shipment, an invasion of Panama—all highly publicized, all with clear-cut good and bad guys, and all triumphs for the good."[64] We measure success by such things as "street value" ("It is for the War on Drugs what the body count was for the Vietnam War; and it has been about as accurate a predictor of success."[65]) or "kilos

seized or destroyed" ("Helicopters suddenly appeared over the hills and hundreds of men in fatigues began sliding down ropes into the fields below as part of a DEA slash-and-burn campaign. Oklahoma narcotics agents reported that they were told to exaggerate the amount of marijuana they eradicated in order to boost federal funding for the state drug war."[66]) The head of the federal Bureau of Prisons discusses acquiring college campuses and religious seminaries and converting them into minimum-security facilities[67]—the Drug War's strategic hamlets. And the President, when concerned that he's not appearing steely enough on the drug problem, casts a four-star retired Army general, Barry McCaffrey (ironically, a Vietnam veteran), to manage the war effort.

The foot soldiers in this war are the local narcotics commanders. They are often as skeptical as the war's harshest critics:

> [T]heir recurrent metaphor is the war in Vietnam; as one of them put it, "the country has to learn that another division, and another division, doesn't win the war." "Can I guarantee you another 21,000 quality felony narcotics busts? Yes. Can I tell you that will do anything about drug dealing? No," says one senior official of the [New York] narcotics division. [Francis C. Hall, the division's retired commander] is equally frank: "People expect us to eliminate drugs. Some of them use expressions like drug-free zones, drug-free communities. Unrealistic! Totally unrealistic. It's certainly not going to happen in my lifetime."[68]

So New York City's Tactical Narcotics Team does its counterinsurgency best, penetrating an area at street level with special teams that drive overt drug dealing to other neighborhoods until the troops leave and life returns to normal.[69] We may have progressed since G. Gordon Liddy's Operation Intercept, but it's not particularly clear how.

One aspect of this war effort that is not for show is its cost. The Drug War has placed extraordinary burdens on police, prosecutors, judges, and prison officials; diverted resources away from violent crimes toward crimes of drug possession and low-level street dealing; and exacted often terrible social costs in our inner cities. Yet the greatest costs are just be-

ginning to come due: those produced by already overcrowded prisons receiving swelling numbers of additional inmates on a long-term basis—the result of ever-increasing mandatory sentences imposed under tough-appearing federal antidrug laws. Placing to one side the human costs of imposing severe mandatory prison sentences on even relatively minor (and predominantly minority) possession offenders—sentences that are now "horrifying" even the most conservative Reagan-appointed judges[70]—the financial burden is staggering.

America already leads the world in percentage of its population in prison.[71] As of 1993, forty-two states were under court order to reduce prison overcrowding, requiring the states either to let violent offenders go free or to build more prisons.[72] Florida initially chose the former course, releasing 130,000 felons early, many of whom went on a violent crime spree.[73] California is adding more prisons:

> California has more people locked up in prison than any other state. . . . This spring [1996], 146,290 inmates are crammed into 32 adult prisons and 10,500 are in facilities for juveniles.
>
> ---
>
> By 2001, according to California's Department of Corrections, the state will have 250,000 felons beating at the doors and will need 50 prisons to hold them.
>
> Money is tight. California's corrections budget is growing by 11% a year, while state revenue is increasing by only 5.3%. . . . Five years from now, officials predict that the cost of housing prisoners may be close to $5 billion.
>
> The prisoner-bulge is often attributed to the 1994 "three-strikes" law, which specifies that offenders convicted of a felony for a third time must serve 25 years to life without parole. But the "three-strikes" convicts are just reaching the prison system. . . . The flood is expected in two or three years' time.[74]

The principal reason for the overcrowding is severe and mandatory sentencing, which is born of legislators' fear of seeming soft on crime.

One congressional opponent of tougher sentencing laws observed, "When you call for more incarceration, you do not have to explain yourself; when you argue for effective alternatives, you do. And in politics, when you start explaining, you've lost."[75] "But," as columnist Stuart Taylor has asked, "how tough is it to be wasting scarce police, prosecutors, judges, and prison cells going after petty drug offenders instead of killers and robbers?"[76]

This mismatch between crime problem and crime solution calls to mind the scene from Kingsley Amis's novel *Lucky Jim* in which Jim observes from the window of a passing car as a big fat man looks with furtive lust at two rather pretty girls. As the car speeds along, Jim's attention shifts to a cricket match in which the batsman, another big fat man, is violently hit in the stomach by the ball and doubles over in pain. Jim wonders whether "this pair of *vignettes* was designed to illustrate the swiftness of divine retribution or its tendency to mistake its target."

We may wonder likewise about government responses to Americans' justified anxieties about violent crime and the nation's moral climate. Swiftness in response there is, be the triggering event a Supreme Court decision (mail fraud or flag burning), a scandal (politics or college athletics), or fear of an uncontrolled outbreak (church burnings or drug abuse). Yet, especially when we declare "war" on problems and attack them with all our weapons indiscriminately, we have a costly tendency to mistake the target and even to find ourselves casualties of friendly fire.

Moreover, in "war" truth is the first casualty. And so it has been here. It is rather hard to develop solutions for problems one hasn't accurately defined, as Professor Wilson observed. Yet leaping over the first step of trying to ascertain the true state of affairs is increasingly becoming the norm. Congressional leaders (spurred by appeals from the President) began drafting new federal antiterrorism legislation in response to the bombing in Atlanta's Centennial Olympic Park and the explosion on TWA Flight 800, for example, almost immediately after the incidents occurred—before it was possible to form any reasonably accurate understanding of what had transpired, and despite hard statistical evidence that domestic acts of terrorism are way down.[77]

Similarly, journalists who took the trouble to investigate the facts surrounding the recent church-burning hysteria found no support for the proposition that church arson is a dangerously escalating race problem. For instance, James Glassman in the *Washington Post*—stipulating that church arson is evil, and doubly so if motivated by racial animus—uncovered statistics from the National Fire Protection Association and the Bureau of Alcohol, Tobacco, and Firearms indicating that arson is no more a problem for black churches than for white churches.[78] Longtime civil rights leader Roy Innis agreed. He further observed that church burnings nationwide have been steadily declining—from 1,430 reported in 1980 to 520 in 1994. Innis called "for a backing off of the hysteria."

Enacting legislative measures under such circumstances is a bit like purchasing policies of "appearance" insurance. At exceptionally low premiums (some modest staff time and a few legislative hearings), the measures protect legislators from future "appearance" mishaps (such as negative campaign attacks for appearing insensitive on issues of drugs, terrorism, racism, and so forth). And these particular insurance policies begin paying dividends right away. Legislators can appear "tough" and "responsive" to late-breaking problems *and,* by so widely diffusing responsibility for addressing whatever the problem is, assure that no one is actually held responsible for the problem's subsequent worsening or for the costs of the legislative effort. No wonder the policies are so popular. Unfortunately, *we* are saddled with the continuing premiums for years to come—in lost dollars, lost liberties, lost opportunities, and lost political accountability.