



11350 Random Hills Road, Suite 800, Fairfax, Virginia 22030 Phone (703) 934-6101 Fax (703) 352-3678

fff@fff.org www.fff.org

Derivative Crimes and Federal Injustice **by William L. Anderson and Candice E. Jackson**

One of the common complaints levied against criminal justice in the United States is that criminals often are acquitted because of “legal technicalities.” For example, defendants who seem to be guilty find charges dismissed because police did not properly inform them of their “Miranda Rights,” or evidence that clearly demonstrates guilt is kept from legal proceedings because of the “exclusionary rule.”

Indeed, the average person might believe that American justice clearly favors the guilty over the avenging angels of the prosecutorial staffs that are unable to put predators away. In the wake of the O.J. Simpson “not guilty” verdicts in 1995, for example, commentators and much of the outraged public called for an end to the jury system, stronger controls against defenses, and an overhaul of the nation’s judicial system to help better weight the proceedings in favor of the prosecutors.

Think again. At least in the federal system, the vast majority of the estimated 170,000 prisoners are incarcerated for what one can only call “legal technicalities.” In fact, most federal crimes listed on the federal statutes are not crimes at all in the historical sense, but at best are imaginary charges that are derived from other alleged wrongdoing. Thus, we call them “derivative crimes.”

Financial “derivatives” are securities that obtain their value from the value of other securities, such as stock mutual funds or hedge funds. We have chosen to apply the term “derivative” to classes of federal crimes that in and of themselves are works of fiction, but that are created as an umbrella term to include a number of other real violations of the law.

Take the crime of “racketeering,” for example. In the real world, no one “racketeers” another person. However, thanks to the Racketeer Influenced and Corrupt Organizations Act of 1970 (dubbed RICO) the federal government deems racketeering to be a pattern of wrongdoing such as running illegal gambling operations and prostitution rings.

Of course, the activities upon which racketeering is based are already illegal under most state laws. The reason that racketeering laws exist is not to redefine the crime, but rather to push

defendants into federal court, where the rules of evidence clearly tilt in favor of the prosecution — and where winning convictions is easier.

Furthermore, the racketeering laws are written in order to do an end run around the double jeopardy provisions of the U.S. Constitution and, in a technically legal way, to turn into federal cases what the Constitution clearly intended to be matters for the states.

Racketeering is not the only federal derivative crime. The prosecutor's arsenal includes charges such as money laundering, mail fraud, wire fraud, and conspiracy, all of which carry stiff sentences, but which are not really crimes unto themselves.

Take money laundering. If federal investigators believe that at least part of someone's money was obtained illegally, then if one either spends that money or deposits it in a bank, prosecutors can charge that individual with money laundering.

Keep in mind that the activities such as spending money or putting it into a bank by themselves are innocuous. Furthermore, once charges such as money laundering or conspiracy are filed, prosecutors do not have to prove the alleged underlying crime in order to win convictions. Instead, the burden of proof is similar to that of civil court, which is mere preponderance of the evidence.

Easier convictions and harsher punishments

The result is that federal prosecutors have an easier time obtaining convictions than do their state counterparts. Furthermore, federal law calls for harsher sentences for defendants who proceed to trial — and subsequently lose — than for those who plea bargain. The prospect of spending decades in prison for activities that for all intents and purposes are not real crimes can be horrifying to someone who has never had a brush with the law before.

Take the case of former Enron treasurer Ben Glison, who recently pleaded guilty to one count of “conspiracy to commit wire and securities fraud.” While the simple association with the disgraced Enron firm is enough for someone to be judged a criminal in the public eye, the charge to which Glison pleaded guilty is a legal absurdity. To put it another way, he pleaded guilty to a derivative crime of another derivative crime. (For that, he received five years in prison.) The government did not have to prove that he had committed an actual crime of securities fraud (which is highly derivative in itself); it simply concocted a chain of phantom crimes in order to win a conviction.

It gets even worse. Three Christian anti-abortion activists in western Virginia were involved in civil litigation over an adverse possession case in which they cut timber on land to gain possession (all in accordance with Virginia state law). However, in subsequent litigation they settled out of court for \$90,000 with an alleged landowner (who did not have title but to whom the land was later awarded by adverse possession by a federal judge).

When the men cut the timber (after they had carefully researched Virginia law on adverse possession and were convinced they were acting within the law), the government moved in and charged them with conspiracy, wire fraud, and mail fraud. While the charges might seem ominous, they are even more specious than most derivative crimes, which are filed to cover activities that are alleged criminal violations of state codes. In this case, however, no underlying crime was committed, as the original legal proceedings took place under civil litigation. The men were tried and convicted in federal court and are awaiting sentencing at this time.

(Moreover, during the investigation, federal officials offered the defendants a “deal” if they would inform on or testify against some anti-abortion activists. They refused. Thus, one can see that political issues also have a role in the decision-making process of federal prosecutors.)

The filing of criminal charges in regard to a civil case is a major step forward in the federal prosecutorial system, as it greatly increases the possibilities for future “white-collar crime” convictions. U.S. attorneys can simply troll through civil lawsuits, pick the losers, and charge them with various federal crimes such as conspiracy and mail fraud.

If this sounds as though the federal government is increasingly criminalizing normal business conduct, it is because that is exactly what is occurring. Keep in mind that the prospect of going to prison for sending letters or faxes in the course of lawsuits is going to keep a number of business owners and executives up late at night. It will also serve to drive a large portion of investment out of the United States, as the reality of “lose a lawsuit, go to prison” begins to strike home.

In the wake of the Enron and WorldCom debacles, politicians from both sides of the aisle have been calling for more criminal penalties for business executives who seemingly engage in shady conduct. Indeed, new laws such as the USA PATRIOT Act and the Sarbanes-Oxley Act have further expanded the definitions of conspiracy and money laundering in the hope that the nets of criminality can be spread more widely in the business world.

Anyone who believes that expanding the already unjust list of federal crimes will help make business markets more secure and increase “honesty” in economic dealings should look again. By their nature, federal criminal statutes are nebulous and people often do not realize that someone in authority regards their conduct as criminal until it is too late. Laws such as Sarbanes-Oxley and the USA PATRIOT Act increase the uncertainty of what is criminal behavior and what is not.

The great English jurist William Blackstone, who articulated the “Rights of Englishmen” upon which law in this country was built, declared that law must be a shield to protect the innocent from predators, both private and public. Furthermore, he argued, law has to be consistent and certain, with clear boundaries to enable individuals to feel secure in the law.

The days of law having a Blackstone-like character are gone in the United States. Federal criminal law has made law more uncertain and has increased the arbitrariness of enforcement.

The legal fences that once protected ordinary Americans are being torn down, and tyranny is moving into the void.

William Anderson is assistant professor of economics at Frostburg State University in Frostburg, Maryland, and Candice Jackson is an attorney with Judicial Watch in San Marino, California.

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