

Prosecutors' abuse of the RICO and fraud statutes increasingly is threatening the nation's economy.

Federal Crimes and the Destruction of Law

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In April of 1940, new U.S. Attorney General Robert H. Jackson delivered an address to the Second Annual Conference of United States Attorneys in which he warned that federal prosecutors were losing perspective on the limits of their powers. Federal law, he said, was so expansive and vague that prosecutors could pursue anyone they considered unsavory, regardless of whether there was a clear violation of law. The danger, he said, was that prosecutors would first target individuals for prosecution and then look for a crime to prosecute, and that was where “the greatest danger of abuse of prosecuting power lies.” The speech was so significant that it would later be republished, with some revisions, as “The Federal Prosecutor” in the *Journal of Criminal Law and Criminology* and the *Journal of the American Judicature Society*.

Almost 50 years after Jackson’s speech, federal prosecutors in New York, led by then-U.S. Attorney Rudolph Giuliani, decided to target a number of people on Wall Street, including billionaire investment banker Michael Milken, and then went shopping for crimes for which they could charge them. Giuliani ultimately settled on the Racketeer Influenced and Corrupt Organizations Act, better known as RICO, and went to work. By the time Giuliani was done, Milken was in prison and hundreds of billions of dollars of financial wreckage were left behind.

It was somewhat unusual in 1989 for federal prosecutors to use the criminal RICO statutes to prosecute people in business and finance. Today, use of RICO is commonplace. In fact, U.S. attorneys have thousands of statutes and many more thousands of regulations, not to mention the air of invincibility that comes with the fact that federal prosecutors pretty much are the law these days. Harvey Silverglate writes

in his new book, *Three Felonies a Day*, that the average professional person most likely commits a number of federal crimes each day, for which an enterprising U.S. attorney could find a way to prosecute. That most people are not indicted reflects the simple fact that there are too many people and too few prosecutors to accomplish such a questionable feat; it also reflects the sad fact that federal prosecutors prefer to go after bigger targets because high-profile prosecutions and convictions grease the system and establish a successful prosecutorial and political career.

Silverglate recently told *Reason* that businesspeople increasingly will be targeted in the current economic climate:

White collar prosecution issues will be front-and-center because the trend within the Criminal Division of the Justice Department in the last quarter century has been the increasingly unfair application of vague criminal statutes to innocent members of a wide range of occupational groups for conduct not intuitively criminal. This prosecutorial trend will become exacerbated with the flood of indictments just around the corner, seeking scapegoats for an economic collapse for which the federal government is not going to want to take its fair (and rather large) share of the credit (or blame, as the case may be).

In the process of expanding federal criminal law, prosecutors, accommodating judges (many of whom are former federal prosecutors), members of Congress, and compliant juries have managed to eliminate almost all of the protections that old English common law and the legal traditions that once existed in this country had established for people accused of crimes. Federal law in almost no way represents the system we inherited from Great Britain; if anything, it is reminiscent of the former Soviet Union’s “crimes of analogy,” in which a “crime”

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could be fashioned from nearly any activity as long as a prosecutor could find a law criminalizing “similar” conduct.

RICO, ASSET FORFEITURE, AND THEIR ORIGINS

The numbers tell a harsh story. In 1980, there were about 1,500 federal prosecutors and approximately 20,000 federal prisoners. Today, there are more than 7,500 U.S. attorneys and more than 200,000 federal prisoners, according to an October 2009 count. About 52 percent of federal prisoners are drug offenders, reflecting the emphasis of the “War on Drugs,” and while there is no specific “white collar” crime category, one estimates, using Federal Bureau of Prisons statistics, that about 5 to 10 percent of the federal prison population consists of people convicted of white collar crimes.

The federal criminal code is growing. In the early days of the republic, there were three federal crimes: piracy, treason, and counterfeiting. Today, there are more than 4,000 federal criminal laws and more than 10,000 regulations that prosecutors easily can fold into the criminal statutes. One reason for this legal explosion has been the RICO statutes.

BEYOND THE MOB Elected under a “law and order” platform, President Richard Nixon aimed his 1970 “crime bill” at organized crime figures who often were acquitted in state trials or not charged at all, despite their reputations. Though the public seemed more concerned about random murders and robberies than it did about organized crime, Nixon saw an opportunity in RICO to appear “tough on crime.” The key to RICO was trying alleged mob figures in federal court, where judges and juries were considered less likely to be corrupted by organized crime’s influences.

The precedence of directing criminal cases from state courts to federal courts in order to avoid corrupt influence had already been set with the trying of civil rights cases in southern states. In 1967, federal prosecutors secured convictions of civil rights violations against a number of people involved in the notorious murders of three civil rights workers in Neshoba County, MS. State officials refused to investigate, and the decision to prosecute in federal court on civil rights violations understandably was politically popular outside of the South.

Nixon’s expansion of federal law to address perceived and real injustices resonated with voters, although the American Civil Liberties Union and the New York Bar Association raised objections, along with Italian-American organizations who believed RICO wrongly targeted members of their community. (The ACLU later changed its position on RICO after abortion providers filed civil RICO charges against anti-abortion protesters.) To ensure RICO was not a bill of attainder against Italian-Americans, Congress wrote the law in a way that made it vague and widely applicable.

In 1970, Herbert Packer wrote in the *New York Review of Books* that the proposed law would reduce defendants’ rights and simultaneously make prosecuting cases easier for U.S. attorneys. He then added, prophetically, that the law would not do this “just with respect to so-called organized crime but with respect to everyone.” The Bar of the City of New York complained that RICO demonstrated “impatience ... for constitutional and procedural safeguards.” While few people listened to these warnings when they were made, their predictions have come true.

RICO’s framers seized on a legal concept that attorney Candice E. Jackson and I in previous articles have called “deriv-



ative crimes.” That is, federal prosecutors charge someone with a “crime” that is not a crime at all, but rather is derived from other actions that are illegal under state or federal law. For instance, *running* a floating craps game is a violation of state law, but running a craps *enterprise* could be deemed a violation of the federal racketeering law. Interestingly, RICO does not require that the underlying crime be proven in a court of law — the defendant can be convicted of violating RICO even if he is not convicted of running craps.

Consider the late Logan Young, a University of Alabama booster, who was convicted in federal court in 2005 of, among other things, “crossing state lines in order to commit racketeering.” His “racketeering” offense was derived from his allegedly having paid money to a Memphis high school football coach who was then supposed to steer a prized football recruit to the University of Alabama. However, he never was tried under Tennessee bribery laws, let alone convicted, which was the basis of his appeal. (He died in what police ruled a freak accident in his home before the appeals court could review his case.)

This legal “technicality” presents prosecutors with many options. First, while “guilty beyond a reasonable doubt” is the de jure standard in a RICO case, in reality, because a defendant is charged with “racketeering” and not the alleged offenses upon which RICO charges are based, the derivative nature of the charges lowers the de facto standard of proof. Second, because prosecutors can piggyback charges on top of other charges, a conviction on just one charge can trigger multiple convictions, which gives prosecutors huge amounts of leverage in forcing someone to plead guilty.

Another problem with the RICO statutes is that the charges are heard in federal courts, where rules of evidence and procedures favor the prosecution thanks to the passage of the Comprehensive Crime Control Act of 1984 and the Comprehensive Forfeiture Act of 1984. Should someone be convicted under RICO, the penalties are severe, so most people charged take the guilty plea.

JUNK BOND KING Federal prosecutors soon realized they could employ RICO to prosecute business people along with Cosa Nostra figures. By 1979, Jimmy Carter’s Department of Justice began applying criminal RICO charges for “white collar crimes.”

The most notorious business RICO prosecutions came in the late 1980s when Giuliani, then the U.S. attorney for the Southern District of New York, went after two investment firms, Princeton-Newport Securities and Drexel-Burnham-Lambert, which employed Michael Milken. Because RICO’s language is vague, Giuliani found a political treasure trove on Wall Street, where the onerous penalties that accompany RICO coincided with the fact that few people who work on Wall Street ever have been caught up in the maw of the criminal justice system. Giuliani bragged that business people “roll a lot easier” than do hardened criminals. The complexity of the criminal charges plus the stigma of being investigated or charged with “crimes” made Wall Street figures more likely to plead guilty.

Milken, the “junk bond king,” was the most successful

investment banker on Wall Street in the 1980s. At the time he began his career in the mid-1970s, the mainstream U.S. financial system was relatively small and highly stratified, and it was not particularly friendly to the newly arriving high-tech enterprises. By offering high-yield, high-risk bonds to the market, Milken and his firm, Drexel-Burnham-Lambert, could bypass the traditional financial houses and banks. (See “A Middle Ground on Insider Trading,” p. 38.)

For example, when Ted Turner wanted to launch Cable News Network, he turned to Milken, who underwrote the 1980 launching of the network. At the time, this venture was highly controversial and many people predicted failure because it was an untested idea. Among other ventures Milken helped to fund were McCaw Cellular (now part of AT&T) and MCI Communications.

Securities markets are heavily regulated and traders often bump against the numerous rules issued by the Securities and Exchange Commission. Someone as active as Milken easily could break a regulation or operate in “gray” areas. However, regulatory violations tend to be handled by the SEC, not by prosecutors. That was where Giuliani realized Milken and others would be vulnerable.

So-called insider trading already was illegal, but for all of the accusations that Giuliani and others brought forth, the government never could prove an insider trading case against Milken. (In fact, the regulatory violations to which Milken pleaded guilty have not been pursued in criminal court since his 1990 guilty plea.) In a 1992 talk to Rutgers University law students, Giuliani lieutenant John Carroll bragged that prosecutors

were guilty of criminalizing technical offenses.... Many of the prosecution theories we used were novel. Many of the statutes that we charged under ... hadn’t been charged as crimes before.... We’re looking to find the next areas of conduct that meets any sort of statutory definition of what criminal conduct is.

Carroll’s words are chilling, for they declare that it is up to prosecutors to interpret the law in order to determine what is a crime. Instead of the law defining crime, federal prosecutors are doing it, which clearly violates all constitutional norms.

Giuliani took alleged regulatory violations and transformed them into “conspiracy” and “racketeering” charges, claiming that Milken and others had engaged in “patterns of racketeering.” At the same time, a cascade of illegally leaked information from federal grand juries investigating Milken and others found its way into the *New York Times* and *Wall Street Journal*. Although no one admitted to felony leaking, the suspicion was strong that Giuliani or someone close to him did it. It is likely that the acts of leaking were the only real felonies committed in the case.

Playing on Milken’s wealth and the perception that the successful investment banker was a Wall Street “outsider” playing fast and loose with the rules, Giuliani turned every alleged Milken advantage into a liability. For example, in the federal indictment, Giuliani put the incomes of Milken and his brother on the first page (Michael made more than \$500 million in 1987), thus channeling French novelist Honore de Balzac’s

claim, “Behind every great fortune there is a crime.”

In the end, federal prosecutors (after FBI agents went so far as to question Milken’s 92-year-old grandfather) employed perhaps their most powerful weapon, using coercive methods to obtain a guilty plea: if Milken would agree to plead to six non-consequential “crimes,” then the Department of Justice would lay off his family. Milken agreed, although, as prosecutor Carroll would admit three years later, the actual charges were a product of prosecutorial creativity, not real criminal conduct. In fact, before Giuliani hit the scene, Milken might have paid a relatively small fine at worst.

legal counsel. (The idea that one is “too guilty” to have top-notch counsel does not square with the U.S. Constitution nor U.S. legal tradition, but the courts and Congress seem to have swallowed that assault on the Constitution as well.) Prosecutors have found that depriving people charged with crimes of their ability to purchase high-quality counsel makes convictions almost inevitable.

The resulting near-free reign that prosecutors have in federal court is an open invitation to abuse of the law and the legal system. To make matters worse, federal prosecutors enjoy almost total legal immunity and are unlikely to face any

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The legal construct of the RICO charges against Milken were both simple and complicated. As noted before, the government took alleged regulatory violations and interpreted them simply as a “pattern of racketeering,” suddenly turning them into a crime. Many of the regulations, such as ones that limit the “parking” of stocks, are complicated. Jurors are often left bewildered as both prosecutors and the defense attempt to explain them. All too often, jurors take the complicated nature of the alleged infractions as “proof” of guilt, which makes going to trial a dangerous thing, as the penalties for being convicted under RICO charges are severe. Given this reality, and given that prosecutors promised not to indict other members of his family, Milken took the plea.

RACKETEERING TODAY While the use of RICO against business people 20 years ago was controversial, today it is commonplace. For example, in 2003 the Department of Justice prosecuted 3,327 “racketeering” cases. While the federal statistics do not differentiate between RICO filed against an “authentic” mobster versus a garden-variety businessperson, nonetheless it is easy to see that hundreds if not thousands of such cases are aimed precisely toward the business owner or managers in order to force guilty pleas.

One of RICO’s most powerful tools is the ability of federal prosecutors to seize an individual’s assets even before there is a trial. For example, by seizing the assets of Princeton Newport Partners during his Wall Street “investigations,” Giuliani was able to decimate the company even before the case went to court. (A federal jury convicted several Princeton Newport principals of fraud, but appellate courts overturned those convictions.)

Asset seizure even outside of employing RICO has become a common tactic of federal prosecutors. At first, forfeiture laws employed before trial were used to stop alleged “drug kingpins” from being able to “buy justice” by employing excellent

sanctions no matter how dishonest or abusive their behavior might be; the rules that apply to everyone else do not apply to U.S. attorneys.

FINANCIAL BUBBLES, BUSINESS FAILURES, AND FRAUD

The spectacular business and financial failures of 2001–2002 led to some notable federal prosecutions for fraud, but the federal definition of “fraud” conflicts with any historical understanding of that word. Fraud, after all, goes to intent of one’s actions. One cannot “defraud” someone without the intent to defraud, but the federal fraud statutes do not differentiate with regard to intent or knowledge by those charged.

The Justice Department website lists numerous types of fraud charges, from “mortgage fraud,” to “visa fraud,” to “securities fraud,” to “hedge fund fraud,” and beyond. Reading through it calls to mind the scene from *Forrest Gump* in which Bubba names all of the different dishes that can be made with shrimp. The difference is that Bubba’s list ultimately ended, while the federal fraud list seems to be endless.

Consider “honest services fraud,” a charge popular with prosecutors. Geraldine Scott Moohr of the University of Houston Law Center writes that the 1988 law making it a federal crime “to deprive people of the intangible right of honest services” “reaches an extraordinarily broad range of conduct.” She quotes a former prosecutor who declares that “if investigators dig deep enough, anyone can be convicted under [the statute].”

Enron’s Jeff Skilling and Ken Lay were convicted of “honest services fraud” in the wake of the company’s spectacular 2001 implosion. Former congressman Randy “Duke” Cunningham and former lobbyist Jack Abramoff were convicted under the same law. Enough objections have been raised about “honest services fraud” that the U.S. Supreme Court agreed to consider arguments against it in the fall of 2009,

hearing the appeals of Skilling and convicted media businessperson Conrad Black, as well as the appeal of Bruce Weyhrauch, a former Alaska legislator convicted in 2007.

Like many other fraud statutes on the federal books, honest services fraud requires juries to make a judgment after the fact as to whether or not certain actions fall into a category of being criminal. The statute itself gives prosecutors carte blanche to bring charges and then let a jury make the interpretation of criminality, as opposed to the standard of criminal conduct being the law itself. Indeed, Black's lawyers claim in his appeal that the law does not "define the criminal offense with sufficient definiteness that ordinary people

al wealth in Enron stock and were ruined by the collapse) and Enron went out of business. That is a definition of entrepreneurial error, not criminal behavior.

THE ROOTS OF 'WHITE COLLAR CRIME'

While the Enron verdict seemed more emotional than ideological, nonetheless the vast growth of federal criminal law has accompanied an ideological shift in how lawyers, judges, legislators, and the media view the law. That is why the United States has gone from a system that emphasized due process and the rights of the defendant to one in which the prosecution has nearly unlimited powers to stretch any action into

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can understand what conduct is prohibited," a requirement the courts established in 1983 in *Kolender v. Lawson*.

As Silverglate points out in *Three Felonies a Day*, the controversial move by Enron's executives, putting non-earning assets into "special purpose entities," both was legal and was made public in Enron's financial statements. Yet, a federal jury interpreted those actions as being criminally fraudulent (including honest services fraud) because jurors believed prosecutors who claimed that the actions helped to prop up Enron's stock price at a higher level than it should have been. However, a number of Wall Street and business analysts had long been skeptical of Enron's long-term stability, even during its high-flying days in the late 1990s. Whatever characterizations of Skilling and Lay's actions may be appropriate, the claim by prosecutors that Enron's practices were "done in secret" was disingenuous at best and fraudulent at worst.

Because prosecutors pursue liberal definitions of fraud, they can target unpopular people such as Abramoff or the disgraced executives at Enron. This may be cathartic for society, but it is questionable criminal law. Consider this comment by Bethany McLean and Peter Elkind in *Fortune* following the Skilling and Lay verdicts:

Let's acknowledge some unambiguously positive implications of the Enron verdict. First, it finally offers a measure of consolation — or retribution — for those employees who lost everything in Enron's bankruptcy. And it reinforces a critical notion about our justice system: that, despite much punditry to the contrary, being rich and spending millions on a crack criminal defense team does not necessarily buy freedom.

In other words, according to these journalists, Lay and Skilling were criminals because they lost money for themselves and company stockholders (both men had most of their person-

al criminal offense. One reason for this change is found in the ideological roots of the phrase "white collar crime," which was born during the Great Depression.

Sociologist Edwin Sutherland coined the term "white collar crime" during the Great Depression and published a book with that title in 1949. Sutherland, a socialist, argued that most business transactions by themselves are inherently criminal. He believed that businesspeople were respected in the community when, instead, they should have been regarded as malefactors.

Sutherland defined white collar crime as "crime committed by a person of respectability and high social status in the course of his occupation." Louisiana State University law professor John Baker writes that Sutherland was "concerned with whom the alleged perpetrator was, rather than what that person might have done." Because of the anti-business animus that undergirded the New Deal, this view became popular, especially in academic and government circles.

Sutherland attacked the presumption of innocence and *mens rea*, both of which were the bedrock of Anglo-American criminal law. Instead, as Baker notes, Sutherland believed that people charged with white collar crime should be presumed guilty because they already were being treated differently by the criminal justice system than others who might be charged with standard crimes like robbery or murder. Baker continues:

Sutherland intended to provide a basis for facilitating more convictions of executives and corporations by reconceptualizing crime through the term "white-collar crime." He began by equating the "adverse decisions" of regulatory agencies with criminal convictions. As to people involved in business, Sutherland sought to deemphasize the presumption of innocence and the

mens rea requirement to facilitate establishing their criminal liability. Yet what Professor Sutherland called a crime was often only a regulatory violation. Intent is not normally considered in such enforcement actions; thus many of Sutherland's "crimes" may have been inadvertent, unintended acts. Nevertheless, Sutherland was determined to classify such acts as crimes.

The FBI website on "white collar crime" pays homage to Sutherland and his legal theories, and even the U.S. Sentencing Commission's guidelines refer to his work. Sutherland protégé Donald Cressey created the "enterprise" concept that is central to the RICO statutes and wrote in his text *Criminology* (which he co-authored with Sutherland) that "the people of the business world are probably more criminalistic than the people of the slums."

One cannot underestimate the real harm Sutherland and his protégés have done to the law. First, they declared that an entire group of people was inherently "criminal," and then they demanded new laws and policies to deal with this alleged problem, which means innocent people go to prison. Furthermore, anti-business ideology is rampant in the media, books, and in the movies from Oliver Stone's *Wall Street* to Michael Moore's *Capitalism: A Love Story*. Therefore, it is not surprising that public opinion will be skewed against "white collar" defendants.

CRIMES OR ERRORS? In the wake of financial meltdowns, it becomes easy to scapegoat the business community and criminalize what clearly were entrepreneurial errors. For example, federal prosecutors used their powers to destroy the accounting firm Arthur Andersen as a reaction against Enron's collapse. Even though the U.S. Supreme Court ultimately overturned the criminal conviction of the company, the company's "victory" was symbolic because the firm had been liquidated before the Court's decision.

Perhaps the most cogent commentary on the current state of federal criminal law comes from a 2007 *Slate* article:

At the federal prosecutor's office in the Southern District of New York, the staff, over beer and pretzels, used to play a darkly humorous game. Junior and senior prosecutors would sit around, and someone would name a random celebrity — say, Mother Theresa or John Lennon. It would then be up to the junior prosecutors to figure out a plausible crime for which to indict him or her. The crimes were not usually rape, murder, or other crimes you'd see on *Law & Order* but rather the incredibly broad yet obscure crimes that populate the U.S. Code like a kind of jurisprudential minefield: Crimes like "false statements" (a felony, up to five years), "obstructing the mails" (five years), or "false pretenses on the high seas" (also five years). The trick and the skill lay in finding the more obscure offenses that fit the character of the celebrity and carried the toughest sentences. The result, however, was inevitable: "prison time."

CONCLUSION

The only thing that stands between almost any American and doing a stretch in federal prison is the choice of whom prosecutors will target. This is a serious problem that shows no signs of disappearing.

The transformation of federal courts into indictment and conviction machines imperils the U.S. business environment. Entrepreneurs and business owners face enough uncertainty in the current economic climate without having to worry about going to prison because an ambitious federal prosecutor can convince a jury that someone violated a vague, murky law. The U.S. economy is resilient, but if the current onslaught of federal prosecution of "economic crimes" continues, a vigorous economic recovery is less likely. That means diminished living standards for millions of Americans, even if they never find themselves in a federal prosecutor's crosshairs. Prospective entrepreneurs must consider that business risk now entails not only taking a chance with their money, but also doing time in prison. If this trend continues, Americans can be sure that both capital and entrepreneurial talent will flee this country for lands with a stronger commitment to the rule of law, just as it once fled places like China, Cuba, and India for the United States.

Free market economies leave entrepreneurs free to pursue profits, but also to suffer possible losses. In fact, profits and losses both serve vital economic purposes, for they send signals to entrepreneurs about the value of products and resources, and where they should direct them. Unfortunately, profits and losses also have their detractors, as people become envious of those who make profitable decisions and angry with those whose decisions lead to losses.

From Milken to Enron, federal prosecutors effectively have managed to criminalize both correct and incorrect economic decisions, tapping into political discontent and looking for scapegoats. For most of the history of this country, the proper legal venue to deal with disputes in economic matters was civil court, but no longer. Today, federal prosecutors are sending a clear message that entrepreneurial success can be interpreted as a crime and entrepreneurial failure can land someone in prison for nearly a lifetime, even if those losses involved no criminal intent.

This is especially true in financial markets, for without capital markets there is no large-scale production and no way to fund the development of new technologies. Without innovative capital markets, the developments in U.S. telecommunications and computers would not have been as strong or spectacular as they were during the 1980s and 1990s. The legal scene today, with emboldened federal prosecutors going after financial entrepreneurs, is such that it is doubtful we will see much financial innovation in the future — at least in the United States.

The great English jurist William Blackstone declared that law was to be "a shield for the innocent" and a mechanism to protect people from the predations of others, as well as the predations of the government itself — the very meaning of limited government. This is no longer the case. Ironically, as laws proliferate in Congress, the rule of law is disappearing. The law has become the plaything of federal prosecutors who advance their careers by convicting others. **R**