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Time to Prune the Tree: The Need to Repeal Unnecessary Criminal Laws

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Abstract

An elementary rule of constitutional law is that the government must afford the public fair notice of the conduct defined as criminal so that the average person, without resort to legal advice, can comply with the law. Archaic criminal laws can therefore create a serious notice problem. Policies embodied in two bills currently pending before Congress are steps in the right direction. H.R. 4023 would repeal specific federal statutes that attach criminal penalties to trivial conduct, and H.R. 4003 would require federal agencies to provide a list of and justification for all rules and regulations that carry criminal penalties. Only Congress has the constitutional authority to repeal federal crimes that punish actions that are no longer considered inherently blameworthy and therefore deserving of society's most severe form of condemnation. Common sense demands that legislators should exercise that prerogative.

Flowers may die, and old soldiers may fade away, but statutes do neither. They live on indefinitely. That is true in the United States. Statutes may become obsolete or fall into desuetude, a legal term used to describe anachronistic and rarely (if ever) enforced laws, but they retain their force and effect until repealed by the legislature or held unconstitutional by the courts.¹

The problem also appears to be true in England. *The New York Times* recently described an effort by Parliament to repeal outmoded English criminal laws—some of them centuries old—“that nowadays seem irrelevant, and often absurd,” like the one that makes it a crime to handle a salmon under “suspicious circumstances.”² “So voluminous and eccentric is Britain’s collective body of 44,000 pieces of primary legislation that it has a small team of officials whose

KEY POINTS

- The U.S. federal criminal code contains more than 4,000 criminal laws, many of which have fallen into desuetude.
- Unless Congress revisits the federal criminal code, the number of archaic criminal laws will increase inexorably over time.
- It is the prerogative of Congress, not the federal courts, to create criminal offenses.
- Two pending bills, H.R. 4023 and H.R. 4003, would address the desuetude problem as well as the related problem of overcriminalization.
- The government must afford the public fair notice of the conduct defined as criminal so that the average person, without resort to legal advice, can comply with the law.
- Congress needs to continue to identify and repeal federal criminal laws that have fallen into desuetude, either on a piecemeal basis or all at once, to reduce America’s overcriminalization problem.

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sole task is to prune it.”³ Their task arose from a familiar concern: “To have a legal situation where there is so much information that you cannot sit down and comprehend it,” argues Andrew Lewis, professor emeritus of comparative legal history at University College London, “does seem to me a serious problem. I think it matters dreadfully that no one can get a handle on the whole of it.”⁴ Moreover, Parliament itself must undertake the job of pruning unnecessary criminal laws. Unlike this country, England does not have a written constitution—acts of Parliament are the supreme law of the land⁵—so Parliament cannot act like Tom Sawyer and persuade the English courts to do this chore for them.⁶

The same obsolescence or desuetude problem exists in the United States. Our federal criminal code contains more than 4,000 criminal laws, and many of them are no less “irrelevant” and “absurd” than Britain’s ban on “wearing of suits of armor in [Parliament’s] chambers.”⁷ Among the federal criminal statutes that are now obsolete (or were never worth much to start with) are the following:

- It is a crime to make unauthorized use of the 4-H club emblem, the Swiss Confederation coat of arms, and the “Smokey Bear” or “Woodsy Owl” characters;⁸
- It is a crime to misuse the slogan “Give a Hoot, Don’t Pollute”;⁹
- It is a crime to poll a servicemember before an election;¹⁰
- It is a crime to transport dentures across state lines;¹¹
- It is a crime to sell malt liquor labeled “pre-war strength”;¹²
- It is a crime to write a check for an amount less than \$1;¹³ and (a personal favorite)
- It is a crime to install a toilet that uses too much water per flush.¹⁴

As former Attorney General Edwin Meese III advised Congress, “It is difficult to believe that we need to use the federal criminal law” for such purposes.¹⁵

England has begun to prune unnecessary criminal laws, and American officials have begun to consider how to trim our criminal code as well. Members in both houses of the 114th Congress have introduced bills that would reform federal criminal law. The bills include a long-needed default criminal intent (*mens rea*) standard¹⁶ and different methods for reviewing and repealing unnecessary criminal statutes.¹⁷ The latter bills—H.R. 4003 and H.R. 4023—indicate that Congress might address the desuetude problem as well as the related problem of “overcriminalization,” a neologism describing a surfeit of criminal statutes and the unreasonable use of the criminal law when civil or administrative remedies are more appropriate. Two of the pending bills propose useful models for the identification and repeal of unnecessary criminal laws.

The Constitutional Lawmaking Process

Criminal statutes almost never come with an expiration date, and lawmakers never repeal outdated laws. Consider some of the vice laws from the 19th and early 20th centuries, still on the books today, that prohibit the use of interstate commerce to promote a state-run lottery.¹⁸ Congress enacted those laws because state-run gambling was then deemed immoral.¹⁹ Today, however, most Americans no longer find state lotteries objectionable. In fact, numerous states operate lotteries to raise public funds, and the public seems more willing to allow people to gamble than to see their taxes raised.²⁰ Similarly, a 19th century law, the Comstock Act,²¹ prohibited the distribution in interstate commerce of pamphlets or circulars advertising contraceptive products. Today, the public uses contraceptives on a widespread basis, and that practice is protected by the Constitution.²² As noted, other federal criminal statutes are likewise well past their “born on” date.

Unless Congress revisits the federal criminal code, the number of archaic criminal laws will increase inexorably over time. That is true for two reasons.

First, for the past 40 years, the federal government has displayed the unfortunate tendency to use the criminal law “to punish every mistake, and to compel compliance with regulatory objectives.”²³ The prodigious growth of America’s federal criminal code testifies to this problem. That collection has expanded from the small number of core federal crimes needed in the nation’s early days to what is now more than

4,000 offenses. Over the past 30 years, Congress has enacted as many as 60 new federal crimes per year and 500 per decade.²⁴ Even if every one of those criminal laws was necessary when it was adopted—and statutes like the federal carjacking act seem to prove the contrary—there is no reason to assume that those statutes will continue to play a vital role in the criminal law 50 years (or more) from now.

Second, only Congress can enact or repeal a federal criminal law.²⁵ The Bicameralism and Presentment Clauses of Article I of the Constitution define the process by which the federal government can enact a law. Because Congress is a bicameral legislature consisting of a Senate and House of Representatives,²⁶ both chambers must cooperate in the legislative process. To exercise its “legislative Power” and create a “Law,” each chamber must pass the identical bill and present it to the President for his signature or veto.²⁷ The President then must sign it, or both houses must repass it by a two-thirds vote following a veto.²⁸ Once a bill has become a law, Congress and the President must follow the same procedure to revise or repeal it.²⁹

The federal courts cannot play a supporting role in the enactment or repeal of a federal criminal law. In 1812, early in the tenure of Chief Justice John Marshall, the Supreme Court held in *United States v. Hudson*³⁰ that the federal courts cannot create criminal offenses; that is Congress’s prerogative.³¹ What is true at the front end is also true at the back end. Sixty years ago, the Supreme Court explained in *District of Columbia v. John R. Thompson Co.*³² that only Congress can repeal a criminal law. That is true, the Court explained, even when a law has fallen into desuetude. “The failure of the executive branch to enforce a law does not result in its modification or repeal.... The repeal of laws is as much a legislative function as their enactment.”³³

Compliance with the Bicameralism and Presentment Clauses is therefore as necessary to modify or repeal a statute as it is to enact one in the first place.³⁴ Accordingly, Congress cannot look to the federal courts to help prune the United States Code of needless criminal laws.

The Problems Created by Criminal Laws That Are Outdated or Have Fallen Into Desuetude

If criminal statutes were like museum statues whose purpose is merely to represent life in a bygone era like Prohibition, the continued presence of those

laws on the statute books might offend a contemporary sense of feng shui, but would not create practical problems for the public. Statutes and statues, however, are materially different. A criminal law enacted by the First Congress that still can be found in the United States Code continues to outlaw and punish the same defined conduct today, regardless of whether the reason why that act was adopted has become unimportant or has been long forgotten. The statute may have fallen into desuetude, but it remains good law. As the Supreme Court explained in *John R. Thompson Co.*, the executive branch’s refusal to enforce a statute, for however long, leaves that law on the books, and the courts must apply it. Federal courts are not free to disregard laws that have fallen into desuetude.³⁵

Indeed, the desuetude doctrine has never taken hold in Anglo-American law³⁶—and for good reason. Ad hoc application of any such doctrine by the courts would grant them a veto power that the Constitution reserves to the President³⁷ and would offer the courts no guidance regarding when they can refuse to enforce a law as being overripe.³⁸ Over time, statutes may lose their utility, but they always retain their vitality. The federal courts cannot send them on their way.

The continued presence of archaic criminal laws on statute books can create a serious problem for the public.³⁹ An elementary rule of constitutional law is that the government must afford the public fair notice of the conduct defined as criminal so that the average person, without resort to legal advice, can comply with the law.⁴⁰ The resurrection and enforcement of outmoded, rarely enforced, or never-enforced criminal laws raises a notice problem.

Most people are not lawyers, so they do not acquire their understanding of the law through formal education or hands-on experience. They learn what the criminal law forbids from their parents, ministers, teachers, the scriptures, and others in their community. Their knowledge extends to what the moral code puts out of bounds, but it does not stop there. They also come to learn how the law is enforced—that is, which laws are enforced strictly (e.g., murder or rape) or laxly (e.g., speed limits or bans on jaywalking). As argued elsewhere:

The criminal law draws its moral force from the assumption that everyone knows the law and can take steps to avoid breaking it. Obscure criminal

statutes share an affinity with the laws of the infamous Roman Emperor Caligula, which were published in an unreadable site. Just as a secret criminal law provides no more notice than a law that is publicly available but incomprehensible, a law whose obscurity renders it, as a practical matter, unknown to the public is little better than an unrecorded statute. That is particularly true when the law does not reflect the prevailing moral code and is not limited to conduct that is inherently immoral or dangerous—circumstances in which the conduct itself might put someone on alert that the law may regulate his or her actions.⁴¹

Resurrecting a statute that has long been dead could trip up the average person whose intent is to comply with the law, because no one would reasonably know what that statute forbids.

Two Pending Bills That Would Repeal Unnecessary Federal Laws and Address Desuetude

History shows that legislators occasionally do repeal unnecessary criminal laws. Congress repealed the Sedition Act, the Volstead Act (a Prohibition-Era law), and a national speed limit after recognizing that the laws were no longer necessary.

Two bills pending before the 114th Congress would follow in those footsteps. The Clean Up the Code Act of 2015, H.R. 4023, would repeal a few specific federal statutes that attach criminal penalties to trivial conduct, such as the seven noted earlier,⁴² laws that are “obsolete, superfluous, and unnecessary.”⁴³ The Regulatory Reporting Act of 2015, H.R. 4003, goes much further. It would require each federal agency to provide the House and Senate Judiciary Committees with a list of and justification for all rules and regulations that carry criminal penalties.⁴⁴ The bill directs Congress to scrutinize those rules under these specific criteria:

(1) Why civil penalties are inadequate to deter the regulated behavior. (2) What mens rea or criminal intent is required for criminal liability arising from a violation of the rule. (3) What notice is provided to persons subject to the rule that a violation of the rule may result in criminal penalties. (4) If the rule applies to all persons, including natural persons as well as corporations and other business associations. (5) If a violation of

the rule is likely to result in any of the following (and if so, how): (A) Substantial bodily injury or death to another person. (B) Property damage or destruction. (C) Harm to public safety. (D) Harm to national security. (E) Fraud against the United States.⁴⁵

Those criteria would help to ensure that Congress uses the criminal law, rather than civil or administrative penalties, only when strictly necessary and only in connection with subjects that the federal government alone is best equipped to handle.⁴⁶ That approach would finally heed the old wisdom of Chief Justice William H. Rehnquist:

[T]he trend to federalize crimes traditionally handled in state courts is not only taxing the Judiciary’s resources and affecting its budget needs, but it also threatens to change entirely the nature of our federal system.... The pressure in Congress to appear responsive to every highly publicized societal ill or sensational crime needs to be balanced with an inquiry into whether states are doing an adequate job in these particular areas and, ultimately, whether we want most of our legal relationships decided at the national rather than local level.⁴⁷

If Congress required federal agencies to answer those questions, and if Congress required Members to do the same when introducing new criminal laws, Congress could avoid enacting any laws that would be better executed by states or through the civil legal system.

Paths to Repeal: The Overcriminalization Task Force Should Continue to Operate as a Desuetude Review Board

In May 2013, the House Judiciary Committee chartered an Overcriminalization Task Force to review the federal criminal code and recommend how it could be improved.⁴⁸ The task force did not issue a formal report outlining its recommendations, but two of its members introduced a bill—the Sensenbrenner–Scott Over-Criminalization Task Force Safe, Accountable, Fair, Effective Justice Reinvestment Act of 2015—that would reform the criminal justice system to “improve public safety, accountability, transparency, and respect for federalism in Federal criminal law.”⁴⁹ The bill, however,

does not identify any specific federal criminal laws that should be repealed, and the task force has since disbanded, its legislative mandate expired.

One of the best ways to improve the code would be to reduce its size. Congress should re-establish the Overcriminalization Task Force to assume that job and proceed along two tracks:

- Follow the approach taken in the Clean Up the Code Act of 2015 by identifying for repeal particular federal criminal statutes widely deemed unnecessary.
- Use the criteria specified by the Regulatory Reporting Act of 2015 to review the entire federal criminal code and recommend the repeal of additional unnecessary statutes.

The House Judiciary Committee should direct the task force to undertake both assignments and complete them by the end of this Congress. The Senate Judiciary Committee should create its own task force for the same purposes and should instruct it to complete that task before this Congress adjourns. Each committee should then take up the recommendations early in the 115th Congress so that there will be adequate time for debate both at the committee level and on the floor of each chamber.

Paths to Repeal: A Piecemeal Repeal Process

The Clean Up the Code Act of 2015 addresses overcriminalization on a piecemeal basis. Members of Congress have previously tried to approach this problem on a similar statute-by-statute basis by recommending the repeal of particular sections in discrete criminal laws that are no longer necessary or that create needless problems. An example is the Lacey Act, which makes it a crime to import flora and fauna in violation of a foreign nation's laws.⁵⁰

Some states also have taken that approach.⁵¹ Consider what happened in Michigan. The legislature enacted a series of bills, each one repealing a few specific criminal laws. Michigan H.B. 4248, for example, repealed:

statutes that ban posting reproachful or contemptuous language for not fighting a duel; or using indecent, immoral, obscene, vulgar or insulting language in the presence or hearing

of any woman or child; or leaving an abandoned refrigerator or other container where a child could crawl in and suffocate; or singing and playing the Star Spangled Banner in an entertainment venue as part of a medley.⁵²

Other bills repealed laws prohibiting “walkathons,” endurance contests,⁵³ and the sale of dyed baby chicks, rabbits, or ducklings.⁵⁴ Here, too, it is difficult to believe that we need to use the criminal law to regulate that conduct.

The federal criminal code is also due—some would argue long overdue—for a “spring cleaning.”⁵⁵ Repealing anachronistic criminal statutes one or a few at a time would help to reduce overcriminalization, but such a piecemeal approach would take a considerable amount of time. For one thing, no one knows how many federal criminal laws are currently scattered throughout the federal code. As retired Justice Department official Ronald Gainer remarked, “You will have died and resurrected three times” before you can figure out how many federal crimes exist.⁵⁶ A one-or-two-statutes-at-a-time approach also can get mired in the legislative process as Members of Congress try to turn a relatively uncontroversial bill into a Christmas tree. Accordingly, while Congress can and should pursue the path taken by the Clean Up the Code Act of 2015, it should also use the criteria listed in the Regulatory Reporting Act of 2015 in deciding what criminal laws should be jettisoned.⁵⁷

Paths to Repeal: A Bulk Repeal Process

Because the entire federal criminal code contains obsolete, “redundant, superfluous, and unnecessary criminal laws,”⁵⁸ Congress should consider identifying large swaths of such provisions and repealing all of them at one time. To do so, there are several steps that Congress could take.

Congress should begin by directing the Department of Justice to compile a list of all federal criminal laws and to supply it with information regarding how often each statute has formed the basis for a criminal charge. Congress could impose a similar requirement on all federal agencies. Both requirements are part of current bills pending in the House and Senate.⁵⁹ Only the Justice Department can bring criminal prosecutions, but agencies have the authority to promulgate regulations defining terms in statutes used in criminal prosecutions.⁶⁰ A collection

of all relevant regulations is necessary because estimates of the number of relevant rules exceed 300,000, a number far too high for any lay person to be able to run down.⁶¹ The Senate and House task forces can use those lists to decide what is and is not necessary for federal criminal law.⁶²

In the meantime, Congress could turn that list of statutes into an act of Congress and add it to Title 18 of the U.S. Code, the location where federal crimes belong.⁶³ Doing so would collect all federal criminal law in one location for use by both the bar and the public.

Those paths to decriminalization are not mutually exclusive. Congress should pursue each one and should use all of the tools at its disposal to trim the federal criminal code.

Conclusion

The federal criminal code is long overdue for a “spring cleaning.” The explosive growth of federal criminal law requires legislative attention because people expect that certain conduct is a crime and other conduct is not. Leaving statutes that long ago lost resonance with the moral judgment of a community on the books, still available for use by creative and overzealous prosecutors, gives rise to a lack of notice and unfair selection.

The number and often inadequate composition of federal crimes can punish a myriad of actions that are no longer considered inherently blameworthy and that therefore do not deserve society’s most severe form of condemnation. Only Congress has the constitutional authority to repeal those laws. Common sense demands that legislators should exercise that prerogative. Congress should continue the hard work of identifying and repealing federal criminal laws that have fallen into desuetude or that are otherwise unnecessary, either on a piecemeal basis or all at once, to reduce America’s overcriminalization problem.

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Endnotes

1. See, e.g., Paul J. Larkin, Jr., *Finding Room in the Criminal Law for the Desuetude Principle*, 65 RUTGERS L. REV. COMMENTARIES 1 (2014) (hereafter Larkin, *Desuetude*); Note, *Desuetude*, 119 HARV. L. REV. 2209 (2006); Comment, *The Challenge of Obsolete Penal Statutes*, 65 J. CRIM. L. & CRIMINOLOGY 315 (1974); see also Ronald J. Allen, *The Police and Substantive Rulemaking: Reconciling Principle and Expediency*, 125 U. PA. L. REV. 62, 81 (1976).
2. Stephen Castle, *Britain Prunes Silly Laws on Salmon Handling and Armor Wearing*, N.Y. TIMES (Dec. 15, 2015), <http://www.nytimes.com/2015/12/16/world/europe/britain-pares-down-silly-laws-from-salmon-handling-to-armor-wearing.html>.
3. *Id.*
4. *Id.*
5. See, e.g., ARTHUR L. GOODHART, "LAW OF THE LAND" 75-76 (1966).
6. *Id.* Aggravating the problem is the way that England compiles its laws. Unlike the United States, which places its laws in separate subject-matter codes, England does not classify its laws in any such manner. Like file cards containing old recipes kept in a (small) box, England stores its laws in a (large) general compendium that is not divided by subject matter. *Id.*
7. Castle, *supra* note 2.
8. 18 U.S.C. § 596 (2012).
9. *Id.*
10. 18 U.S.C. §§ 711-711a (2012).
11. H.R. 4023, 114th Cong. (2015).
12. See 27 U.S.C. §§ 205 & 207 (2012); 27 C.F.R. §7.29(f) (2015).
13. 18 U.S.C. § 336 (2012).
14. Paul J. Larkin, Jr., *Public Choice Theory and Overcriminalization*, 36 HARV. J.L. & PUB. POL'Y 715, 751 (2013) (hereafter Larkin, *Overcriminalization*).
15. Edwin Meese III, *Testimony Before the House Judiciary Committee, Subcommittee on Crime, Terrorism and Homeland Security, Principles for Revising the Criminal Code* (Dec. 13, 2011), <http://www.heritage.org/research/testimony/2011/12/principles-for-revising-the-criminal-code> (citing Gary Fields & John R. Emshwiller, *As Criminal Laws Proliferate, More Are Ensnared*, WALL ST. J. (July 23, 2011), <http://online.wsj.com/article/SB10001424052748703749504576172714184601654.html>. On the provenance of the use of the criminal law for the enforcement of small-scale social welfare infractions, see Francis Bowles Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55 (1933).
16. Criminal Code Improvement Act of 2015, H.R. 4002, 114th Cong. (2015). See also John G. Malcolm, *Congress Is Finally Considering Real Criminal Justice Reform*, DAILY SIGNAL (Nov. 20, 2015), <http://dailysignal.com/2015/11/20/congress-is-finally-considering-real-criminal-justice-reform/>; John G. Malcolm, *The Pressing Need for Mens Rea Reform*, HERITAGE FOUNDATION LEGAL MEMORANDUM No. 160 (Sept. 1, 2015), <http://www.heritage.org/research/reports/2015/09/the-pressing-need-for-mens-rea-reform>.
17. Regulatory Reporting Act of 2015, H.R. 4003, 114th Cong. (2015); Clean Up the Code Act of 2015, H.R. 4023, 114th Cong. (2015).
18. See the Anti-Lottery Act of 1890, ch. 908, 26 Stat. 465 (codified, as amended, at 18 U.S.C. §§ 1301-1307 (2012)); WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 158-59 (2011).
19. See, e.g., *Champion v. Ames* (Lottery Case), 188 U.S. 321, 355-56 (1903); *Stone v. Mississippi*, 101 U.S. 814, 818 (1880); *Phalen v. Virginia*, 49 U.S. (8 How.) 163, 168 (1850); JOHN SAMUEL EZELL, *FORTUNE'S MERRY WHEEL: THE LOTTERY IN AMERICA* 1-59 (1960); S. Misc. Doc. No. 57, 52d Cong., 2d Sess. 173-95 (1893).
20. See *United States v. Edge Broadcasting Co.*, 509 U.S. 418, 421-22 (1993). See also Sara Sun Beale, *The Many Faces of Overcriminalization: From Morals and Mattress Tags to Overfederalization*, 54 AM. U. L. REV. 747, 750 (2005) ("One form of overcriminalization is the retention of crimes beyond the time that they serve an important social purpose, particularly when the laws deal with conduct that is common and innocuous.").
21. Act of Mar. 3, 1873, ch. 258, 17 Stat. 599.
22. See, e.g., *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold v. Connecticut*, 381 U.S. 470 (1965). The common and constitutionally protected use of contraceptives was a reason why the Supreme Court in *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983), held that the Comstock Act's ban on interstate advertising of that product violated the First Amendment.
23. THE HERITAGE FOUNDATION, *OVERCRIMINALIZATION* (Nov. 30, 2015), <http://www.heritage.org/issues/legal/overcriminalization>; see also Michael B. Mukasey & Paul J. Larkin, Jr., *The Perils of Overcriminalization*, HERITAGE FOUNDATION LEGAL MEMORANDUM No. 146 (Feb. 12, 2015), <http://www.heritage.org/research/reports/2015/02/the-perils-of-overcriminalization>.
24. See Press Release, House Judiciary Committee, House Judiciary Committee Reauthorizes Bipartisan Over-Criminalization Task Force (Feb. 5, 2014), <http://judiciary.house.gov/index.cfm/2014/2/house-judiciary-committee-reauthorizes-bipartisan-over-criminalization-task-force>. See also William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 512 (2001) ("Criminal law is both broad and deep: a great deal of conduct is criminalized, and of that conduct, a large proportion is criminalized many times over."); Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703, 719-39 (2005) (discussing the problems of and solutions to overcriminalization generally).

25. See, e.g., *United States v. Bass*, 404 U.S. 336, 348 (1971) (stating that “because criminal punishment usually represents the moral condemnation of the community, legislatures...should define criminal activity.”); John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 190 (1985) (explaining that only Congress is “politically competent to define crime” and that, generally, the “principle of legality...stands for the desirability in principle of advance legislative specification of criminal misconduct.”); Steven S. Smith, *Overcoming Overcriminalization*, 102 J. CRIM. L. & CRIMINOLOGY 537, 563 (2013) (“A bedrock principle of American criminal justice is legislative supremacy—the idea that it is for legislatures, not courts or law enforcement, to define what is a crime (and, in doing so, to prescribe the appropriate penalty).”). Arguably, however, one need not look beyond the first clause of Article I of the Constitution—which states that “[a]ll legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives”—to know that only Congress can create criminal laws. U.S. CONST. art. I, § 1, cl. 1.
26. See U.S. CONST. art. I, § 1 (“All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.”).
27. See U.S. CONST. art. I, § 7; *INS v. Chadha*, 462 U.S. 919 (1983).
28. See U.S. CONST. art. I, § 7.
29. See *Clinton v. City of New York*, 524 U.S. 417 (1998).
30. 11 U.S. 32 (1812).
31. *Id.* at 34 (“[A]ll exercise of criminal jurisdiction in common law cases we are of opinion is not within [the Court’s] implied powers.”).
32. 346 U.S. 100 (1953).
33. *Id.* at 113–14 (citations omitted); see *Clinton*, 524 U.S. at 436–41; cf. *Ex parte United States*, 242 U.S. 27, 42 (1916) (“[T]he possession by the judicial department of power to permanently refuse to enforce a law would result in the destruction of the conceded powers of the other departments, and hence leave no law to be enforced.”).
34. Larkin, *Desuetude*, *supra* note 1, at 7–8 (citing *Clinton v. City of New York*, 524 U.S. 417, 438–39 (1998)).
35. See *supra* text accompanying note 33.
36. See THEODORE F.T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 337–38 (5th ed. 1956) (“On the continent there was some speculation during the middle ages as to whether a law could become inoperative through long-continued desuetude. In England, however, the idea of prescription and the acquisition or loss of rights merely by the lapse of a particular length of time found little favour. Moreover, statutes were definitely pronouncements of the Crown, and the royal prerogative included the maxim that ‘time does not run against the King.’ There was consequently no room for any theory that statutes might become obsolete.”); Larkin, *Desuetude*, *supra* note 1, at 8 nn.32–33 and accompanying text. Only one state, West Virginia, accepts desuetude as a type of criminal defense.
37. See U.S. CONST. art. I, § 7, cls. 2–3.
38. See Larkin, *Desuetude*, *supra* note 1, at 8.
39. Larkin, *Overcriminalization*, *supra* note 14, at 782.
40. Larkin, *Desuetude*, *supra* note 1, at 3–4 (“Three complementary doctrines reinforce that principle. The first one is the rule of lenity, which demands that the courts interpret ambiguities in a criminal statute in favor of the defendant. The second one is the void-for-vagueness doctrine, which provides that an insolubly ambiguous or indecipherable statute, one that a person ‘of ordinary intelligence’ cannot understand, cannot form the basis for a criminal charge. The last doctrine does not have a particular name, but it prohibits the courts from construing a criminal statute in a manner that makes an unforeseeable expansion of what that law defines as a crime. Together, those principles ensure that no one can be punished without receiving fair warning where the line falls between legal and illegal conduct.”) (footnotes omitted).
41. *Id.* at 4 (footnotes omitted); see also Cass R. Sunstein, *What Did Lawrence Hold? Of Autonomy, Desuetude, Sexuality, and Marriage*, 55 SUP. CT. REV. 27, 59–60 (2003). For a ranking of criminal codes in the United States that accounts for fair notice, randomness, and the proportionality of punishment and crime, among other measurements, see Paul H. Robinson et al., *The Five Worst (and Five Best) American Criminal Codes*, 95 NW. U. L. REV. 1 (2000).
42. H.R. 4023, 114th Cong. (2015).
43. Meese, *supra* note 15.
44. H.R. 4003, 114th Cong. (2015) (as reported by committee on Nov. 18, 2015).
45. *Id.*
46. Former Attorney General Edwin Meese III has argued that this scope of subject matter is much smaller than that over which the federal government has assumed jurisdiction and that the public safety and criminal justice system would be much better served if the federal government returned much of its criminal lawmaking authority to the states and focused on what it is uniquely positioned to handle: issues like data collection and international and interstate crimes. See Edwin Meese III, *Federalism in Law Enforcement*, FED. SOC. (May 1, 1998).
47. Ellen S. Podgor, *Overcriminalization: New Approaches to a Growing Problem*, 102 J. CRIM. L. & CRIMINOLOGY 529, 531–32 (2012) (citing WILLIAM H. REHNQUIST, *THE 1998 YEAR-END REPORT OF THE FEDERAL JUDICIARY*, (1999), *reprinted in* 11 FED. SENT. R. 134, 135 (1998)) (internal punctuation omitted).

48. Press Release, H. Judiciary Comm., House Judiciary Committee Reauthorizes Bipartisan Overcriminalization Task Force (Feb. 5, 2014), <http://judiciary.house.gov/index.cfm/2014/2/house-judiciary-committee-reauthorizes-bipartisan-over-criminalization-task-force>; Press Release, U.S. Courts Judiciary News, Task Force Urged to Curb Over-Federalization of Criminal Law (July 11, 2014), <http://www.uscourts.gov/news/2014/07/11/task-force-urged-curb-over-federalization-criminal-law>. See also Evan Bernick, Paul J. Larkin, Jr. & Jordan Richardson, *Is Congress Addressing Our Overcriminalization Problem? Reviewing the Progress of the Overcriminalization Task Force*, HERITAGE FOUNDATION LEGAL MEMORANDUM No. 131 (Aug. 12, 2014), http://www.heritage.org/research/reports/2014/08/is-congress-addressing-our-overcriminalization-problem-reviewing-the-progress-of-the-overcriminalization-task-force#_ftn35 (reviewing the progress of the task force up to the summer of 2014).
49. H.R. 2944, 114th Cong. (2015), <https://www.govtrack.us/congress/bills/114/hr2944/text>.
50. S. 1019, 114th Cong. (2015) (as referred to committee on Apr. 21, 2015); Press Release, H. Comm. on Natural Resources, Witnesses: Bills to Amend Lacey Act Would Correct Unintended Consequences of Law, Protect from Over-Criminalization (May 8, 2012), <http://naturalresources.house.gov/newsroom/documentsingle.aspx?DocumentID=294486>. The states have also taken valuable steps in this regard.
51. In April 2015, Michigan State Representative Chris Afendoulis reportedly said that “I believe it is time to identify and repeal unnecessary criminal statutes and burdens currently in state law that result in over-criminalization and over-penalization of Michigan citizens.” Jack Spencer, *Bills Put Obsolete Laws on the Chopping Block*, CAPCON (Apr. 28, 2015), <http://www.michigancapitolconfidential.com/21238>. Rep. Afendoulis remarked that the bill “is the initial result of a collaborative effort to bring commonsense reforms to Michigan’s penal code.” *Id.* In 2015, California Governor Edmund G. Brown, Jr., vetoed a set of criminal bills by letter to the state legislature, stating that “[b]efore we keep going down this road, I think we should pause and reflect on how our system of criminal justice could be made more human, more just and more cost-effective.” Letter of Gov. Edmund G. Brown, Jr., to the Members of the California State Assembly (Oct. 3, 2015), https://www.gov.ca.gov/docs/AB_144_Veto_Message.pdf.
52. *2015 House Bill 4248: Repeal Archaic Laws*, MACKINAC CENTER FOR PUB. POL’Y, <http://www.michiganvotes.org/2015-HB-4248>, last accessed Nov. 3, 2015.
53. *2015 House Bill 4250: Repeal Ban on “Walkathons” and Similar Endurance Events*, MACKINAC CENTER FOR PUB. POL’Y, <http://www.michiganvotes.org/2015-HB-4250>, last accessed Nov. 3, 2015.
54. *2015 House Bill 4251: Repeal Archaic Laws*, MACKINAC CENTER FOR PUB. POL’Y, <http://www.michiganvotes.org/Legislation.aspx?ID=168743>, last accessed Nov. 3, 2015.
55. Larkin, *Overcriminalization*, *supra* note 14, at 782.
56. Gary Fields & John R. Emshwiller, *Many Failed Efforts to Count Nation’s Federal Criminal Laws*, WALL ST. J. (July 23, 2011), <http://www.wsj.com/articles/SB10001424052702304319804576389601079728920>.
57. While reviewing the federal penal code, Congress could also ensure that only individuals who intend to flout the law wind up charged with a crime. Some laws create what the criminal law terms a *malum prohibitum* offense, which means that the targeted conduct is unlawful only because Congress had outlawed it, as opposed to offenses that are *malum in se*, or crimes that are inherently blameworthy. Moreover, some laws lack an adequate *mens rea*—that is, criminal intent—standard that the government must prove to convict someone of a crime. This is one area in which the law is apt “not [to] reflect the prevailing moral code and is not limited to conduct that is inherently immoral or dangerous—circumstances in which the conduct itself might put someone on alert that the law may regulate his or her actions.” Larkin, *supra* note 1, at 4. Contrast such recondite crimes with conduct that everyone would know is wrong. See, e.g., *United States v. Freed*, 401 U.S. 601, 609 (1971) (“[O]ne would hardly be surprised to learn that possession of hand grenades is not an innocent act.”); *United States v. Int’l Minerals & Chem. Corp.*, 402 U.S. 558, 565 (1971) (“[W]here, as here...dangerous or deleterious devices or products or obnoxious waste materials are involved, the probability of regulation is so great that anyone who is aware that he is in possession of them or dealing with them must be presumed to be aware of the regulation.”). A default *mens rea* standard could make up for that shortcoming. Alternatively, Congress could authorize a mistake of law defense. See Paul J. Larkin, Jr. & Edwin Meese III, *Reconsidering the Mistake of Law Defense*, 102 J. CRIM. L. & CRIMINOLOGY 725 (2013); Paul J. Larkin, Jr., *Regulatory Crimes and the Mistake of Law Defense*, HERITAGE FOUNDATION LEGAL MEMORANDUM No. 157 (July 9, 2015), <http://www.heritage.org/research/reports/2015/07/regulatory-crimes-and-the-mistake-of-law-defense>; Paul J. Larkin Jr., *The Need for a Mistake of Law Defense as a Response to Overcriminalization*, HERITAGE FOUNDATION LEGAL MEMORANDUM No. 91 (Apr. 11, 2013), <http://www.heritage.org/research/reports/2013/04/the-need-for-a-mistake-of-law-defense-as-a-response-to-overcriminalization>.
58. Meese, *supra* note 15.
59. Bills pending in the House and Senate include a mandate to identify all federal crimes. See Sentencing Reform and Corrections Act of 2015, S. 2123, 114th Cong. (2015–2016) (as introduced Oct. 1, 2015); Criminal Code Improvement Act of 2015, H.R. 4002, 114th Cong. (2015–2016); Regulatory Reporting Act of 2015, H.R. 4003, 114th Cong. (2015–2016) (“the head of each Federal agency, in consultation with the Attorney General, shall submit to the Committee on the Judiciary of the House of Representatives and the Committee on the Judiciary of the Senate a report that lists each rule of that agency that, if violated, may be punished by criminal penalties.”); see also Smarter Sentencing Act of 2014, S. 1410, 113th Cong. (2013–2014).
60. See Paul J. Larkin, Jr., *Prohibition, Regulation, and Overcriminalization: The Proper and Improper Uses of the Criminal Law*, 42 HOFSTRA L. REV. 745 (2014).

61. See John G. Malcolm, *Criminal Law and the Administrative State: The Problem with Criminal Regulations*, HERITAGE FOUNDATION LEGAL MEMORANDUM No. 130 (Aug. 6, 2015), <http://www.heritage.org/research/reports/2014/08/criminal-law-and-the-administrative-state-the-problem-with-criminal-regulations> (citing Paul Rosenzweig, *The History of Criminal Law*, in ONE NATION UNDER ARREST: HOW CRAZY LAWS, ROGUE PROSECUTORS, AND ACTIVIST JUDGES THREATEN YOUR LIBERTY (Paul Rosenzweig ed., 2d ed. 2013)).
62. If Congress wanted to force the Justice Department to conduct a thorough search, or if the Department proves obstinate, Congress could consider passing legislation prohibiting the Department of Justice from enforcing any criminal laws not included on the list.
63. Former Attorney General Edwin Meese III recommended this step to Congress in testimony before the House Judiciary Committee on Dec. 13, 2011, stating: "First: The federal criminal laws should be consolidated into a single Title of the U.S. Code. Second: The federal criminal code needs to be shorn of redundant, superfluous, and unnecessary criminal laws. Third: Offense definition should be a task for the Congress, not for agency officials, because only Congress is accountable to the people. And fourth: The federal criminal code should be revised to ensure that the mens rea or 'guilty mind' elements of federal crimes capture only blameworthy conduct." Meese, *supra* note 15. This is warranted in part because "regulatory criminal laws" are not only "ever more far reaching, ever more technical and specialized," but ever more inaccessible as well. JEREMY HORDER, *EXCUSING CRIME* 276 (2004). A law that is of no value to the public nonetheless could be of dangerously high value to the government. See Livingston Hall & Selig J. Seligman, *Mistake of Law and Mens Rea*, 8 U. CHI. L. REV. 641, 650 n.39 (1940) ("[W]here the law was not available to the community, the principle of '*nulla poena sine lege*' comes into play."); Larkin, *supra* note 1, at 4 ("Just as a secret criminal law provides no more notice than a law that is publicly available but incomprehensible, a law whose obscurity renders it, as a practical matter, unknown to the public is little better than an unrecorded statute.").