# HAM SANDWICH NATION: DUE PROCESS WHEN EVERYTHING IS A CRIME

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Attorney General (and later Supreme Court Justice) Robert Jackson once commented: "If the prosecutor is obliged to choose his cases, it follows he can choose his defendants." The result is "The most dangerous power of the prosecutor: that he will pick people he thinks he should get, rather than pick cases that need to be prosecuted." Prosecutors could easily fall prey to the temptation of "picking the man, and then searching the law books . . . to pin some offense on him."[2] In short, prosecutors' discretion to charge – or not to charge – individuals with crimes is a tremendous power, amplified by the huge number of laws on the books.

Two recent events have brought more attention to this problem. One involves the decision not to charge NBC anchor David Gregory with weapons-law violations bearing a potential year-long sentence for brandishing a 30-round magazine (illegal in D.C.), despite the prosecutor's statement that the on-air violation was clear; [3] the other involves prosecutors' rather enthusiastic efforts to prosecute Reddit founder Aaron Swartz for downloading academic journal articles from a closed database, prosecutorial

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[1] Beauchamp Brogan Distinguished Professor of Law, University of Tennessee. J.D. Yale Law School, 1985.

[2] Harvey Silverglate: Three Felonies A Day xxxv-xxxvi (2011).

[3] Peter Herrmann, David Gregory Won't Be Charged, Washington Post, January 11, 2013, available online at http://www.washingtonpost.com/blogs/post-politics/wp/2013/01/11/david-gregory-wont-be-charged/. See also, letter declining to prosecute David Gregory from Washington D.C. Attorney General Irvin Nathan, January 11, 2013, available online at http://www.docstoc.com/docs/141426869/DC-Attorney-General-Letter-Declining-to-Prosecute-David-Gregory.

efforts so enthusiastic that Swartz committed suicide in the face of a potential 50-year sentence.[4]

Both cases have aroused criticism, and in Swartz's case even legislation designed to ensure that violating websites' terms cannot be prosecuted as a crime.[5] But the problem is much broader. Given the vast web of legislation and regulation that exists today, virtually any American is at risk of prosecution should a prosecutor decide that they are, in Jackson's words, a person "he should get."

As Tim Wu recounted in 2007, a popular game in the U.S. Attorney's office in the Southern District of New York was to name a famous person – Mother Teresa, or John Lennon -- and decide how they could be prosecuted.:

> 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

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[4] Lawrence Lessig, Prosecutor As Bully, Lessig Blog 2.0, January 12, 2013, available at http://lessig.tumblr.com/post/40347463044/prosecutor-as-bully.

[5] Lawrence Lessig, Aaron's Law: Violating a Site's Terms of Service Should Not Land You In Jail, The Atlantic, January 16, 2013, available online at http://www.theatlantic.com/national/archive/13/01/aarons-law/267247/#. The legislation in question has been introduced by Rep. Zoe Lofgren (D-CA). For criticism of the Gregory decision see David French, David Gregory and the Decline of the Rule of Law, National Review Online, January 15, 2013, available online at http://www.nationalreview.com/corner/337702/david-gregory-and-decline-rule-law-david-french. ("Can we even speak of the rule of law as a meaningful concept when we combine an explosive regulatory state with near-absolute prosecutorial discretion?")

> celebrity and carried the toughest sentences. The, result, however, was inevitable: "prison time."[6]

With so many more federal laws and regulations than were present in Jackson's day, the task for prosecutors of first choosing the man – or woman – and then pinning the crime on him or her has become much easier.

This problem has been discussed at length in Gene Healy's *Go Directly To Jail: The Criminalization of Almost Everything,*[7] and Harvey Silverglate's *Three Felonies A Day.*[8] The upshot of both is that the proliferation of federal criminal statutes and regulations has reached the point that virtually every citizen, knowingly or not (usually not) is potentially at risk for prosecution. That is undoubtedly true, and the consequences are drastic and troubling.

The result of overcriminalization is that prosecutors no longer need to wait for obvious signs of a crime. Instead of finding Professor Plum dead in the conservatory and launching an investigation, authorities can instead start an investigation of Colonel Mustard as soon as someone has suggested he is a shady character. And since, as Wu's game illustrates, everyone is a criminal if prosecutors look hard enough, they're guaranteed to find something eventually.

Most of us remain safe. Prosecutors have limited resources, and there are political constraints on egregious overreaching. And, most of the time, prosecutors can be expected to exercise their discretion soundly. Unfortunately, these limitations on prosecutorial power are likely to be least effective where prosecutors act badly because of politics or prejudice. Limited resources or not, a prosecutor who is anxious to go after a political enemy will always find sufficient staff to bring charges, and political constraints are least effective where a prosecutor is playing to public passions or hysteria.

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6 Tim Wu, American Lawbreaking, Slate.com, October 14, 2007, available online at http://www.slate.com/articles/news_and_politics/jurisprudence/features/2007/american_lawbreaking/introduction.html.

7 Gene Healy, Go Directly To Jail: The Criminalization of Almost Everything (2004).

8 Silverglate , supra note 2.

And, once charged with a crime, citizens are in a tough position. First, they must bear the costs of a defense, unless they're indigent. Second, even if they consider themselves entirely innocent, they will face strong pressure to accept a plea bargain, pressure made worse by the modern tendency of prosecutors to overcharge with extensive "kitchen-sink" indictments: When facing a hundred felony charges, the prospect that a jury might go along with even one of them is enough to make a plea deal look attractive, something that many prosecutors count on. Then, of course, there are the reputational damages involved, which may be of greatest importance precisely in cases where political motivations might be involved. And prosecutors have no countervailing incentives not to overcharge. A defendant who makes the wrong choice will wind up in jail; a prosecutor who charges improperly will suffer little, if any, adverse consequence beyond a poor win/loss record. Prosecutors are even absolutely immune from lawsuits over misconduct in their prosecutorial capacity.[9]

Overcriminalization has thus left us in a peculiar place: Though people suspected of a crime have extensive due process rights in dealing with the police, and people charged with a crime have even more extensive due process rights in court, the actual decision whether or not to charge a person with a crime is almost completely unconstrained. Yet, because of overcharging and plea bargains, that decision is probably the single most important event in the chain of criminal procedure.

So how to respond? That's a good question, and I hope that this brief Essay will be the beginning of discussion on the topic, rather than the last word. However, I believe that the decision to charge a person criminally should itself undergo some degree of due process scrutiny. I also believe that, short of constitutional due process scrutiny, it is time to look at structural changes in the criminal justice system that will deter prosecutorial abuse.

Traditionally, of course, the grand jury was seen as the major bar to prosecutorial overreaching. The effectiveness of this approach may be seen

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[9] See generally, David Keenan et al., The Myth of Prosecutorial Accountability After Connick v. Thompson: Why Existing Professional Responsibility Measures Cannot Protect Against Prosecutorial Misconduct, 121 Yale L.J. Online 203 (2011), http://yalelawjournal.org/2011/10/25/keenan.html (discussing prosecutorial immunity).

in the longstanding aphorism that a good prosecutor can persuade a grand jury to indict a ham sandwich. Grand jury reforms – where grand juries still exist – might encourage grand jurors to exercise more skepticism, and educate them more. But grand juries are not constitutionally guaranteed at the state level, and reforming them at the federal level is iffy.

Overall, the problem stems from a dynamic in which those charged with crimes have a lot at risk, while those doing the charging have very little skin in the game. One source of imbalance is prosecutorial immunity. The absolute immunity of prosecutors – like the absolute immunity of judges – is a judicial invention, a species of judicial activism that gets less attention than many other less egregious examples. Although such immunity no doubt prevents significant mischief, it also enables significant mischief by eliminating one major avenue of accountability. Even a shift to qualified, good-faith immunity for prosecutors would change the calculus significantly.

Another remedy might be a "loser pays" rule for criminal defense costs. After all, when a person is charged with a crime, the defense – for which non-indigent defendants bear the cost – is an integral part of the criminal justice process.[10] For guilty defendants, one might view this cost as part of the punishment. But for those found not guilty, it looks more like a taking: Spend this money in the public interest, to support a public endeavor, or go to jail. To further discipline the process, we might pro-rate things: Charge a defendant with 20 offenses, but convict on only one, and the prosecution must bear 95% of the defendant's legal fees. This would certainly discourage overcharging.

The "nuclear option" of prosecutorial accountability would involve banning plea bargains. An understanding that every criminal charge filed would have to be either backed up in open court or ignominiously dropped would significantly reduce the incentive to overcharge. It would also drastically reduce the number of criminal convictions achieved by our justice system, but given that America is a world-leader in incarceration it is fair to suggest that this might be not a bug, but a feature. Our criminal justice system, as presently practiced, is basically a plea-bargain system with actual trials of guilt or innocence a bit of showy froth floating on top.[11]

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10 Legal Aid Corp. v. Velaszquez, 531 U.S. 533 (2001).

11 See Stephanos Bibas, The Machinery of Criminal Justice: From Public Morality Play To Hidden Plea-Bargaining Machine, The Volokh Conspiracy,

Less dramatically, we might require that the prosecution's plea offers be presented to a jury or judge before sentencing. Jurors might then wonder why they are being asked to sentence a defendant to 20 years without parole when the prosecution was willing to settle for 5. 15 years in jail seems a rather stiff punishment for making the state undergo the bother of a trial.

It is also worth considering whether mere regulatory violations – *malum prohibitum* rather than *malum in se* – should bear criminal sanctions at all. Traditionally, of course, citizens have been expected to know the law. But traditionally, regulatory crimes applied only to citizens in specialty occupations where they might be expected to be familiar with applicable regulatory law, while ordinary citizens needed no special knowledge to avoid committing rape, robbery, theft, etc. But now, with the explosion of regulatory law, every citizen is at risk of criminal prosecution for crimes that – as David Gregory's defenders noted[12] – involve no actual harm or ill intent. Yet any reasonable observer would have to conclude that actual knowledge of all applicable criminal laws and regulations is impossible, especially when those regulations frequently depart from any intuitive sense of what "ought" to be legal or illegal. Perhaps placing citizens at risk in this regard constitutes a due process violation; expecting people to do (or know) the impossible certainly sounds like one.

These are just preliminary thoughts, but it seems to me that the problem here is a real one. If we care about due process – and we should – we should be deeply concerned about a system in which official discretion reigns almost unfettered where it matters most. I encourage readers to offer their own suggestions for improvement.

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March 13, 2012, available at http://www.volokh.com/2012/03/13/the-machinery-of-criminal-justice-from-public-morality-play-to-hidden-plea-bargaining-machine/.

[12] Howard Kurtz, David Gregory, Piers Morgan Under Assault Over Guns, The Daily Beast, Dec. 26, 2012, available at http://daily-download.com/david-gregory-piers-morgan-assault-guns/#.UNr0lpOeoB8.twitter. For other examples in the same vein, see Katie Glueck, Media Disdain for the David Gregory Story, Politico.com, Dec. 26, 2012, available at http://www.politico.com/blogs/media/2012/12/disdain-for-the-david-gregory-story-152840.html.