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## Not Everything That's Unseemly Should Be Illegal

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The explosion in criminal statutes is only a part of the problem of overcriminalization. The other side of the coin is prosecutorial discretion: a prosecutor's official authority to charge certain offenses and not to charge others. The growth of criminal codes, state and federal, gives prosecutors more tools, which allows them to both "stack" charges and expand the reach of criminal code provisions to new, non-criminal facts.

Take for example several recent prosecutions under New Jersey's official misconduct statute, a felony provision with a mandatory five-year, no-parole sentence.

On its face, the law simply prevents government officials from abusing their offices for personal gain. "Official misconduct" under the statute means an official's act or omission "relating to his office but constituting an unauthorized exercise of his official functions, knowing that such act is unauthorized or he is committing such act in an unauthorized manner." Prosecutors have used this broadly worded language in highly creative ways.

In one recent case, New Jersey Superior Court Judge Carlia M. Brady was charged with official misconduct and harboring a fugitive. Judge Brady went to the police on June 10, 2013 to report that her car was stolen and that her then-boyfriend, Jason

Prontnicki, was likely involved. As it turned out, Prontnicki was wanted on an outstanding warrant for robbery. The police informed Judge Brady that she was obliged as an “officer of the court” to inform the police as to Prontnicki’s whereabouts. When Prontnicki showed up at her house for brief periods of time on June 10 and 11, Judge Brady informed Prontnicki that he could not stay with her and Prontnicki made clear his intentions to turn himself in with the help of counsel. After both incidents, Judge Brady called the police and left unreturned voicemails. On June 11, police arrested Prontnicki and Brady at her home.

Clearly Judge Brady had violated her duty to report the whereabouts of a wanted criminal suspect, right? The only problem is that such a duty doesn’t exist, either for citizens generally or for judges specifically.

In New Jersey, like most places, the enforcement of arrest warrants is the job of law enforcement officials, such as police. Indeed, the very idea of a judge enforcing the warrants she or her colleagues issue conjures up the ridiculous image of a robe-clad jurist chasing a fleeing suspect while wielding a wooden gavel. The state supreme court has even made clear that judges don’t have an official duty to effectuate arrest warrants.

Yet the prosecutor decided to charge Brady not only with harboring Prontnicki—a dubious move given her clear instructions for him to stay away, the absence of any assistance, and their understanding that he would turn himself in—but with official misconduct. In the prosecutor’s eyes, Brady’s judicial role created a special duty to report and her failure to do so constituted official misconduct—despite clear case law to the contrary and the fact that Judge Brady was on vacation from her official duties when the relevant acts occurred.

The misuse of New Jersey’s official misconduct statute isn’t limited to judges or even executive-branch officials, but reaches teachers.

In two cases, those of [Adrian McConney](#) and [Nicole McDonough](#), high school teachers who had sex with adult students were charged with official misconduct. Neither had been accused of promising grade bumps or using their authority to control or initiate the sexual relationship. Because of this absence of the abuse of official power for some

sort of quid pro quo, prosecutors in both cases looked to the administrative codes governing teacher conduct to invent a legal duty that was allegedly violated by consensual sexual relationships.

The administrative codes governing educators were not intended to provide the basis for criminal prosecution, and say as much expressly. In other words, these teachers' extra-curricular activities may be firing offenses (and maybe not – we don't want to get into employment law and union regulations) but they're not crimes.

If the prosecutors' logic were carried to its conclusion, these codes—which require such innocuous things as teachers' maintaining professional appearance at all times—could result in five-year mandatory no-parole sentences. Every municipal bureaucrat would now have the power to write criminal law via civil guidance; any principal who has a personal conflict with a teacher could threaten prosecution with a savvy interpretation of administrative rules.

Moreover, words in official government guidance would lose all meaning: if the state says that a particular civil code will not be the basis for criminal prosecution, that should be a good indicator to a reasonable person that he or she will not run afoul of criminal laws by violating that code. Due process of law demands sufficient notice of what is criminal before a statute is applied against a defendant.

In both the federal and state criminal-justice systems, prosecutors are quite properly entrusted with discretion to charge appropriate offenses in appropriate cases—but that discretion is abused when the law is made to stretch to cover obviously licit conduct. Whatever one thinks of a judge who fraternizes with shady characters or teachers who have sex with adult students, New Jersey has not seen fit to criminalize either of these behaviors. It's not the job of prosecutors to gap-fill the criminal code by dubiously extending the reach of criminal provisions such that anything that hints of social impropriety must be criminal.

It's bad enough when legislatures pass laws to criminalize behavior of which they morally disapprove—as Bill Buckley said, not everything that's bad should be illegal—but when prosecutors effectively write their own criminal codes, it's the antithesis of the rule of law.

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