

## *Out of Unenforceable Laws, Amnesties Are Born*

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### **Body**

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The ambitious immigration overhaul package that Congress is studying has drawn criticism from conservatives who say it offers amnesty to lawbreakers, and from immigration advocates who say it will not do enough to bring millions of people out of the shadows.

But to Douglas Husak and Lawrence Solum, the elephant in the room is that the existing immigration law that underlies the debate has no connection with reality.

Husak and Solum, legal theorists and philosophers, argue that laws on immigration are part of a broad pattern. In recent decades, they say, Congress has passed innumerable laws that no one seriously expects will be enforced. Such laws largely seem to serve symbolic purposes and are often designed to placate some powerful constituency -- conservatives in the case of immigration, or the entertainment industry in the case of laws that seek to deter people from swapping copyrighted music and movies.

The yawning divide between reality and what such laws say should happen is what produces the dilemmas that lead to amnesties. Immigration law has produced a situation where an estimated 12 million people in the country -- most of whom look, sound and act like law-abiding citizens -- are supposed to be apprehended, prosecuted and deported, a job that is not only well beyond the capacity of the police and courts, but would wreck substantial parts of the economy were it attempted.

"No one is so stupid as to think police are going to go out and round up 12 million illegal immigrants," said Husak, at Rutgers University. "Ninety million living Americans have used illegal drugs. It is inconceivable you can punish them. Downloading copyrighted music [without paying for it] -- half or more of all teenagers are guilty. No one is going to enforce such laws."

The consequence of symbolic lawmaking is over-criminalization, which turns out to be as difficult a problem to deal with in the long run as crime itself. It might sound good for a politician to sternly declare that draft dodgers are in violation of the law and at risk for prosecution, but how do you deal with thousands of Americans who evaded the draft during the Vietnam War -- after the country had concluded the war was lost and a ghastly mistake? You offer them amnesty, of course.

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Federal **laws** that make it a crime to include false information on a mortgage or car-loan application have turned tens of thousands of people into potential felons -- because they say that their parents gave them money for a down payment, rather than lent it to them, Solum says. Saying the money is a gift makes the borrower seem like a better risk.

"People commit perjury all the time," added Solum, at the University of Illinois College of **Law**. "People in civil cases shade the truth in depositions and on the stand all the time -- and we know that because there are radically inconsistent stories being told all the time -- but we almost never prosecute perjury that arises in a civil lawsuit. It probably happens hundreds of times a day."

When **laws** are passed that cannot or will not be enforced, people quickly come to understand that the **law** does not mean what it says. This is why, if you actually happen to drive at the 55 mph speed limit on the Capital Beltway, you seriously run the risk of getting rear-ended by the flood of vehicles that are whizzing by 5, 10 or even 20 miles per hour faster.

There is a **law** about speeding, but it is not the **law** that is on the books. Exceed a certain speed -- it might be 60 or 65 or 70 mph -- and you are going to get a ticket. What Solum and Husak are arguing is that, if the cops are going to give you a ticket when you cross 65 but not when you cross 55, set the speed limit at 65. Get the **law** to mean what it says.

"When we set up **laws** that are intended to express symbolic disapproval, but that we are not willing to enforce, we send a message that we are not expecting people to obey the **law**," Solum said. "The immigration **laws** are a perfect example of that."

The problem is not just that when people start interpreting the **law** on their own, they come up with wildly different interpretations-- some people drive 5 mph over the speed limit, others think the magic cushion is 15 mph. The bigger problem with setting the bar too low, so that large numbers of people become lawbreakers, say Solum and Husak, is that it greatly enhances the discretionary powers of police, prosecutors and the executive branch.

The vast majority of people punished for speeding, drug violations or downloading music, or for perjury, prostitution or illegal immigration, are not targeted merely because they are breaking the **law** -- only a tiny fraction of those who break such **laws**, after all, ever get punished. Most people who get in trouble are the ones who police and prosecutors decide, for whatever reason, should be punished, Husak says. Enacting impractical **laws** that have largely rhetorical value, in other words, leads to selective enforcement -- with all the attendant risks of unfairness and bias.

"The myth is that legislators are the most important people in the criminal justice system," Husak said. "But when legislators draft **laws** that are very broad, they abdicate their roles and give prosecutors the power to decide who will get punished and who should not."

Regardless of your political affiliations or your views on immigration, speeding, perjury or downloading music, Solum and Husak say, that's no way to run a country.

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