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Epilogue: Overcriminalizing: An Agenda for Change

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Epilogue: Overcriminalizing: An Agenda for Change

EPILOGUE

OVERCRIMINALIZATION: AN AGENDA FOR CHANGE

PAUL ROSENZWEIG*

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INTRODUCTION

The Articles and Essays in this issue paint a daunting and depressing picture. To the near exponential growth in federal criminal statutes,¹ we must add the devaluation of the moral component of criminal law² and the expansion of the subject matter of criminal law to diverse issues including mattress tags, regulations, and morals.³ The consequences of these changes have been unsettling at best, and corrosive at worst: the prospect of criminal prosecution may chill the development of intellectual property;⁴

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1. John S. Baker, Jr., *Jurisdictional and Separation of Powers Strategies to Limit the Expansion of Federal Crimes*, 54 AM. U. L. REV. 545 (2005).

2. Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703 (2005).

3. Sara Sun Beale, *The Many Faces of Overcriminalization: From Morals and Mattress Tags to Overfederalization*, 54 AM. U. L. REV. 747 (2005).

4. Geraldine Szott Moohr, *Defining Overcriminalization Through Cost-Benefit Analysis: The Example of Criminal Copyright Laws*, 54 AM. U. L. REV. 783 (2005).

cause businesses to adopt practices that are inconsistent with good ethical conduct;⁵ and drive a harmful wedge between criminal suspects and their attorneys.⁶ None of these are good things—nor can any reasonable person portray them as such.

Must we simply accept this trend? Is there any reasonable prospect for change? If so, what should that change be and how can it be achieved? What should be the practical response to the excellent theoretical insights provided by the authors in this volume?

I. WHAT CAUSES CRIMINALIZATION?

To understand the possibilities for change, we first need to recognize the origins of criminalization. At the federal level, that can be answered in a single word: *Politics*. As Professor William Stuntz of Harvard has noted, American criminal law “covers far more conduct than any jurisdiction could possibly punish.”⁷ This broad span of American law is the product of institutional pressures that attract legislators to laws with broader liability rules and harsher sentences.⁸ When a legislator is faced with a choice between drafting a new criminal statute narrowly and potentially underinclusive or broadly and potentially overinclusive, political considerations give the legislator an incentive to be overinclusive. Few, if any, groups regularly lobby legislators regarding criminal law. Those groups that do are more likely to seek harsher penalties and more criminal laws, rather than less.⁹ The political dynamic is exacerbated by the consideration, usually implicit, of the costs associated with the criminal justice system. Broad and overlapping statutes with minimum obstacles to criminalization and harsh penalties are easier to administer and reduce the costs of the legal system to the government. They induce guilty pleas and produce high conviction rates, minimizing the costs of the cumbersome jury system and producing outcomes popular with the public.¹⁰

The final piece of the equation is legislative reliance on the existence of prosecutorial discretion. Broader and harsher statutes may produce bad

5. John Hasnas, *Ethics and the Problem of White Collar Crime*, 54 AM. U. L. REV. 579 (2005).

6. Peter J. Henning, *Targeting Legal Advice*, 54 AM. U. L. REV. 669 (2005).

7. William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 507 (2001).

8. *See id.* at 510 (explaining that the political atmosphere created by “[t]he current tough-on-crime phase of our national politics” is responsible for the present trend toward broader liability and harsher sentences).

9. *See id.* at 552-57 (stating that interest groups often seek to expand the breadth of criminal liability by lobbying for the creation of new crimes or the expansion of existing ones).

10. *See id.* at 536-39 (demonstrating that costs related to the criminal justice system can be reduced by limiting the number of cases filed, restricting the amount of time spent per case and by encouraging plea-bargaining in lieu of a criminal trial).

outcomes that the public dislikes, but blame for those outcomes will lie with prosecutors who exercise their discretion poorly, not the legislators who passed the underlying statute. As a consequence, every incentive exists for criminal legislation to be as expansive as possible.

Nor are these mere theoretical concerns—the natural legislative incentives have real, and sometimes humorous consequences. As this essay goes to press, Congress is considering the Horse Slaughter Prevention Act¹¹ (“the Act”) which, in the last session of Congress had 227 House co-sponsors—more than the Puppy Protection Act.¹² The Act would make it a federal felony to slaughter horses for the purposes of human consumption. This represents an odd choice if one were seeking to protect equine life more generally, for the law would continue to permit the euthanasia of horses for dog food, or to make glue, or for a *Godfather*-style warning.¹³

The troubling aspect of this law is that it is really morals legislation disguised as a criminal prohibition. In the absence of a well-defined *mens rea* requirement, it has the potential to criminalize a great deal of innocent conduct: those who sell horses without knowing that the buyer intends to kill them for human food or a buyer who purchases meat without realizing that it is horse meat are subject to criminal sanction.¹⁴ The only barrier to their prosecution is the “conscience and circumspection in prosecuting officers.”¹⁵ Or, as the Supreme Court said in *Dotterweich*, Americans are obliged to rely only on “the good sense of prosecutors, the wise guidance of trial judges, and the ultimate judgment of juries” to determine criminal conduct.¹⁶ In effect, the legislative branch has transferred a substantial portion of its authority to regulate American social and economic conduct to prosecutors, trial judges, and jurors who lack accountability and expertise. Thus, decisions on criminalizing conduct are made without any ability to consider the broader societal impacts of these decisions.

11. See American Horse Slaughter Prevention Act, H.R. 503, 109th Cong. (2005).

12. Cf. American Horse Slaughter Prevention Act of 2004 S.2352, 108th Cong. (2004) (11 Senate co-sponsors). Compare American Horse Slaughter Prevention Act, H.R. 857, 108th Cong. (2003) (227 co-sponsors), with Puppy Protection Act, H.R. 3484, 108th Cong. (2003) (53 co-sponsors).

13. In Francis Ford Coppola’s classic movie, one of Don Corleone’s adversaries awakes to find a horse’s head in his bed. He is, thereafter, much less inclined to oppose the Don’s insistence that one of his friends have a successful film career. See *THE GODFATHER* (Paramount 1972).

14. See Robert Laurence, *Cowboys and Vegetarians: The Proposed “American Horse Slaughter Act”*, 2003 ARK. L. NOTES 103 (2003) (criticizing the bill for its narrowly stated objectives and for its failure to prohibit the slaughter of horses for uses such as pet food and zoo-animal food), available at <http://law.uark.edu/library/publications/lawnotes2003/commentary.pdf>.

15. *Nash v. United States*, 229 U.S. 373, 378 (1913).

16. *United States v. Dotterweich*, 320 U.S. 277, 285 (1943).

II. CAN THE DYNAMIC BE CHANGED?

The answer to the conundrum of criminalization must also lie in the same, single word: *Politics*. Those seeking change must demonstrate concrete political objections to criminalization—ones that will stand as a counterweight to the natural tendency to expand the criminal law. How can those objections be advanced? The following subsections provide a few suggestions.

A. Measure the Problem

Perhaps the easiest first step is the seemingly simple one of requiring the Federal Government to measure and report on the use of new criminal statutes. Many of the newer offenses, for example, fit within the paradigm of “white collar” crime,¹⁷ or “corporate crime” but, because of their comparative novelty, they have never been measured in the same way as traditional common law crimes.

Programs to track the incidence of traditional crimes have been in place for decades. The FBI, for example, collects statistics that become part of its Uniform Crime Reporting Program (“UCR”) which tracks, annually, the crime rate in various index crimes like murder and robbery.¹⁸ Although the National White Collar Crime Center¹⁹ has published reports on certain subsets of the new criminal code (for example cybercrime), the Department of Justice has acknowledged that “no systematic data collection” system for recording the use of newer criminal provisions exists.²⁰

Just as the UCR tasks the FBI with compiling data from state and local agencies on traditional crimes, the Department of Justice should be tasked with compiling data on nationwide use of newer white collar and corporate

17. For a discussion of the origins of the term “white-collar” crime, see John S. Baker, Jr., *The Sociological Origins of “White-Collar Crime,”* LEGAL MEMORANDUM (The Heritage Foundation, Washington, D.C.), Oct. 4, 2004 (explaining the development of the term “white collar” crime by sociologist Professor Edward Sutherland in 1949, who defined the term based on the social status of the criminal rather than the basis of criminal intent), available at <http://www.heritage.org/Research/LegalIssues/loader.cfm?url=/commonspot/security/getfile.cfm&PageID=70073>.

18. The most recent Uniform Crime Reports are available on the Federal Bureau of Investigation website at <http://www.fbi.gov/ucr/ucr.htm>.

19. The National White Collar Crime Information Center (www.nw3c.org) is a federally-funded, non-profit corporation that conducts research and provides support to law enforcement regarding certain forms of white collar crime. Its Fiscal Year 2003 budget was just \$9,000,000. See DEPARTMENT OF JUSTICE, SUMMARY OF BUDGET AUTHORITY BY APPROPRIATION, at www.usdoj.gov/jmd/2004summary/html/pg4-5.htm (last visited Apr. 14, 2005) (on file with the American University Law Review).

20. U.S. DEP’T OF JUSTICE, 2001-06 STRATEGIC PLAN 35-36 (2001), available at <http://www.usdoj.gov/archive/mps/strategic2001-2006/goal2.pdf>. The last comprehensive evaluation of corporate crime, for example, was conducted in 1979. See Marshall B. Clinard et al., *Illegal Corporate Behavior* (U.S. Dep’t of Justice Law Enforcement Assistance Administration, National Institute of Law Enforcement and Criminal Justice, October 1979) (on file with author).

criminal laws. The data could be organized to identify which statutes are used, with what frequency, at the cost of what resources for each particular type of prosecution and used to identify trends in burgeoning criminal categories. The Department could collect criminal enforcement data categorized by enforcement agency along with prosecution records from each of the prosecuting agencies. It could then catalog the type of offenses prosecuted and report on the comparative corporate size of various violators. Though the development of a consistent methodology for collecting such data will not be a trivial exercise, there is reason to believe that collection of criminal prosecution data of this sort is achievable.²¹ An improvement in data collection regarding the use of new criminal sanctions is a vital first step in understanding the phenomenon of over-criminalization.

B. Measure the Costs

Second, we should subject criminal laws to the same cost/benefit analysis that often attends other legislative enactments. No one, for example, has ever tried to measure the costs to society of the expansion of criminal law. That should change.

We know that there are likely to be significant costs—we know that because, of course, one of the single purposes of criminal law is to deter conduct. It is a fundamental tenet of our criminal justice system that the existence of a potential for punishment is intended to dissuade criminal actors from their intentional wrongful acts. Evidence, although limited, supports the reasonableness of this insight into human nature—the threat of punishment deters.²²

The entire premise of the utility of deterrence is that for traditional crimes it is, in effect, costless in its exercise. There is no *acceptable* level of murder, rape, robbery or any of the other common law crimes. Thus, there is no possibility of over-detering these forms of conduct—we *want*

21. A recent Government Accountability Office study, for example, collected data on criminal prosecutions of Federal contractors from various federal regulatory agencies. See GOVERNMENT ACCOUNTABILITY OFFICE, GOVERNMENT CONTRACTING: ADJUDICATED VIOLATIONS OF CERTAIN LAWS BY FEDERAL CONTRACTORS (2002).

22. See, e.g., Hashem Dezhbakhsh et al., *Does Capital Punishment Have a Deterrent Effect?*, 5 AM. L. & ECON. REV. 344, 369 (2003) (suggesting that the effect of capital punishment is so strong that each execution deters approximately eighteen murders from occurring); Joanna M. Shepherd, *Murders of Passion, Execution Delay, and the Deterrence of Capital Punishment*, 33 J. LEGAL STUD. 283, 305-15 (2004) (exploring the deterrent impacts of capital punishment and potential length of time spent on death row on the murder rate by comparing jurisdictions that impose capital punishment with those that do not); Joanna M. Shepherd, *Police, Prosecutors, Criminals, and Determinate Sentencing: The Truth About Truth-In-Sentencing Laws*, 45 J.L. & ECON. 509, 531 (2002) (predicting that an increase in the severity of punishment for certain crimes may decrease instances of that crime but may also cause criminals to commit other crimes as a substitute).

to drive the murder rate down to zero if we can. Put another way, the criminal conduct at issue in traditional common law crimes is so socially unredeeming that we want actors to stay far back from the line of unacceptable behavior. Even if some killings, for example, are justified as self-defense or as the product of duress, we want those to be exceedingly rare and, when faced with a choice, we want actors to preferentially decline to engage in potentially proscribed conduct. And the *in terrorem* prospect of criminal sanctions, including imprisonment, is designed to achieve precisely that result. There is no *optimal* level of rape or robbery—and so we punish such crimes in all their forms.

However, that paradigm changes as the Federal Government expands the scope of criminal law. For example, there *is* an optimal level in the production of new intellectual property that is derivative of other creative efforts. When discussing issues like environmental pollution, the law expressly recognizes that some production of waste products is the necessary result of the manufacturing process. Thus, we do *not* try to drive the level of pollution or the production of derivative new intellectual property to zero—rather, we recognize that some optimal balance between costs and benefits exists, while also acknowledging the difficulty of defining precisely where that balance should rest. More broadly, there are many social and economically productive acts that are good in moderation but bad in excess. When the criminal law is applied to that category of activity its effect is likely to over-deter conduct that is otherwise useful.

For example, consider the Sarbanes-Oxley act and its enhanced criminalization of conduct in the securities field.²³ Securities fraud is, and ought to be, penalized. But the issuance of stock and capital formation for new entrepreneurial ventures are fundamentally positive occurrences. If Sarbanes-Oxley has the effect of deterring the creation of new economic opportunities, society will incur a substantial cost. It may be a cost that is worth the benefit of lower rates of fraud—but there is no way of knowing that without first assessing the magnitude of the effect of Sarbanes-Oxley on stock market activity.

To date no one has made the effort to measure these effects—either in the stock market or in any other regulated field, such as medicine, where the effects of excess criminalization might be felt. Anecdotal evidence suggests that these effects can be real—that, for example, in reaction to Sarbanes-Oxley companies are choosing to list on European stock exchanges rather than the New York Stock Exchange.²⁴ At a minimum,

23. See Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002) (enhancing potential liability for corporations, executive officers and auditors for failure to comply with the requirements set forth in the act).

24. E.g., Silvia Ascarelli, *Citing Sarbanes, Foreign Companies Flee U.S. Exchanges*,

one should demand of Congress that it begin efforts to measure these adverse costs in a meaningful way.

How? It isn't easy. The costs of criminalization are often difficult to disaggregate from the costs of regulation more generally.²⁵ And even those regulatory costs are hard to measure. But *hard to measure* is not the same as *impossible*. Congress can begin by tasking the Department of Justice's Bureau of Justice Statistics with collecting data, for example, on the number of white collar/regulatory crimes prosecuted annually. It can then require the Department of Commerce, working with the Office of Management and Budget, to develop an econometric model for estimating the economic effects of those prosecutions. In order to ensure balance, an estimate of the deterrence benefits should also be developed, for as we shall see, nobody measures such results either.

C. Measure the Results

Besides measuring adverse costs or effects and the actual number of prosecutions, we need to ask criminal law to justify itself by measuring its benefits, or results. And when we do ask that question, we often measure the wrong thing.

An anecdote illustrates the problem: One day an observer was out on a ride along with a local police officer.²⁶ After several hours patrolling the police car pulled to a stop in an alley behind a small business establishment. The officer explained to the observer that they were now "on site" and that, if the police's intelligence was accurate, someone was soon going to break into the business.

As predicted, within a short time an individual approached the back door of the business and, to the observer's horror, after looking around furtively, smashed the lock and broke into the shop. The policeman leapt out of the car, dashed into the shop and arrested the burglar. The result was one arrest and approximately \$500 damage to the business in addition to substantial inconvenience to the owner and, even if insured, perhaps increased insurance fees.

WALL ST. J., Sept. 20, 2004, at C1; Larry Schlessinger, *Sarbanes-Oxley Forces Porsche to Reverse*, ACCOUNTANCY AGE (Oct. 17, 2002) (announcing that Porsche abandoned its New York Stock Exchange listing in order to avoid complying with the Sarbanes-Oxley Act), available at <http://www.accountancyage.com/News/1131114>; *Porsche Won't List Shares in U.S.*, WALL ST. J., Oct. 17, 2002, at C16.

25. See THE WHITE HOUSE, OFFICE OF MANAGEMENT AND BUDGET, INFORMING REGULATORY DECISIONS: 2004 DRAFT REPORT TO CONGRESS ON THE COSTS AND BENEFITS OF FEDERAL REGULATIONS AND UNFUNDED MANDATES ON STATE, LOCAL, AND TRIBAL ENTITIES (2004) (estimating the costs of general Federal legislation), available at http://www.whitehouse.gov/omb/inforeg/draft_2004_cbreport.pdf.

26. I am indebted to Maurice McTeague, of the Mercatus Center at George Mason University, for this wonderful anecdote.

“For goodness sake,” asked the observer, “why didn’t you stop him before he broke the door down?” The police officer calmly answered: “Because I only get credit for the arrest and clearing the crime. Nobody counts whether I stop a crime before it happens.”

This, in a nutshell, is the results paradox: You get what you measure. In the federal system today, we do not measure the correct thing.

Imagine if the Metropolitan Police Department (“MPD”) in the District of Columbia measured its success by the raw number of murder prosecutions without disclosing anything about the murder rate. Imagine, for example, if this year the MPD proudly announced that there had been fifty murder indictments, up from forty-five the year before.

Nobody would take that sort of measurement seriously. A meaningful measure of MPD’s success (or lack of success) does not lie in the gross number of indictments but in more fundamental statistics: Is the murder rate in DC going up or down? Is the clearance rate, the percentage of murders that are solved, increasing or decreasing? We would not think that an increase of five indictments in a year was a good sign, if the per capita annual murder rate had increased by twenty percent and the clearance rate had decreased equivalently.

And so, in metropolitan areas across the country, law enforcement agencies are learning how to measure and report their results. In New York City, for example, the police department has championed a crime reporting system that collates data throughout the city, and the department is judged by its success in reducing crime levels. This change to a results-oriented measurement is widely thought to have contributed to remarkable reductions in crime experienced by New York over the past few years.²⁷

Portions of the Federal Government have begun to implement this same lesson. Federal agencies are required to measure their success in terms of actual results. The Government Performance and Results Act (“GPRA”)²⁸ mandates annual reports to Congress by federal agencies that report their performance in terms of outcomes, rather than outputs. To take a rather simple example, the National Highway Transportation Safety Administration (“NHTSA”) does not report on how many rules it issued, or how many hearings it conducted, or even how many recalls it ordered.

27. For the New York Police Department’s description of its new crime prevention initiative, see NEW YORK POLICE DEPARTMENT, COMPSTAT PROCESS, at <http://www.nyc.gov/html/nypd/html/chfdept/compstat-process.html> (last visited on Apr. 14, 2005) (describing the weekly process of the NYPD in which each precinct compiles a summary of statistics regarding crime complaints, arrests, summonses, summaries of significant cases and police activity which is then entered into a city-wide database for analysis).

28. See Government Performance and Results Act of 1993, Pub. L. No. 103-62, 107 Stat. 285 (1993).

Rather, NHTSA's obligation is to report the bottom line outcome that results from all of its programs—highway deaths, measured on a per capita basis, increasing or decreasing.²⁹ By focusing on the most important factors and measuring them, government becomes accountable for results. You get what you measure.

A large swath of federal criminal law enforcement, however, has yet to learn this lesson. On the occasion of Attorney General John Ashcroft's resignation, the Department of Justice summarized its recent successes, boasting, for example, that the Corporate Fraud Task Force had, in twenty-eight months, charged more than 900 violators in 400 cases and secured more than 500 individual convictions.³⁰ Not terribly long ago, the Department's Environment and Natural Resources Division reported its annual success, boasting that more than \$800 million in civil and criminal fines had been collected at a cost of only \$100 million—a "return on investment" of 100:1, as if criminal prosecution was a capital product to be purchased for investment purposes.³¹

But these measures say absolutely nothing about the effect criminal prosecution has had on the underlying problems of corporate fraud or criminal environmental pollution. Without knowing whether fraud rates are increasing or decreasing, for example, Congress can have no way of knowing whether these levels of prosecution are optimal. It is entirely possible that the optimal level of prosecution for corporate offenses requires a doubling of effort, or a halving. Because federal law enforcement does not measure its effect on the underlying crime rates, we do not have a measure of its effectiveness.

That can and should change. Through the GPRA, Congress should demand that law enforcement in the federal sphere report its effectiveness in terms of its results—in terms of the ultimate outcomes that it produces, and not merely its outputs. In other words, Congress should insist on knowing the real benefits of criminal law and ask the federal law enforcement organizations to do the same thing that the NYPD has been doing for ten years. When combined with a concrete measure of its costs, an accurate picture of criminalization will emerge.

29. See, e.g., NAT'L HIGHWAY TRANSP. SAFETY ADMIN., FY 2003 PERFORMANCE PLAN (2002) (measuring results in reductions in number of crashes and fatalities), available at <http://www.nhtsa.dot.gov/nhtsa/whatis/planning/perf-plans/2003/Index.html>.

30. Attorney General John Ashcroft, Farewell Letter to the American People (Nov. 10, 2004), available at http://www.usdoj.gov/archive/ag/speeches/2004/ag_farewell_letter_110904.htm.

31. *Master of the Court*, ENVTL. F., Nov.-Dec. 2002, at 40, 42 (interview with Asst. Atty. General Thomas Sansonetti).

D. Reform the Criminal Code

Finally, and most ambitiously, Congress needs to be encouraged to return to the issue of reforming the federal criminal code. In the late 1990s, a blue-ribbon American Bar Association Commission cataloged the over-federalization of criminal law.³² Its principal conclusion was that much of the growth of federal crimes was a result of federal law taking on too many responsibilities that were best left to state law enforcement agencies.³³ A recent example of that trend is the federal carjacking statute passed in the early 1990s when concern over carjacking crimes became a short-lived public concern. Notwithstanding the existence of laws against both theft and violence in every State, Congress felt impelled by political expediency to craft a federal prohibition.³⁴ As might be expected, given the prevalence of effective state law enforcement tools, the federal law has been mostly ignored, with fewer than 100 federal prosecutions last year, compared to several tens of thousands of state prosecutions annually.³⁵ Given the small role that federal law plays, one is entitled to ask whether we need the law at all.

We can also critique the proliferation of specialized niche criminal laws designed to address a single, narrow special interest. There are, for example, broad general laws prohibiting making a false material statement to an agency of the United States³⁶ and using the federal mails and wires to perpetrate a fraud on individuals.³⁷ Given these statutes of general applicability, do we really need specialized statutes making it a crime to file false environmental reports,³⁸ defraud stock investors,³⁹ or commit health care fraud?⁴⁰ Assuredly not. Yet whenever there is regulatory legislation, advocates for the special interest underlying the legislation

32. See JAMES A. STRAZELLA, AM. BAR ASS'N, *THE FEDERALIZATION OF CRIMINAL LAW*, app. C (1998).

33. See *id.*; see also Ronald L. Gainer, *Federal Criminal Code Reform: Past and Future*, 2 BUFF. CRIM. L. REV. 45, 53 (1998) (arguing that the level of inefficiency in the enforcement of Federal criminal laws has led to a trivialization of the criminal law and reduced its deterrent effect).

34. The original carjacking law was passed in 1992. See Pub. L. No. 102-519, Title I, § 101(a), 106 Stat. 3384 (1992).

35. Compare U.S. DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS, CARJACKING, 1993-2002 (2004), at <http://www.ojp.usdoj.gov/bjs/abstract/c02.htm> (estimating approximately 38,000 carjackings annually), with ADMIN. OFFICE OF THE U.S. COURTS, OFFICE OF JUDGES PROGRAMS, STATISTICS DIVISION, FED. JUDICIAL CASELOAD STATISTICS (2004) (reporting 130 auto theft prosecutions nationwide in FY 2003), available at <http://www.uscourts.gov/caseload2004/tables/D04Mar04.pdf>. The Bureau of Justice Statistics estimate is based on the assumption that not all of the auto thefts prosecuted in Federal court involved violence against the owner.

36. 18 U.S.C. § 1001.

37. 18 U.S.C. §§ 1341, 1343.

38. 33 U.S.C. § 1319(c)(4).

39. 15 U.S.C. § 78(ff).

40. 18 U.S.C. § 1347.

insist upon their own unique criminal prohibition. It is almost as if no federal agency thinks itself complete without its own narrow body of criminal law to enforce.

The growth of federal law has many adverse effects, as the other contributors to this volume have amply demonstrated. But perhaps the most insidious effect is that we can no longer say with confidence that *ignorance of the law is no excuse*. The maxim was derived at a time and place when the subject matter of criminal law was widely known in the community and we could comfortably assume that any protestation of ignorance was a sham or that one professing not to know of a criminal prohibition had achieved that ignorance through willful blindness.

We are now, however, at a time when nobody knows how many laws there are. Though Professor Baker has offered an estimate, the Congressional Research Service, the arm of Congress charged with conducting research on its behalf, has professed that it is impossible to know the exact number.⁴¹ If the elected representatives who create the criminal code cannot catalog it, what hope has any American for knowing the criminal law's full scope?

And so the time has come for Congress to take up the difficult task of reforming the entire federal criminal code. Attempts in the 1980s failed, despite substantial efforts.⁴² The time is ripe for a new effort—at least in part because the rate of the increase in federal laws continues to rise, almost doubling in the last thirty years.

To avoid the political problems that frustrated the last attempt, Congress should be asked to authorize an independent bipartisan commission to review the entire federal code of criminal offenses and to consolidate those offenses in a single title of the federal code. The new code should eliminate duplicative niche criminal provisions and expunge federal crimes addressing issues better handled by state and local authorities. At the end of its work, the Commission's report to Congress should be subject to a single, unitary up or down vote on the recommendations—lest the many compromises and choices made by the Commission be *cherry-picked* by varying majorities and the entire report put to death by 1,000 cuts. With

41. See *Union Reporting and Disclosure: Legislative Reform Proposals—Consideration of H.R. 4054 and H.R. 4055: Hearing Before the Subcomm. on Employer-Employee Relations of the House Comm. on Educ. and the Workforce*, 107th Cong. (2002) (testimony of Paul Rosenzweig, Senior Legal Research Fellow, Center for Legal and Judicial Studies, the Heritage Foundation) (reporting conversations with CRS and congressional staff, and explaining that due to the diversity of criminal statutes, their regulations, and their haphazard placement throughout the federal code, it is impossible to determine the exact number of federal criminal statutes and regulations), available at <http://edworkforce.house.gov/hearings/107th/eedrdatwo62702/rosenzweig.htm>.

42. See Gainer, *supra* note 33, at 87 (detailing the history of previous attempts to reform the entire Federal criminal code).

sufficient political will and commitment, much needed code reform can be achieved.

CONCLUSION

The agenda for change outlined here is no panacea. It will take hard work, and a political commitment that has been noticeably absent from congressional consideration. But one might sense that the tide is beginning to turn. Both sides of the political spectrum have come to realize that the proliferation of criminal law, at its core, undermines the moral force of the law itself. For when everything becomes a crime, then nothing, in the end, is truly wrong.