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Revisiting the Explosive Growth of Federal Crimes

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Measuring the growth in the number of activities considered federal crimes is challenging. Ideally, one compares counts of federal crimes taken at different times and employing consistent criteria to determine what constitutes a federal crime. Obtaining comparable data, however, is almost impossible. Nonetheless, a careful survey of laws enacted by Congress does permit reasonable estimation of the number of federal criminal offenses.

This report follows from other attempts to count the number of federal criminal offenses or to measure their growth. The most complete count of federal crimes, done by the U.S. Department of Justice (DOJ) in the early 1980s, put the number at 3,000. A 1998 report by a task force of the American Bar Association relied on the DOJ figure and other data to measure the growth of federal criminal law but did not itself actually provide a count of federal crimes.[1] In a 2004 Federalist Society monograph building on the DOJ and ABA reports, I counted new federal crimes enacted following the point at which the ABA report finished its data collection at the close of 1996. That report estimates that there were 4,000 federal crimes at the start of 2000.[2] This report updates that total through 2007, finding 452 additional crimes created since 2007, for a total of at least 4,450 federal crimes.[3]

The growth of federal crimes continues unabated. The increase of 452 over the eight-year period between 2000 and 2007 averages 56.5 crimes per year—roughly the same rate at which Congress created new crimes in the 1980s and 1990s. So for the

Talking Points

- Congress has enacted 452 new crimes over the eight-year period between 2000 and 2007—a rate of about 57 new crimes per year—for a total of 4,450 federal crimes in the U.S. Code.
- This growth rate is basically unchanged from the rates that prevailed during the 1980s and 1990s, despite that the growth of the federal criminal law has come under increasing scrutiny in recent years.
- Election politics may be driving the growth of the federal criminal law. The data show that Congress creates more criminal offenses in election years.
- Troublingly, many new crimes lack a *mens rea* requirement, a traditional element that protects those who did not intend to commit wrongful acts from prosecution and conviction.
- The trend of "overcriminalization" continues unabated as Congress subjects more and more activities to criminal sanction and weakens the role of *mens rea*. In the process, the criminal law's power as a system of moral education and socialization is diminished.

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past twenty-five years, a period over which the growth of the federal criminal law has come under increasing scrutiny, Congress has been creating over 500 new crimes per decade. That pace is not steady from year to year, however; the data indicate that Congress creates more criminal offenses in election years.

This study reviews the crimes newly enacted by Congress in order to: (1) update the number of federal crimes; (2) measure whether Congress continues to pass federal criminal laws at the same pace found by the ABA report; and (3) determine whether the new crimes contain a *mens rea* requirement, a key protection of the common law that protects those who did not intend to commit wrongful acts from unwarranted prosecution and conviction.

Previous Studies

Counting the number of federal crimes might seem to be a rather straightforward matter: Simply count all the statutes that Congress has designated as crimes. After all, unlike state law, federal law has never had a common law of crimes. Locating purely common-law crimes requires consulting judicial opinions, and even then, determining what is and is not a common-law crime is problematic.[4] Given that federal courts lack common-law jurisdiction over crimes, all federal crimes must be statutory.[5] So it would seem that counting statutes should be an easy task.

Making an accurate count is not as simple as counting the number of criminal statutes, however. As the American Bar Association's Task Force on the Federalization of Crime stated, "So large is the present body of federal criminal law that there is no conveniently accessible, complete list of federal crimes."[6] Not only is the number of statutes large, but the statutes are scattered and complex.[7] The situation presents a two-fold challenge: (1) determining what statutes count as crimes and (2) determining whether, as to the different provisions within a section or subsection, there is more than a single crime, and if so, how many.

The first difficulty is that federal law contains no general definition of the term "crime." Title 18 of the U.S. Code is designated "Crimes and Criminal Procedure," but it is not a comprehensive criminal code. Title 18 is simply a collection of statutes. It does not provide a definition of crime. Until repealed in 1984, however, Section 1 of Title 18 began by classifying offenses into felonies and misdemeanors, with a sub-class of misdemeanors denominated "petty offenses." Later amendments re-introduced classifications elsewhere in Title 18.[8] The repeal and later amendments, however, were tied to the creation of the United States Sentencing

1. TASK FORCE ON FEDERALIZATION OF CRIMINAL LAW, AMERICAN BAR ASSOCIATION, THE FEDERALIZATION OF CRIMINAL LAW (1998) [hereinafter ABA REPORT].
2. JOHN BAKER, FEDERALIST SOCIETY FOR LAW AND PUBLIC POLICY, MEASURING THE EXPLOSIVE GROWTH OF FEDERAL CRIME LEGISLATION (2004) [hereinafter FEDERALIST SOCIETY REPORT].
3. *See* app.
4. *See* WAYNE R. LAFAVE, 1 SUBSTANTIVE CRIMINAL LAW § 2.1(e) (2003).
5. United States v. Hudson & Goodwin, 11 U.S. (7 Cranch) 32 (1812).
6. ABA REPORT, *supra* note 1, at 9.
7. The ABA report explained:

   > [A]n exact count of the present "number" of federal crimes contained in the statutes (let alone those contained in administrative regulations) is difficult to achieve and the count subject to varying interpretations. In part, the reason is not only that the criminal provisions are now so numerous and their location in the books so scattered, but also that federal criminal statutes are often complex. One statutory section can comprehend a variety of actions, potentially multiplying the number of federal "crimes" that could be enumerated…. Depending on how all this subdivisible and dispersed law is counted, the true number of federal crimes multiplies.

   Id. at 93.
8. *See* 18 U.S.C. § 3581 (classification of felonies, misdemeanor and infraction in terms of sentencing); 18 U.S.C. § 3156(3) (definition of "felony" for purposes of release and detention).

Commission, and this new focus on sentencing has done nothing to solve—and probably has exacerbated—the problem of determining just what should be counted as "crimes." That issue is particularly pertinent for offenses not listed in Title 18. Title 18 does contain many, but not all, of the federal crimes. Other offenses carrying criminal penalties are distributed throughout the other 49 titles of the U.S. Code.[9] These scattered criminal provisions are usually regulatory or tort-like, sometimes making them difficult to identify.

The second problem is that, whether it is codified in Title 18 or some other title, one statute does not necessarily equal one crime. Often, a single statute contains several crimes. Determining the number of crimes contained within a single statute is a matter of judgment. Different people may make different judgments about the number of crimes contained in each statute, depending on the criteria they employ. In the absence of a definition of crime, it is incumbent upon the compiler to explain the criteria employed in making the count. Not intending to re-invent the criteria, I have looked to previous attempts to count the number of federal crimes.

The most comprehensive effort to count the number of federal crimes was undertaken by the Office of Legal Policy (OLP) of the U.S. Department of Justice in early 1983 in connection with efforts to pass a comprehensive federal criminal code. Ronald Gainer, who oversaw the study, later published an article entitled "Report to the Attorney General on Federal Criminal Code Reform."[10] The DOJ's count involved a review by hand of every page of the U.S. Code, and it put the number at "approximately 3,000 federal crimes," a figure which has been much cited since.[11] That number includes all federal offenses in the U.S. Code carrying a criminal penalty enacted through early 1983.

In a 1998 article, "Federal Criminal Code Reform: Past and Future," Gainer cited the figure of "approximately 3,300 *separate provisions* that carry criminal sanctions for their violation."[12] This number was based on a count done by the Buffalo Criminal Law Center "employing somewhat different measures" than the DOJ survey.[13] This survey apparently considered only "separate provisions" as constituting crimes, while the methodology used in the DOJ count often found more than one crime in a single provision.

In 1998, the American Bar Association's Task Force on the Federalization of Criminal Law, chaired by former Attorney General Edwin Meese and containing this author as a member, issued a report entitled "The Federalization of Criminal Law." This report was concerned with the growth in federal criminal law and thus faced the problem of identifying the number of federal crimes enacted over periods of time. The Task Force decided, however, not to "undertake a section by section review of every printed federal statutory section," which would have been too "massive" an undertaking for the Task Force's "limited purpose."[14] The ABA report did conclude that the 3,000 number was "surely outdated by the large number of new federal crimes enacted in the 16 or so years since its estimation."[15] The ABA report did not attempt a comprehensive count like DOJ, but it did provide a good measure of the growth of federal criminal law, which demonstrated that the number of federal crimes as of the end of 1996 greatly exceeded 3,000.

Although the ABA Report did not actually count the number of crimes, it drew the following dramatic conclusion from the available data:

9. There are 50 titles, but Title 34 currently contains no un-repealed statutes.
10. Ronald Gainer, *Report to the Attorney General on Federal Criminal Code Reform*, 1 CRIM. L.F. 99 (1989).
11. *Id.* at 110.
12. Ronald Gainer, *Federal Criminal Code Reform: Past and Future*, 2 BUFF. CRIM. L. REV. 46, 55 n.8 (1998) (emphasis added).
13. *Id.*
14. ABA REPORT, *supra* note 1, at 92.
15. *Id.* at 94.

> The Task Force's research reveals a startling fact about the explosive growth of federal criminal law: *More than 40% of the federal provisions enacted since the Civil War have been enacted since 1970.*[16]

But the ABA report's approach actually *underestimates* the increase in the number of federal crimes. According to Gainer, the DOJ effort to count crimes discovered that any attempt to count using computer searches would consistently undercount crimes. This is why the DOJ did a complete hand count of federal crimes, which meant reading through the many thousands of pages of the U.S. Code. The ABA report, for its purposes, instead conducted a Westlaw search of the statutes "us[ing] the key words 'fine' and 'imprison' (including any variations of those words such as 'imprisonment')."[17] As explained below, this strategy likely missed many crimes.

Methodology

This current report and the accompanying count were developed against the background of the DOJ and the ABA Task Force reports. Like the ABA Task Force, my researchers and I could not review thousands of pages of statutes in order to complete a count as comprehensive as the DOJ's, nor even review all the new crimes enacted since the DOJ completed its count in 1983. The ABA report did not actually include a count, and even the comprehensive count by the DOJ report gave the number in terms of an estimate. In part, that was due to the fact that the DOJ count employed debatable criteria about how many crimes are contained in a particular statute. Nevertheless, our count adhered to the criteria used in the DOJ count. For the current count, we reviewed legislation from the beginning of 2000 through the end of 2007.

Building on the data in the 1998 ABA report, which run through 1996, my previous report for the Federalist Society estimated that the U.S. Code contained 4,000 crimes as of the beginning of 2000.[18] For the present report, we conducted a comprehensive search of statutory provisions enacted from the beginning of 2000 through 2007. Like the DOJ and ABA reports, this and my previous report consider only statutes, not regulations. As the ABA report notes, if regulations were included, that would have added, as of the end of 1996, an additional 10,000 or so crimes.[19] Another report from the early 1990s, however, estimated that "there are over 300,000 federal regulations that may be enforced criminally."[20]

For purposes of continuity, this report, like my previous one, relied on Westlaw searches using the same terms as the ABA report. For this report, however, we went beyond the terms used by the ABA report and found more crimes in amendments to existing laws that did not contain those search terms. Just searching the database of statutes passed each year using the terms "fine!" and "imprison!"—the ABA Report approach—does not yield a comprehensive list of crimes because it does not capture statutory amendments that do not contain either of those terms. For example, an amendment to an existing law might revise the statute by adding an additional subsection. This subsection, due to its placement in the existing statute, might create a new crime, although it does not include either "fine!" or "imprison!." Therefore, after using the search terms "fine!" and "imprison!," the search proceeded to the "Historical Notes" field for each of the years from 2000 through 2007. This produced several hundred hits for each year (the highest being about 690 in a single year), which yielded a number of crimes

16. *Id*. at 7 (emphasis in the original); *see also id*. at n.9 ("[M]ore than a quarter of the federal criminal provisions enacted since the Civil War have been enacted within the sixteen year period since 1980").
17. ABA REPORT, *supra* note 1, at app. C, 91, n.1.
18. The Federalist Society Report looked at crimes enacted through 2003, but only drew conclusions about the number of crimes as of the beginning of 2000. *See* FEDERALIST SOCIETY REPORT, *supra* note 2, at 8.
19. *See* ABA REPORT, *supra* note 1, at 10.
20. John C. Coffee, Jr., *Does "Unlawful" Mean "Criminal"?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. Rev. 193, 216 (1991).

which were not captured just using the ABA search terms.

In this report, we employed the DOJ report's methodology for counting the number of new crimes contained within a single statute. Under the DOJ approach, statutes containing more than one act corresponding to a common-law crime were determined to have as many crimes as there were common-law crimes in the statute. [21] On the other hand, the DOJ counted a statute as containing only one crime, even though it contained multiple acts, if those acts did not constitute common-law crimes.

Specifically, the criteria employed in this report to distinguish whether the new statutory language did or did not create a new crime are as follows:

- Each act stated in terms corresponding to the act element of a traditional or common-law crime (*e.g.*, theft, burglary, fraud) is counted separately as one crime. Thus, multiple crimes may be listed in a single section or subsection.
- Multiple acts unrelated to traditional crimes, when stated in the same section or subsection, are treated as different ways of committing one crime. Also, elaborations on traditional crimes (*e.g.*, theft by fraud, misrepresentation, forgery) are counted as one crime only if listed together in one section or subsection.
- If the same or similar non-traditional crimes are listed in separate sections or sub-sections, each section or subsection is counted as a separate crime. Attempts and conspiracies to commit a crime were counted as distinct crimes.
- The number of crimes listed for each section or subsection indicates only the number of crimes added that year by a statute or amendment, which does not necessarily equal the total number of crimes in those sections or subsections originally enacted in an earlier year.

The Number of Federal Crimes

My 2004 report stated that "Conservatively speaking, the U.S. Code contains at least 3,500 offenses which carry criminal penalties. More realistically, the number exceeds 4,000." The estimate of over 4,000, as of the beginning of 2000, rested on an evaluation of the information already covered by the counts conducted by DOJ and the ABA and new data for the years 1997 through 1999.

Since the start of 2000, Congress has created at least 452 new crimes. So the total number of federal crimes as of the end of 2007 exceeds 4,450. Ninety-one of the 452 were contained in new laws that created 279 new crimes, and the remaining were contained in amendments to existing laws.[22] The total of 452 new crimes breaks down by year as follows: 65 for 2000; 28 for 2001; 82 for 2002; 51 for 2003; 48 for 2004; 13 for 2005; 145 for 2006; 20 for 2007. The Appendix to this report lists all the federal statutes containing new crimes.

The data suggest a potential electoral motivation behind the growth of the federal criminal law. Except for in 2003, the number of new crimes enacted in election years significantly surpass those in non-election years. While this may be due to the two-year cycle in Congress and the time it takes to pass a bill, work done on legislation in a previous Congress need not be completely duplicated. Bills are, for example, frequently re-introduced at the commencement of the a new Congress.

This study did not perform a statistical analysis of the number of crimes created in various discrete areas of substantive law. My 2004 report, however, concluded that a large percentage of the new crimes came in the environmental area. For the years 2000 through 2007, many of the new crimes were in the following areas:

- National security, i.e., aircraft security, protection of nuclear and other facilities, counterfeit/forged insignia and documents;
- Terrorism and support for terrorists;
- Protection of federal law enforcement;
- Protection of members of the armed forces;
- Protection of children from sexual exploitation; and
- Controls on the Internet.

21. Telephone interview with Ronald Gainer (Dec. 29, 2003).

22. The ABA report does not include a review of amendments. *See* ABA REPORT, *supra* note 1, at 8 n.10.

Not surprisingly, many of the new crimes were enacted in response to the events of 9/11.

Interpretation: A Troubling Trend

As practitioners in the field know well, the number of criminal statutes does not tell the whole story. Measuring the rate of growth certainly confirms that Congress continues to enact criminal statutes at a brisk pace. But no matter how many crimes Congress enacts, it remains for federal prosecutors to decide which statutes to invoke when seeking an indictment.

Federal prosecutors have certain favorites, notably mail and wire fraud statutes,[23] which they use even when other statutes might be more applicable. That, of course, does not mean that the addition of little-used crimes is unimportant. The federal government is supposedly a government of limited powers and, therefore, limited jurisdiction. Each new crime expands the jurisdiction of federal law enforcement and federal courts. Regardless of whether a statute is used to indict, it is available to establish the legal basis upon which to show probable cause that a crime has been committed and, therefore, to authorize a search and seizure. The availability of more crimes also affords the prosecutor more discretion and thereby greater leverage against defendants. Increasing the number and variety of charges tends to dissuade defendants from fighting the charges, because they usually can be "clipped" for something.

Moreover, the expansion of federal criminal law continues to occur even without new legislation. Federal prosecutors regularly stretch their theories of existing statutes. For example, federal courts often cooperate with prosecutors by making new laws apply retroactively. What Judge John Noonan wrote in 1984 about bribery and public corruption continues to be generally true, namely that federal prosecutors and federal judges have been effectively creating a common law of crimes through expansive interpretations.[24]

Ultimately, the reason the ABA report and this report track the increase of federal crimes is to provide some measure of the extent to which federal criminal law and its enforcement are over-reaching constitutional limits. The Supreme Court has admonished Congress twice within recent years, when it declared federal statutes unconstitutional, that it lacks a "plenary police power."[25] The statistical measures in this and the ABA report indicate that those cases have not dissuaded Congress from continuing to pass criminal laws at the same pace.

Judicial Interpretation of *Mens Rea*

A *mens rea* requirement has long served an important role in protecting those who did not intend to commit wrongful acts from unwarranted prosecution and conviction. *Mens rea* elements, such as specific intent, willful intent, and the knowledge of specific facts constituting the offense, are a part of nearly all common-law crimes. These protections were generally codified into statutes, as state legislatures adopted criminal codes, and the practice was continued in the creation of statutes defining new crimes in addition to those recognized historically by the common law.

If anything, *mens rea* requirements are more important today than in the past. Historically, nearly all crimes concerned acts that were *malum in se*, or wrong in themselves, such as murder, battery, and theft. Today, however, new crimes and petty offenses created by statute almost always concern acts that are *malum prohibitum*, or wrong only because it is prohibited. This category includes petty offenses and crimes like marketing medicines not approved by the FDA and shipping flammable materials without a sticker on the box. For *malum prohibitum* crimes and petty offenses, *mens rea* requirements can serve to protect individuals who have accidentally or unknowingly violated the law or, in some cases, were unaware that a law covered their particular conduct.

For the period 2000 through 2007, the great majority of sections or subsections appeared to

23. 18 U.S.C. §§ 1341, 1343 (mail fraud and wire fraud, respectively).

24. *See* JOHN NOONAN, BRIBES (1984) at 585–86, 620.

25. United States v. Lopez, 514 U.S. 549, 566 (1995); United States v. Morrison, 529 U.S. 598, 618 (2000).

have a *mens rea* requirement, often employing the term "knowingly" or "willfully." Nevertheless, 55 statutory provisions (some of which contain more than one crime) contained no reference to a *mens rea* requirement. Of these 55, 17 are new and 38 amend existing statutes. That means that 17 out of the total of 91 new criminal statutes did not specify a mental element.

The Appendix of this report identifies the *mens rea* element or the lack thereof for each of the 237 statutory provisions containing new crimes passed by Congress.

This count concerning *mens rea* is somewhat tentative, for several reasons. For example, whether an offense has a *mens rea* requirement may depend on a judgment about the number of crimes contained in a particular section or subsection. Consider, for example, 18 U.S.C. § 1960, which prohibits "unlicensed money transmitting businesses" and was amended in the wake of 9/11. The statute contains several subsections. The 2001 amendments added a new subsection expanding the definition of "unlicensed money transmitting business." The added section contains a knowledge requirement. In our count, the amendment does not count as adding a crime. While the amendment adds a *mens rea,* it also drops a *mens rea* requirement from an existing provision.[26] If 18 U.S.C. § 1960 is counted as just one crime or if only the newly added subsection is considered, then the crime carries a *mens rea.* That means, however, that the elimination of the one *mens rea* requirement may escape notice. Once again, what counts as a crime dictates conclusions about what Congress has done in passing a statute—that is, whether it has or has not eliminated a *mens rea* requirement.

The linkage between the *mens rea* issue and meaning of "crime" goes to the heart of the moral foundation of criminal law, as Professor John Coffee has explained:

> [T]o define the proper sphere of the criminal law, one must explain how its purposes and methods differ from those of tort law. Although it is easy to identify distinguishing characteristics of the criminal law—e.g., the greater role of intent in the criminal law, the relative unimportance of actual harm to the victim, the special character of incarceration as a sanction, and the criminal law's greater reliance on public enforcement—none of these is ultimately decisive.
>
> Rather the factor that most distinguishes the criminal law is its operation as a system of moral education and socialization. The criminal law is obeyed not simply because there is a legal threat underlying it, but because the public perceives its norms to be legitimate and deserving of compliance. Far more than tort law, the criminal law is a system for public communication of values.[27]

When the traditional requirement of *mens rea* is weakened, then, the unique features of the criminal law are undermined, to the great detriment of society. It is troubling that, in a significant proportion of new criminal statutes enacted in recent years, Congress has neglected this crucial component that cuts to the heart of what it means to be "guilty" of a crime.

Conclusion

As is repeated throughout this report, one's opinion about what counts as a federal crime drives the count of federal crimes. Simply focusing on the penalty may not be sufficient because one penalty often applies to several acts. While federal law classifies crimes by penalties, federal law does not provide a clear definition of crime that would allow distinctions among separate criminal acts. That makes any count subject to argument. At the very least, however, this report can conclude the following: Based on the growth of federal crime legislation since the count in the early 1980s by the Office of Legal Policy in the Department of Justice, the United States Code today includes at least

26. Previously, the relevant portion of the provision (18 U.S.C. § 1960(b)(1)(A)) read "is intentionally operated"; it now reads "is operated."

27. Coffee, *supra* note 20, at 193–194 (emphasis added) (citation omitted).

4,450 offenses which carry a criminal penalty, and the rate at which Congress passes new crimes has not waned since at least the 1980s.

Appendix

The Appendix to this report, which lists and describes the criminal statutory provisions enacted from 2000 through 2007, is available at http://www.heritage.org/Research/LegalIssues/upload/2008_Baker_appendix.pdf.

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