

WebMemo



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Inaugural Tickets for Sale? Overcriminalization Strikes Again

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Congress's habit, when confronted with anything that its Members dislike, no matter how trivial, is to write a new criminal offense. The latest example is particularly egregious: A new bill introduced by Senator Diane Feinstein (D-CA) would criminalize the sale of inaugural tickets, which are handed out for free by congressional offices. The measure, according to reports, may win passage under expedited procedures, without any debate or deliberation.

This sort of knee-jerk criminalization has led to the proliferation of criminal offenses—4,500 in federal statutes, alone. This broadening of the criminal law, to the point that any person is probably guilty of some federal crime, cheapens the notion of crime and reduces the law's deterrent effect. The criminal law is simply the wrong tool to enforce regulation of productive economic conduct, and Congress should avoid making matters worse by creating still more criminal offenses targeting behavior that, though disliked by lawmakers, is simply not *criminal* in nature.

A Hot Ticket. Since President-elect Barack Obama clinched the presidency on November 4, congressional offices have been flooded with phone calls and e-mails requesting tickets to his inauguration in January. Some offices report receiving upwards of 10,000 calls from constituents seeking one of the 240,000 tickets to Obama's swearing in. Each office, however, will receive only 198 tickets to distribute to the public—at no charge. Some offices promise to stage raffles for the tickets, while others are handing them out to supporters or on a first-come basis. Individuals who are unable to obtain

tickets will have to settle for watching the ceremony from the National Mall or on television.

With this great chasm between supply and demand, as well as the enthusiasm many harbor for Obama, it should come as no surprise that some are willing to pay exorbitant sums to watch the swearing-in ceremony up close. According to news reports, tickets have been advertised online for \$5,000 to \$40,000 apiece, and some have even found buyers at those exorbitant prices. This market's rapid emergence is a stunning reaffirmation of the simple law of supply and demand.

But it has also proven offensive to some Members of Congress. Last week, Feinstein issued a statement labeling such ticket sales "unconscionable" and demanding that they "must not be allowed." Calling the inauguration "one of the most important rituals in our democracy," Feinstein maintains that "the chance to witness this solemn event should not be bought and sold like tickets to a football game." The tickets, she said, are supposed to be free, and allowing sales would deprive party volunteers, schoolchildren, and "members of the African-American community" the chance to see the inauguration.

In response to pressure from Feinstein, several Internet sites have already pulled inaugural ticket

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sales and halted auctions and are forbidding the posting of new ones. Nonetheless, a cursory look shows that tickets remain on sale on many websites. As tickets will not be distributed until just before the inauguration, some of these listings may be fraudulent, which is also among Feinstein's concerns.

No new law is needed, however, to prevent fraud, which is already a criminal offense many times over. A new statutory offense prohibiting fraud in inaugural ticket sales would do no more than duplicate these existing prohibitions in that context, while adding to the clutter of Title 18 of the U.S. Code, where most criminal offenses are located.

And it is difficult to imagine, in any case, what good banning the legitimate sale of inaugural tickets would accomplish. Contra Feinstein, a ban would not prevent any schoolchild, African-American, or Obama volunteer who obtains a ticket from witnessing the ceremony. Instead, it would give those individuals an additional choice: the opportunity, if they so choose, to sell their ticket and reap the rewards. When transactions such as these are not coerced, they are mutually beneficial—that is, each side winds up better off. So a college-age volunteer in dire need of cash could sell her ticket to an Obama supporter who lost her delegation's lottery but wants nothing more than to see her candidate sworn in. By prohibiting sales, Congress would actually leave ticket recipients worse off.

Law Loses Its Moorings. But if Members, for whatever idiosyncratic reasons, find the idea of paying for admission to an event to be offensive, there are more straightforward means to prevent it than a criminal prohibition. The easiest is simply refusing to admit individuals whose names do not match those printed on the tickets, just like with voter identification requirements in several states, which the most recent election proved to be efficient, effective, and no deterrent at all to legitimate participants. Anyone who has ever attended a concert or other ticketed event can recall other means of limiting access to those who obtained tickets directly from the source.

Given that these other means exist, Congress should not misuse the criminal law to carry out this end. Putting a ticket up for sale lacks an essential component of most criminal offenses, as they have traditionally been defined: an *actus reus*, or bad act.

Traditionally, acts deemed criminal were wrongful in and of themselves, like theft and murder.

Only in recent decades have we witnessed an explosion in the number of acts that are not wrong because of their intrinsic nature—that is, they do not cause actual harm to others or otherwise violate society's basic mores—but merely because they have been designated as such by a legislature. These offenses are known as "*malum prohibitum*," or acts that are wrong merely because they are prohibited. A big problem with *malum prohibitum* offenses is that they provide no intrinsic notice to individuals that certain conduct is illegal, and that is an especially significant concern when the criminal code has swollen to contain thousands of offenses.

Arbitrary offenses like the sale of inaugural tickets also distance the criminal law from its moral roots. If selling a legitimate ticket is a crime with the same penalty as, for example, theft or actual fraud, the criminal law becomes divorced from the notion of actual harm and is cheapened for it. As Professor John Coffee has explained, the criminal law's greatest strength is in its power as a system of moral education and socialization, both reflecting and establishing the norms that undergird society. This law is followed not merely for the legal threat underlying it but for the reason that people consider it to be a legitimate statement of their rights and responsibilities. As Coffee puts it, "the criminal law is a system for public communication of values."

Market Interference. Is it really among our values that tickets to an inauguration should never be sold or that money is not an appropriate measure of the value to a person of attending a historic event? Of course not. Since this nation's founding, people have paid money to attend events that offer personal and historical value and, if the ads on Craigslist (an online marketplace) are any indication, will pay thousands on room and board to spend inauguration week in D.C.—if, that is, they can obtain tickets.

Congress can certainly ban ticket sales if it wishes, but in achieving such a narrow objective, it should avoid making our already unruly criminal law even worse.

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