
CORPORATIONS

MEASURING THE EXPLOSIVE GROWTH OF FEDERAL CRIME LEGISLATION

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EXECUTIVE SUMMARY

The Federalist Society commissioned a study to ascertain the current number of crimes in the United States Code, and to compare that figure against the number of federal criminal provisions in years past. The purpose of the study was to ascertain, as best as possible, the rate of growth in the enactment of federal crimes. We analyzed legislation enacted after 1996 and combined that data with the compilations of federal crimes assembled in several previous studies. The study reaches several significant conclusions, all confirming the conventional assumption that the federal criminalization of legal disputes is on the rise:

* There are over 4,000 offenses that carry criminal penalties in the United States Code. This is a record number, and reflects a one-third increase since 1980.

* Previous studies conducted in 1989, 1996 and 1998 all reported “explosive” growth in the number of offenses created by Congress in the years since 1970. The rate of enactment has continued unabated since 1970.

* A review of Congressional enactments from the past seven years reveals that a very substantial number addresses environmental issues.

* The report does not attempt to document changes in the facial mens rea requirements for federal crimes. However, as documented elsewhere, there is uncertainty as to what state of mind various standards of intent actually require. Unclear mens rea requirements, combined with the “explosive” growth in the number of federal crimes enacted since 1970, combine to create an environment of uncertainty and unpredictability over exactly what acts are criminal.

On December 28, 2003, the Associated Press syndicated an article by Jeff Donn entitled “Expanded fed role against common crime called ‘out of control.’”¹ The title and the article quoted this author. The article estimated the number of federal crimes to be about 3,500. Mr. Donn based that number on several sources, including this author. At the time, we were collecting data for the present Report. Based on the rate of increases in the number of federal crimes, there had to be at least 3,500 federal crimes. With the

completion of our research for this Report, it has become evident that there are many more than 3,500 federal crimes. For reasons discussed below, this author concludes that there are over 4,000 offenses carrying criminal penalties.

This Report cannot provide a complete count of federal crimes. That would require much more time and resources than were available. More importantly, even if those resources were available, rendering a complete and accurate account encounters serious obstacles. In the course of attempting to understand and explain these obstacles, it became clear that the inability to make an accurate count is the failure of federal law to identify clearly what is a crime as distinguished from a regulatory violation. The purpose of this Report regarding the number of crimes is two-fold: to determine 1) whether Congress continues to pass federal criminal laws at the same pace found by the ABA Report, as well as to offer some estimate of the total number of federal crimes; and 2) whether the statutes reflect that Congress more often than in the past dispenses with the mens rea requirement.

I. COUNTING FEDERAL CRIMES

Counting the number of federal crimes might seem to be a rather straightforward matter. Simply count all the statutes that are designated as crimes. Unlike state law, federal law has never had a common law of crimes. Locating purely common-law crimes requires consulting judicial opinions; even then determining what is and is not a common-law crime is problematic.² Given that federal courts lack common-law jurisdiction over crimes, all federal crimes must be statutory. *United States v. Hudson & Goodwin*, 11 U.S.(7 Cranch) 32 (1812). So it would seem that counting statutes should be an easy task.

A. Obstacles to a Complete Count

Unfortunately, getting an accurate count is not as simple as counting the number of criminal statutes. 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.”³ Not only are the number of statutes large, the statutes are scattered and complex.⁴ The situation presents a two-fold challenge: 1) determining what statutes count

as crimes and 2) differentiating whether, as to the different acts listed 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 subclass of misdemeanors denominated “petty offenses.” Later amendments re-introduced classifications elsewhere in Title 18.⁵ As discussed further below, however, the repeal and later amendments were tied to the creation of the United States Sentencing Commission. Its creation represented a new focus on sentencing. Unfortunately, as discussed below, the 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, which are more often regulatory or tort-like.⁶ Title 18 does contain many, but not all, of the federal crimes.⁷ Other crimes are distributed throughout the other forty-nine titles of the U.S. Code.⁸

The second problem is that, whether contained 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 involves a matter of judgment. Different people may make different judgments about the number of crimes contained in each statute, depending on the criteria used.⁹ In the absence of a definition of crime, it is incumbent on the compiler to explain the criteria employed to determine the count. Not intending to reinvent the criteria, we have looked to previous attempts to count the number of federal crimes.

The most comprehensive effort to count the number of federal crimes was conducted by the Office of Legal Policy (“OLP”) in the U.S. Department of Justice during the early 1980s, in connection with the effort to pass a comprehensive federal criminal code. A person who oversaw the effort, Mr. Ronald Gainer, later published an article entitled, “Report to the Attorney General on Federal Criminal Code Reform,” 1 *Crim. L. Forum* 99 (1989). That article cited the figure “approximately 3,000 federal crimes,” *id.* at 110, a number that has been much cited since. In a

later article, “Federal Criminal Code Reform: Past and Future,” 2 *Buff. Crim. L. Rev.* 46 (1998), Mr. Gainer cited the figure of “approximately 3,300 separate provisions that carry criminal sanctions for their violation.” *Id.* at 55, n.8. The latter number was based on a count done by the Buffalo Criminal Law Center, “employing somewhat different measures.” *Id.*

In 1998, a Task Force of the American Bar Association, on which this author served, issued a report, referred to above, entitled *The Federalization of Criminal Law* (Hereafter “ABA Report”). This report was concerned with the growth in federal criminal law and thus had to identify 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 was too “massive” for its “limited purpose.” *Id.* at 92. As previously noted, that would have meant reviewing 27,000 pages of statutes.¹⁰ At the same time, the ABA Report noted 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.” *Id.* at 94. As described below, the count in the ABA Report was less comprehensive than the OLP count, but it was more up-to-date in terms of the criteria employed.

Lacking even the limited time and resources available to the ABA Task Force, this Report could not conduct a comprehensive count on the scale of the OLP count, nor even update the OLP count since it was done in the early 1980s. This Report, therefore, begins with the section and subsection counts through 1996 used in the ABA Report as a base and, using the same methodology, updates that count for the years 1997 through 2003. Based on these findings, the Report provides an updated estimate of the OLP count. As discussed below, the ABA count is far from comprehensive. Even the OLP count, the most complete count for the period covered, is still something of an estimate; it employs certain judgments about how many crimes are contained in a particular statute. To demonstrate the problem, the Appendix counts the crimes contained in the statutes enacted since 1996. The count in the Appendix lays out the criteria upon which judgments were made.

B. Ways of Counting Federal Crimes

The period of time considered (7 years) by itself was too short to make the kind of dramatic statements in the ABA Report, which observed:

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.*¹¹

As reflected in a chart in the ABA Report,¹² the number of new criminal sections added per year varied significantly from one year to the next. If the numbers for the three years 1997 through 1999 are added to those in the ABA Report for 1990 through 1996, however, the total would be virtually the same for the last decade of the century as for the prior two decades.¹³

As explained below, following the ABA methodology greatly undercounts the actual number of federal crimes. Even though the data are therefore unavoidably incomplete, a year-by-year look at the numbers confirms one fact which is hardly surprising: Congress passed many more completely new criminal sections in all the three election years ('98, '00, and '02) than it did in any of the non-election years.

1) The Methodology Employed in Various Counts

Coverage: The count in the 1998 ABA Report runs through 1996. The present Report covers statutes enacted from 1997 through 2003. Like the ABA Report, this Report considers only statutes, not regulations. As the ABA Report noted, if regulations are included, that would have added, as of the end of 1996, possibly 10,000 more crimes.¹⁴ According to another estimate from the early 1990s, however, "there are over 300,000 federal regulations that may be enforced criminally."¹⁵

OLP did a complete hand count of federal crimes, which meant reading through the many thousands of pages in the U.S. Code. Without doing that, obtaining a complete count of the crimes in the Code – regardless of other obstacles – is practically impossible. The ABA Report, for its more limited 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.')." ¹⁶ For continuity purposes, our Report also did a Westlaw search using the same terms.

In order to understand the limits of the search terms employed by the ABA Report, however, the researcher for this Report, Ms. Ellerbe, ran a search employing more terms (fine! or imprison! or crim! or

illegal! or culp!). The search for just one year produced hundreds of documents. The search was too broad to be efficient; that is to say, if one were to do that extensive a search, it would be just as well and more accurate to do a complete hand-count. Nevertheless, a partial search of the documents from the one year produced a number of crimes not yielded by the search using only "fine" and "imprison" (including the variations on those words). It confirmed that the ABA had good reason not to attempt a broad computer search of all the titles in the U.S. Code.

The Unit of Measure: This is the hard part. The ABA Report focuses on statutory sections and (sometimes) subsections. So in its two charts, the ABA Report refers to 1,020 "statutory sections." That number excludes the 414 sections added in 1948 as part of the Title 18 recodification. The ABA Report acknowledges that it had thereby excluded some sections from existing law.¹⁷ Including the recodification would have distorted the picture¹⁸ presented by the charts which graph the growth of federal crimes from year to year (ABA Chart 1) and from decade to decade (ABA Chart 2). Thus, the statements in the ABA Report about the growth of crime from 1970 through 1996 chart the year-to-year numbers, and the decade-to-decade percentages are based on this number of 1,020.

The ABA Report also includes a grid in its Appendix C, which lists and describes 1,582 statute section numbers. That number is more than 50% higher than the number 1,020. It separately counts some subsections which are not broken out in the number 1,020. "The grid ... contains all the statute section numbers representing federal crime provisions on the Sentencing Commission's selective list at the time the list was obtained, complimented by the non-duplicative sections located through the computer search, with the exception of those statutes which have been repealed."¹⁹ Thus, this list includes 184 entries which represent a different subsection of a statute identified in a listing. Eliminating those 184 duplicates reduces the sections in Appendix C to 1,398.

Whether it is 1,020, 1,398, or 1,582, the numbers in the ABA Report are a long way from the 3,000 in the OLP count from the early 1980s. Yet, as previously noted, the ABA Report stated that the 3,000 number was "surely outdated" and that the present number was "unquestionably higher."²⁰ The ABA Report generally avoided making the more detailed analysis and debatable judgments of how many crimes were really contained in individual sections and subsections.

But it did not avoid the judgments altogether. Although in its charts it only considered statutory sections, the inclusion of 158 separate entries for additional subsections in Appendix C reflected the judgment that the subsections included discrete crimes.

In doing its count, OLP made more judgments about how many crimes were included within a single statute. As explained to this author by Mr. Ronald Gainer,²¹ who was responsible for the OLP count, 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. On the other hand, OLP counted a statute as having only one crime, even though it contained multiple acts, if those acts did not constitute common law crimes.

Our Count for 1997 through 2003: The Appendix to this Report lists all the federal statutes located using the same search terms as those used by the ABA Report. Our search identified 164 new and amended statutes. The ABA Report, however, does not include amended statutes.²² Eliminating the amendments leaves 79 new sections and subsections. That number reflects the same criteria for the number 1,582 in Appendix C of the ABA Report. Eliminating “duplicates” leaves 67, which number reflects the same criteria used for the number 1,020.

The number 67 breaks down by year as follows: 1 for ‘97; 18 for ‘98; 3 for ‘99; 18 for ‘00; 6 for ‘01; 18 for ‘02; 6 for ‘03. As mentioned above, the numbers for the election years significantly surpass the numbers for non-election years. Of course, this may be attributable to the two-year cycle in Congress and the time it takes to pass a bill. On the other hand, work done on legislation in a previous Congress need not be completely duplicated when proposals are re-introduced in a new Congress.

The total for the years 1997 through 1999 is 22 (1, 18, and 3). From Chart 2 of the ABA Report,²³ 12% of the 1,020 sections or roughly 122 sections were adopted during the period of 1990 through 1996. Adding the 122 and the 22 in order to complete the decade equals 144. By comparison, the decade of 1970-1979 produced 14% of the 1020 sections or approximately 143 and the decade of 1980-1989 produced 15% of the 1020 or approximately 153. *Thus, the decade of the 1990s, according to the search terms used, reflected that Congress was enacting new federal criminal legislation at virtually the same pace it had been doing for the previous two decades which,*

as the ABA Report noted, reflects “explosive growth”²⁴ since 1970.

2) Evaluation and Estimation of the Number of Federal Crimes

Conservatively speaking, the U.S. Code contains at least 3,500 offenses which carry criminal penalties. More realistically, the number exceeds 4,000. Any number put forward admittedly rests on a series of judgments. The estimate of over 4,000 rests on an evaluation of the information already covered about the counts conducted by OLP, the University of Buffalo, the ABA, and the Appendix to this Report.

None of the counts considers it sufficient simply to tally the number of sections in the U.S. Code which contain at least one criminal offense and to count each of these sections as only one crime. The ABA Report used such an approach to measure growth rates only. It recognized, however, that the actual number of crimes was much higher than the 1,020 sections.²⁵ Moreover, its Appendix C counted subsections separately for a number of sections in the Code.

When going beyond counting sections and/or subsections, the compiler necessarily makes judgments about the different acts listed in the statute. Unfortunately, the criteria employed in the OLP and the University of Buffalo studies were not published. In fact, the counts themselves were not published; these totals were referenced in more general articles about a possible federal criminal code.²⁶ Mr. Gainer, however, has graciously provided the author with information about the criteria used in the OLP count. Mr. Gainer cannot speak with the same authority about the University of Buffalo count.

The University of Buffalo counted, as of early 1998, approximately 3,300 criminal offenses in the U.S. Code. Although more than 3,000, that number was produced approximately 16 years after the OLP count. During that sixteen-year period, there was significant growth – regardless of how that is measured – in the number of federal crimes. Apparently, the criteria used by the University of Buffalo were somewhat more conservative than the OLP count. Still, six years have elapsed since the University of Buffalo count. During that period, the number of federal crimes, as measured by sections, has increased at least 6.6%.²⁷ Adding 6.6%²⁸ of 3,300 to that number for a total of 3,517 produced the conservative estimate of at least 3,500 crimes.

The better number to update, however, is the 3,000 count given by OLP in the early 1980s. *Since the OLP count in the early 1980s, the number of federal crimes has increased by over one-third.* That is to say, per the ABA Report, during a sixteen-year period from 1980 through 1996, Congress enacted more than 25% of all the sections in the U.S. Code. A figure that is 25% of a total represents a 33% or one-third increase over the number that represents 75% of the total.

It is not clear exactly when the OLP count was completed in the early 1980s. Nevertheless, the ABA Report states²⁹ and shows in a chart³⁰ that, as of the end of 1996, over one-quarter of all federal crimes enacted since the Civil War were passed in the sixteen-year period from 1980 - 1996. As shown above, the rate of new crimes during the entire decade of the 1990s was essentially the same as for the 1980s. So at whatever point the OLP count was completed in the early 1980s, (presumably prior to 1984), the number would have increased by one-third over roughly the next sixteen years. Thus, by 2000, the 33% increase of the 3,000 crimes would have produced a number of 4,000 crimes.

Since 2000, Congress has not stopped enacting new federal crimes. So the current number, using the OLP criteria, would be beyond 4,000. Just how much greater cannot be confidently estimated with the information available.

To further flesh out the elusive total for federal crimes, the researcher, Ms. Ellerbe, did her own count of crimes within the statutes. The criteria for that count, also stated in the Appendix, were the following:

- Each traditional or common-law crime (e.g., theft, burglary, fraud, etc.) is counted separately as one crime. Thus, multiple crimes may be listed in a single statute.
- Multiple forms of non-traditional crimes or 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 subsections, each section or subsection is counted as a separate crime.
- An explanation is provided for each section or subsection.
- A few of the sections or subsections

have a “?” indicating uncertainty as to number of crimes or the mental elements.

- The number of crimes listed for each section or subsection indicates the number added that year by a statute or amendment, not necessarily the total number of crimes in the section or subsection.

Of the 164 statutes identified in the search, 36 include no new crimes. That leaves 128 sections and subsections. According to the criteria used, these 128 provisions contain over 600 crimes. The actual count is put at 600. Three sections, however, have a “?” for the number of crimes because it seemed debatable whether two of the sections did or did not include any new crimes and just how to count the numerous potential crimes in a third section. Whatever the exact number over 600, the count in the Appendix produces approximately 4.69 crimes per section or subsection ($600+ \div 128$). This represents a much higher per section/subsection count than would be reflected in the OLP count. The point is not necessarily that everyone would agree with the criteria used in the Appendix, or that in using the criteria everyone would reach exactly the same count. Rather, *the count of 600+ crimes in the seven-year period from 1997 demonstrates the estimate of over 4,000 crimes today, which is a projection from the OLP study, is fairly conservative.*

This study, however, did little in the way of analyzing the number of offenses created in various discrete areas of substantive law. Earlier studies did not undertake that task, and consequently, there is no benchmark for comparison. But one fairly glaring trend did emerge which deserves mention. During the seven-year period of this Report from 1997, 24 of the 67 sections and subsections were created in the environmental area. That is over 35% of the total number of sections and subsections created by Congress during that period.³¹

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,³² 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. Every 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, therefore, greater leverage against defendants. Increasing the number and variety of charges tends to dissuade defendants from fighting the charges, because (s)he 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. Thus, in the Martha Stewart case the prosecutors developed a “novel,” indeed ludicrous, theory that Ms. Stewart committed fraud by proclaiming her innocence of the charges. Ultimately, the trial judge rightly threw out the fraud charge. Often, though, federal courts cooperate with prosecutors and happily make new law retroactively. What (then) Professor and (later federal 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.³³

Ultimately, the reason the ABA Report and this Report do a count 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 the last decade when it declared federal statutes unconstitutional, stating that it lacks a “plenary police power.”³⁴ The counts in this and the ABA Report indicate that those cases have not dissuaded Congress from continuing to pass criminal laws at the same pace.

II. JUDICIAL INTERPRETATION OF *MENS REA*

As part of this Report, the Appendix identified the *mens rea* or the lack thereof for each section or subsection. The purpose was to determine whether Congress was more prone today to enact crimes without a *mens rea* than it was a few decades ago. A quick scan of the initial listing of the sections and subsections, with the *mens rea* indicated, demonstrated that the great majority of sections or subsections appeared to have a *mens rea*.³⁵ *But simply counting the number of offenses that appear to have a mens rea does not adequately capture the situation, again due to judi-*

cial interpretation. Regardless of what a statute says, 1) a crime that appears not to have a mens rea may be interpreted by courts to have one; 2) a crime that appears to have a mens rea may have the mens rea diluted as applied in prosecution and as interpreted by courts. The problem of *mens rea* in federal criminal law is well summarized by a leading casebook, as follows:

Federal statutes, for example, provide for more than 100 types of *mens rea*. Even those terms most frequently used in federal legislation—“knowing” and “willful”—do not have one invariable meaning. Particularly with respect to judicial interpretation of the term “willful,” the precise requirements of these terms depend to some extent on the statutory context in which they are employed. Another layer of difficulty is attributable to the fact that Congress may impose one *mens rea* requirement upon certain elements of the offense and a different level of *mens rea*, or no *mens rea* at all, with respect to other elements.³⁶

Moreover, whether an offense has a mens rea may depend on the judgment about the number of crimes contained in a particular section or subsection. Consider for example 18 U.S.C. § 1960, prohibiting “unlicensed money transmitting businesses,” which was amended in the wake of 9/11. The statute has several subsections. The 2001 amendments add a new subsection under (b)(1), which expands the definition of “unlicensed money transmitting business.”³⁷ The added section has a knowledge requirement. But with regard to an existing section, (b)(1)(A), the amendments dropped a *mens rea*.³⁸ If 18 U.S.C. § 1960 is counted as one crime only or if only the newly added subsection is considered, the elimination of “intentionally” may escape notice.³⁹ Once again, what counts as a crime dictates conclusions about what Congress has done in passing a statute, i.e., whether it has or has not eliminated a *mens rea*.

The linkage between the *mens rea* issue and what qualifies as a crime goes to the heart of the moral foundation of criminal law. The current confusion on this point has been well described, in an important article by Columbia University Professor John Coffee, published in 1991:

My thesis is simple and can be reduced to four assertions. First, the dominant development in substantive federal criminal law

over the last decade has been the disappearance of any clearly definable line between civil and criminal law. Second, this blurring of the border between tort and crime predictably will result in injustice, and ultimately will weaken the efficacy of the criminal law as an instrument of social control. Third, to 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 it norms to be legitimate and deserving of compliance.* Far more than tort law, the criminal law is a system for public communication of values. As a result, the criminal law often and necessarily displays a deliberate disdain for the utility of the criminalized conduct to the defendant. Thus, while tort law seeks to balance private benefits and public costs, criminal law does not (or does so only by way of special affirmative defenses), possibly because balancing would undercut the moral rhetoric of the criminal law. Characteristically, tort law prices, while criminal law prohibits.⁴⁰

Professor Coffee despaired at the possibility of Congress or the Supreme Court drawing any meaningful distinction between tort and crime and hoped the Sentencing Commission would do so.⁴¹ The Sentencing Commission has not done so. Its sentencing guidelines for organizations have only made matters worse.⁴²

Consider offenses labeled “petty offenses.” They are not truly crimes. “Petty offenses” have for some time been understood in terms of length of possible sentence, namely six months’ imprisonment or less.⁴³ At an earlier stage, however, the Supreme Court maintained the common-law basis for the distinction between these offenses and true crimes. Generally, the

issue has arisen in the context of whether the Sixth Amendment Right to Jury Trial applies to “petty offenses.” In *Schick v. United States*, 195 U.S. 65 (1904), the Supreme Court recognized that crimes involve “moral delinquency.”

It will be noticed that the section characterizes the act prohibited as an offense, and subjects the party to a penalty of fifty dollars. So small a penalty for violating a revenue statute indicates only a petty offense. *It is not one necessarily involving any moral delinquency.* The violation may have been the result of ignorance or thoughtlessness, and must be classed with such illegal acts as acting as an auctioneer or peddler without a license, or making a deed without affixing the proper stamp. That by other sections of this statute more serious offenses are described and more grave punishments provided does not lift this one to the dignity of a crime.⁴⁴

This has implications for counting crimes. As the Court went on to say, the same statute might include both a crime and a petty offense:

Not infrequently a single statute in its several sections provides for offenses of different grades, subject to different punishments, and to prosecution in different ways. In some States in the same act are gathered all the various offenses against the person, ranging from simple assault to murder, and imposing punishments from a mere fine to death. This very statute furnishes an illustration. By one clause the knowingly selling of adulterated butter in any other than the prescribed form subjects the party convicted thereof to a fine of not more than one thousand dollars and imprisonment for not more than two years. An officer of customs violating certain provisions of the act is declared guilty of a misdemeanor and subject to a fine of not less than one thousand dollars nor more than five thousand dollars, and imprisonment for not less than six months nor more than three years. Obviously these violations of certain provisions of the statute must be classed among serious criminal offenses and can be prosecuted only by indictment, while the violations of the statute in the cases before us were prosecuted by information. The

truth is, the nature of the offense and the amount of punishment prescribed rather than its place in the statutes determine *whether it is to be classed among serious or petty offenses, whether among crimes or misdemeanors*. Clearly both indicate that this particular violation of the statute is only a petty offense.⁴⁵

The italicized part of this last quote seems to equate petty offenses and misdemeanors. A petty offense is a misdemeanor, but misdemeanors with potential penalties of more than six months are not today considered petty offenses. Whereas the Court in *Schick* spoke of both the nature of the offense and the length of the punishment, the trend for some time in criminal law has been to consider only the length of the possible punishment. Unfortunately, potential sentences continue to rise without much, if any, consideration of moral culpability. Without that distinction, physical and financial harms – which are the focus of tort law – are too easily labeled “crimes.” Ronald Gainer, who held several senior positions in the Justice Department, puts the situation this way:

This amalgamation of the criminal law and the non-criminal law has contributed to the development of the popular misconception that if a person has violated “The Law,” he deserves to be imprisoned and that any lesser consequence demonstrates the legal system is unjust.⁴⁶

CONCLUSION

As is repeated throughout this Report, one’s opinion about what counts as a federal crime drives the count of federal crimes. Traditionally, crime requires a *mens rea*.⁴⁷ Common law crimes are presumed to have a *mens rea*.⁴⁸ Under the common law, an offense without a *mens rea* would not be labeled a “crime.” When crimes and regulatory offenses are combined and confused as in federal law, however, the issue changes to whether the crime includes a *mens rea*. 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 unfortunately does not provide a clear definition of crime that would allow distinctions among separate criminal acts. That makes any count arguable. At the very least, however, this Report can justifiably 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 Jus-

tice, the United States Code today includes over 4,000 offenses which carry a criminal penalty

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Footnotes

¹ Jeff Donn, *Expanded Fed Role against Common Crime Called ‘Out of Control,’* ASSOCIATED PRESS, December 28, 2003).

² See WAYNE R. LAFAVE, *SUBSTANTIVE CRIMINAL LAW*. (West Group, 2003) Vol. 1, Sec. 2.1(e) at 109-116.

³ *The Federalization of Crime* (1998) (Hereafter “ABA Report”) at 9.

⁴ As noted elsewhere in the Report (pp. 9-10), an 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. (For example, the language of 18 U.S.C. § 2113 encompasses bank robbery, extortion, theft, assaults, killing hostages, and storing or selling anything of value knowing it to have been taken from a bank, etc.) Depending on how all this subdivisible and dispersed law is counted, the true number of federal crimes multiplies. *Id.* at 93.

⁵ 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).

⁶ See, eg, 21 U.S.C. §331, which criminalizes the misbranding of food in interstate commerce; or 42 U.S.C. 300j-23, which criminalizes the sale, in interstate commerce, of any drinking water cooler that is not lead free.

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The federal statutory law today is set forth in the 50 titles of the United States Code. Those 50 titles encompass roughly 27,000 pages of printed text. Within those 27,000 pages, there appear approximately 3,300 separate provisions that carry criminal sanctions for their violation. Over 1,200 of those provisions are found jumbled together in Title 18, euphemistically referred to as the ‘Federal Criminal Code,’ and the remainder are found scattered throughout the other 49 titles. The judicial interpretations of those provisions, which are necessary for their understanding, are found within the printed volumes reporting the opinions issued by judges in federal cases – volumes which now total over 2,800 and which contain approximately 4,000,000 printed pages.

Ronald L. Gainer, *Federal Criminal Code Reform: Past and Future*, 2 BUFF. CRIM. L. REV. 46; at 53.

⁸ There are 50 titles, but two titles, 6 and 34, currently contain no un-repealed statutes.

⁹ For example, 20 U.S.C. §9573 criminalizes knowing disclosure, publication and use of confidential student data. This could arguably be counted as one offense, or as many as three offenses

¹⁰ See n. 5, *supra*.

¹¹ *ABA Report* at 7 (emphasis in the original) and see note 9 (“more than a quarter of the federal criminal provisions enacted since the Civil War have been enacted within the sixteen year period since 1980”).

¹² *Id.* at 8, Chart 1.

¹³ See *Id.* at 9, Chart 2.

¹⁴ See *ABA Report* at 10.

¹⁵ John C. Coffee, Jr., *Does ‘Unlawful’ Mean ‘Criminal’?: Reflections on the Disappearing Tort/Crime Distinction in American Law*. 71 B.U.L. REV. 193 (1991) at 216. (Hereafter *Does ‘Unlawful’ Mean ‘Criminal’?*)

¹⁶ *ABA Report*, App. C at 91, n.1.

¹⁷ *Id.* at 8, n. 10.

¹⁸ *Id.*

¹⁹ *Id.* at 91-92.

²⁰ *Id.* at 94.

²¹ Telephone conversation between the author and Mr. Gainer on December 29, 2003.

²² *ABA Report* at 8, n. 10.

²³ *Id.* at 9.

²⁴ *Id.* at 7.

²⁵ *Id.* at 94, Appendix C.

²⁶ Ronald L. Gainer, *Report to the Attorney General on Federal Criminal Code Reform*, 1 CRIMINAL LAW FORUM 99, 1 (1989); Ronald L. Gainer, *Federal Criminal Code Reform: Past and Future*, 2 BUFF. CRIM. L. REV. 46 (1998).

²⁷ In that period of time, our count shows an increase of 67 crimes calculated on the same criteria used by the ABA to establish that there were 1,020 sections with criminal punishments as of the end of 1996. Our count, using the same criteria, also shows that only one crime was added in 1997. An increase of 67 crimes to an existing count of 1,020 represents a 6.6% increase.

²⁸ Statisticians usually use a confidence interval, which means that the true value may be higher or lower than 6.6%.

²⁹ *ABA Report* at 7.

³⁰ *Id.* at 9, Chart 2.

³¹ According to methodology of the Appendix, those 24 sections and subsections contained 84 crimes, which is 14% of the total of 600 crimes.

³² 18 U.S.C. §§ 1341 (Mail Fraud) and 1343 (Wire Fraud).

³³ See JOHN NOONAN, BRIBES (1984) at 585-86 and 620.

³⁴ *United States v. Lopez*, 514 U.S. 549, 566 (1995); quoted also in *United States v. Morrison*, 529 U.S. 598, 618 (2000).

³⁵ The information from this initial chart has been included in the Appendix.

³⁶ JULIE R. O’SULLIVAN, FEDERAL WHITE COLLAR CRIME (St. Paul; West Group, 2001) at 53 citing William S. Laufer, *Culpability and Sentencing of Corporations*, 71 NEB. L. REV. 1049, 1064-65 (1994); and noting See, e.g., *Ratzlaf v. United States*, 510 U.S. 135, 141, 114 S.Ct. 655, 659, 126 L.Ed.2d 615 (1994) (“‘Willful,’ this Court has recognized, is a ‘word of many meanings,’ and ‘its construction [is] often * * * influenced by its context.’”) (quoting *Spies v. United States*, 317 U.S. 492, 497, 63 S.Ct. 364, 87 L.Ed.418 (1943)).

³⁷ (C) otherwise involves the transportation or transmission of funds that are known to the defendant to have been derived from a criminal offense or are intended to be used to promote or support unlawful activity; (2) the term “money transmitting” includes transferring funds on behalf of the . . .

³⁸ Previously, (b)(1)(A) read “is intentionally operated . . .”; it now reads “is operated.”

³⁹ Also, consider the following comments by then General Counsel of the Treasury, Mr. Aufhauser, regarding his deliberate elimination of the *mens rea* in the regulations applicable to financial institutions:

Let me first tell you about that Executive Order, because it’s important you get the perspective of where the PATRIOT Act falls in. It is not our only tool. It would be a fool’s errand to think it was.

The Executive Order that we wrote is global in scope. It specifically targets financiers of terror. It uses an operative phrase, which is an invention of my own, which is it reaches not only people knowingly associated with it but anyone otherwise associated with the act of transmission. That was written deliberately so that there was no mens rea, that there was no scienter, that it was strict liability.

What we wanted to do is try to create a *code of conduct* here and abroad so that you are strictly liable for what happens in your institution. We *understand it was unprecedented*. We understand it’s bold. But it’s worked; I can tell you it’s worked. I know how it’s worked.

I know that when we suspected that transactions have gone through institutions abroad or through intermediaries abroad, like lawyers, we’ve gone to them, sometimes directly, sometimes through intermediaries, and sometimes through their host governments. *We’ve told them we don’t believe you know this. We believe you’re too casual about things. We don’t think your financial controls are good, so we’re not going to do anything. We want you to be our partner. So share your books and records with us.*

We didn't have to complete the rest of that paragraph, because they know the Order. If they decline to give us the books and records and decline to be our partners, we would name not only their institution under the Executive Order that is freezing the assets and prohibiting all trade with that institution, but we would freeze the assets and prohibit trade with the fiduciaries in charge of those institutions.

Now in this respect the Executive Order is a powerful tool. *It's better in form of threat than actual execution. I can't tell you how we'd do in a court of law if somebody challenged it.* But anyway it's an extraordinary power under national security measures, and the President enjoys an awful lot of leeway with such circumstances.

Excerpted from remarks by General Counsel David D. Aufhauser at the Federalist Society's National Lawyers Convention, Nov. 15, 2002 (unpublished transcript, on file with author) (emphasis added).

⁴⁰ "Does 'Unlawful' Mean 'Criminal'?", *supra* n. 12 at 193-194. (footnotes deleted; emphasis added)

⁴¹ *See Id.* at 194.

⁴² *See generally*, John S. Baker, Jr., *Reforming Corporations through Threats of Federal Prosecution*, 89 CORNELL L. REV. 310 (2004).

⁴³ *See Duncan v. Louisiana*, 391 U.S. 145, 159 (1968); *Baldwin v. New York*, 399 U.S. 66 (1970) (both saying that the 6th Amendment right to jury trial does not apply to "petty offenses," i.e., those punishable by imprisonment for 6 months or less).

⁴⁴ 195 U.S. at 67-68. (emphasis added).

⁴⁵ *Id.* at 68. (emphasis added).

⁴⁶ Ronald L. Gainer, *Report to the Attorney General on Federal Criminal Code Reform*, 1 CRIMINAL LAW FORUM 99, 125 n. 37 (1989).

⁴⁷ *See Morissette v. United States*, 342 U.S. 246 (1952).

⁴⁸ *Id.*