That paradigm changes, however, as the federal government expands the scope of criminal law. There *is* an optimal level, for example, of economic activity with collateral adverse effects. When discussing issues like environmental pollution, the law expressly recognizes that some production of waste products is necessarily the result of the manufacturing process. So to, we recognize that the provision of medical services is not an exact science – and thus, that some errors in its provision will occur. Thus, we do *not* try to drive the level of pollution or medical error 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 wrong in excess. As DeLong, Lynch and Turner demonstrate, when the criminal law is applied to that category of activity its effect is likely to overdeter conduct that is otherwise socially useful – to society's general detriment.

The final piece of the over-criminalization puzzle is the federalization of criminal law. As Healy discusses in his own contribution to the volume, even those crimes (like gun violence) that ought to be crimes are not, necessarily, appropriate for federal prosecution and are best left to the States. In the late 1990s a blue-ribbon ABA Commission cataloged the over-federalization of criminal law. Its principal conclusion was that much of the growth of federal crimes was as a result of federal law taking on too many responsibilities that were best left to state law enforcement agencies. In addition to the gun violence crimes identified by Healy, a particularly good example of that trend is the Federal Carjacking statute passed in the early 1990s when concern over carjacking crimes became a brief 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. As might be expected, given the prevalence of effective State law enforcement tools, the Federal law has been mostly ignored, with fewer than 50 federal prosecutions every year, compared to several tens of thousands of State prosecutions annually. Given how little role the Federal law plays, one is entitled to ask (as Healy does) whether we need the law at all.

The sad truth is that nobody knows exactly how many federal criminal statutes there are – for even the Congressional Research Service (Congress' legal research arm) professes to be unable to get an exact count. All we have is an estimate.

Worse yet, neither the public nor the academy seems to have any awareness of this disturbing trend or its unintended consequences. The expansion of criminal law beyond its traditional bounds is truly an unexamined phenomenon. Any thoughtful conservative (whether a natural law traditionalist who believes that criminal law should be confined to acts involving morally wrongful conduct, or a utilitarian libertarian who believes that criminal laws should be limited to those whose costs outweigh its benefits) should be deeply troubled by the trend of applying criminal sanctions to seemingly civil wrongs.

Healy's new volume is a welcome antidote to this lack of understanding, designed to educate the public and heighten their awareness. It is a well-written, broad survey of the problem and it should be on the bookshelf of any reader concerned with the use, and misuse, of the legal system.

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Bringing Justice to the People

The Story of the Freedom-Based Public Interest Law Movement

Edited by Lee Edwards

*Reviewed by Michael Uhlmann**

To members of the mainstream media and, alas, to much of the public, the phrase "public interest law" conjures images of the ACLU fighting to remove the Ten Commandments from courthouse walls, of Ralph Nader inveighing against assorted (and seemingly endless) corporate malefactors of great wealth, or of the Sierra Club standing athwart economic development in order to protect a hitherto unidentified endangered species. Public interest law, that is to say, is widely seen as a stepchild of the political left.

There is much truth to that designation, but it is not the whole truth. The rest of the story is told in *Bringing Justice to the People*, a collection of essays by and about prominent practitioners of conservative public interest law. Herein you will learn about the birth and growth of conservative public interest law. You will learn as well about some of its signal victories — for example, securing school choice against the deep-pockets and power of the education establishment; protecting religious liberty against the effort to establish atheism as the default religion of the American regime; protecting small entrepreneurs and property owners against regulatory excess; and in general trying to secure some enduring sense of limited government and individual initiative in an era when so much legal energy pushes in the opposite direction.

As with any anthology, there is plenty to pick and choose from according to one's particular interests and preferences. And even for those who may be generally familiar with the story, the book provides riveting detail about the

virtues and promise of the freedom-based public interest law movement. It is no slight to the other contributors to note some particularly noteworthy chapters: the introduction ("The First Thirty Years") by editor Lee Edwards, who provides a splendid short history of the subject; "Life, Liberty, and Property Rights," by Ronald A. Zumbrun, the founding president of the very first conservative public interest law organization;"Equality Under the Law," by Roger Clegg, who has patiently labored for many years to prevent the imposition of racial quotas; "Following the Money," by Mark R. Levin, who traces the role of liberal foundations in creating public interest law to begin with; and "The Revival of Federalism," by John C. Eastman, who shows how conservative public interest lawyers have helped to secure a regime of limited government. Other chapters focus more specifically on particular aspects defending property rights, free speech, religious freedom, and the rights of workers. All in all, the book should dispel the myth that the left, and the left alone, has some sort of monopoly right to define what the public interest is.

No anthology, of course, can do full justice to what is after all a rich and complicated story. *Bringing Justice to the People* deals only in passing with the deeper background of public interest law. That would require a separate book altogether, one that probed beneath the surface of the 1960's counterculture. One of these days, an earnest historian will gain access to the files of the Ford Foundation, which invented public interest law pretty much *sua sponte* and *ex nihilo* four decades ago. McGeorge Bundy, the Foundation's president (fresh from his stint as John F. Kennedy's National Security advisor) invented the concept of so-called "advocacy philanthropy." Foundations, so the argument went, could no longer be mere passive observers of the social and political scene. Like government itself, they were (or should be) marked with a sense of public mission. Henceforth, they would (and should) become active proponents of social and economic change.

Inspired by this new philosophy, Ford and other large philanthropies set about to execute a broad, activist agenda, one that bore a striking resemblance to the most liberal wing of the Democratic Party. And a large part of that agenda came to reside in the public interest law movement, which almost from day one saw itself as the inspired angel of social reform and the courts as its preferred field of battle. Whether the chicken or the egg came first is hard to say, but this much seems clear: Somewhere between *Brown v. Board* (1954) and, say, *Flast v. Cohen* (1968), the federal judiciary appears to have drunk deeply from the same flagon as McGeorge Bundy and his philanthropic allies. Standing rules were deliberately relaxed to encourage ideological challenges against government policy on both the state and federal level.

Everyone has his or her favorite horror story about the expansion of federal judicial power in the 1960's and 1970's, but it's hard to beat *U.S. v. SCRAP* (1973), where the Supreme Court allowed five environmentally concerned law students to challenge an ICC rate order. In an opinion that makes the commerce power rationale of *Wickard v. Filburn* look like an amateur warm-up act, the Court found that the plaintiffs were likely to suffer injury if the rate increase went through. And why was that? Follow the bouncing ball carefully: Increased rates would result in fewer goods being shipped, a disproportionate percentage of which would be recycled goods. With fewer goods reaching their happy hunting ground in recycling plants around the nation, the plaintiff students would suffer injury by encountering more litter on their nature walks in the greater District of Columbia area.

Thirty-two years later, such examples seem ludicrous, but they serve to underscore an important point that is too often ignored: The expansion of judicial power in the 'Sixties and 'Seventies – and the radical social change that followed in its wake — went hand-in-hand with the rise of the public interest law movement. Each served the other's institutional and ideological interests, and would be still be doing so today but for Ronald Reagan. That story is told in *Bringing Justice to the People* as well, and it begins long before his election as President.

Lee Edwards has rendered a public service by bringing these diverse materials together in one place. Veterans of the early struggles will enjoy revisiting some of the heroic tales of success. Those who may be unfamiliar with the variety and energy of the contemporary conservative public interest movement will find the book instructive and inspiring.

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