Go Directly to Jail:

The Criminalization of Almost Everything

Edited by Gene Healy

*Reviewed by Paul Rosenzweig**

"An unexamined life," the Greek philosopher Socrates said, "is not worth living." And surely this is equally true for legal doctrines – the unexamined law is probably not worth having. At a minimum, since law is the realm of reason and analysis, the unexamined legal doctrine is at least worth . . . .well, examining.

For too long, the growth in the use of criminal law as a means of controlling social and economic behavior has been one of the dark corners of the legal world, unilluminated and unexplored by the general public. While nobody (save for a few law professors) was looking, for example, the Federal criminal code exploded, growing from fewer than 500 statutes at the start of the 20th century to more than 4000 today. State criminal codes are so vast that no one even hazards a guess as to their scope. Few of the more recent additions have anything to do with "criminal law" as the public understands it – prohibitions against traditional offenses like murder, rape, and robbery. Rather, the "new crimes" are a means of enforcing regulatory norms that the average American would be surprised to learn are also crimes. Who would ever think, to take but one example, that importing honey bees is a federal felony? Yet it is – and the trends that have produced this explosion of criminal prohibitions have gone largely unexamined.

Until now that is. Gene Healy's new collection of essays, "Go Directly to Jail: The Criminalization of Almost Everything" is a welcome change that aims to fill the gap in the public understanding. Healy and his co-contributors offer a chilling description of the current state of affairs – one that ought to awaken the concern of anyone who thinks that law should be morally defensible and rationally structured.

Erik Luna, of the University of Utah, begins the book by explaining the political impulses that drive the growth in the use of criminal law as a means of controlling social behavior – impulses that lead to a "crime of the month" mentality. When a legislator is faced with a choice on how to draw a new criminal statute (either narrowly and potentially underinclusive or broadly and potentially overinclusive), the politics of the situation naturally cause the legislator to be overinclusive. Few, if any, groups regularly lobby legislators regarding criminal law and those that do more commonly seek harsher penalties and more criminal laws, rather than less.

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 transaction costs of resort to the legal system. They induce guilty pleas and produce high conviction rates, minimizing the necessity of using the cumbersome jury system and producing outcomes popular with the public.

The final piece of the equation is legislative reliance on the existence of prosecutorial discretion. Broader and harsher statutes may produce bad outcomes that the public dislikes, but (as Luna explains) 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.

James DeLong and Timothy Lynch then offer a cautionary series of tales describing the application of the new criminal paradigm to a single area of law – environmental regulation. As they outline in depressing detail, the unchecked growth of criminal environmental provisions has had a palpable effect on business. The principal manifestation of this effect has been a change in the rules for criminal liability, creating liability without fault and a new criminal class.

When criminal law was focused on punishing "traditional" crimes whose wrongfulness was known to all, the principle that "ignorance of the law is no excuse" had meaning. For there is no reason to suppose that anyone is reasonably ignorant of the prohibition against murder or robbery. But when the criminal prohibition is now contained in a plethora of environmental regulations, (or as Grace-Marie Turner details in her contribution to this volume, confusing Medicare reimbursement rules) the presumption of knowledge is invidious. It creates, in effect, "absolute liability" where those who act in the context of an economic enterprise act at their own peril.

And that's a harmful effect. The entire premise of criminal deterrence is that for traditional crimes there is no acceptable level of activity. We do not recognize a suitable societal level of murder, for example, or rape or robbery or any of the other common law crimes. Thus, there is no possibility of over-deterring these forms of conduct – we *want* 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. 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 them in all their forms.