

DEVELOPING CONSENSUS SOLUTIONS TO  
OVERCRIMINALIZATION PROBLEMS: THE WAY AHEAD

*Jeffrey S. Parker\**

The foregoing symposium prints papers that were presented initially at the conference on *Overcriminalization 2.0: Developing Consensus Solutions* held in Washington, D.C., on October 21, 2010. I thank all of the participants in the conference, and the sponsoring organizations,<sup>1</sup> for making the conference successful. In particular, I would like to give special thanks to Professor Ellen Podgor of Stetson University, with whom I collaborated in assembling the speakers and program, to my faculty colleagues Frank Buckley and Henry Butler, successive directors of the Law and Economics Center at George Mason University School of Law, whose encouragement and support brought the project forward in terms of my participation, and to the editors and members of the *Journal of Law, Economics, and Policy*, which actually put on the conference and is publishing this symposium.

The basic themes of the conference were two-fold, both indicated in the conference title. First, as indicated by borrowing the cyber-term “2.0,” the conference sought to advance the ongoing discussion of overcriminalization problems. Second, as indicated in the subtitle, and in the wide array of viewpoints invited to participate, the conference sought to focus on developing solutions to those problems that could achieve broad consensus support. Both themes are amply reflected in the papers published in this symposium, and in the other contributions made during the conference sessions.<sup>2</sup>

Professor Podgor’s *Foreword*<sup>3</sup> ably surveys the contents of the symposium papers and conference proceedings. In this concluding essay, my aim is to develop some of those ideas toward the longer-term objective of finding solutions that can achieve both consensus support and substantial potential for ameliorating the problems of overcriminalization. Of course, I can-

---

\* Professor of Law, George Mason University School of Law. The author would like to acknowledge the research assistance of Meredith Schramm-Strosser (in the lead on overcriminalization), Ashley Finnegan, and Krista Goelz. Research support was provided by the Law and Economics Center at George Mason University School of Law.

<sup>1</sup> The sponsoring organizations included the National Association of Criminal Defense Lawyers, the Foundation for Criminal Justice, the *Journal of Law, Economics & Policy*, and the Law and Economics Center at George Mason University School of Law.

<sup>2</sup> While the principal papers and some comments are published in this issue, the full proceedings from the conference, and interviews with some of the participants, are available in video through the *Journal*’s web site, at [www.jlep.net/home/?page\\_id=315](http://www.jlep.net/home/?page_id=315), or at [www.vimeo.com/masonlec/videos](http://www.vimeo.com/masonlec/videos).

<sup>3</sup> See Ellen S. Podgor, *Foreword*, 7 J.L. ECON. & POL’Y 565 (2011).

not do justice to all of the ideas expressed during the conference, and, by necessity, must be selective. Nor are any of the other participants responsible for my comments here, nor my errors or omissions in interpreting their ideas, which are entirely my own.

This essay develops three main themes. The first is consensus. As several conference participants pointed out, concerns about “overcriminalization”—the misuse or overuse of the criminal sanction—are neither new nor unique in America. Moreover, the breadth of that concern, across ideological or methodological divisions, is not new either. However, the current critique reflects both a remarkable degree of consensus, and the potential for even greater consensus-building as we move forward. The vicissitudes of our political system are such that one can never be sure how much consensus is enough. Therefore, more is generally better. This will not be easy, as even the existing members of the coalition for reform are people of fundamentally differing views. Nevertheless, at some point successful consensus-building is likely to overcome political frictions.

While consensus-building is necessary, it may not be sufficient in itself to achieve successful reform. We have had some previous experience with broadly bipartisan law reforms gone awry, most notably the federal sentencing reform of the mid-1980s, which failed to account for the institutional incentives of the several actors that make up the criminal justice system. Therefore, the second theme developed here is the need to take an institutional perspective on reform initiatives. This perspective is applied to three important features of the current system: (1) broad prosecutorial discretion; (2) dilute or non-existent standards of *mens rea*, and otherwise vague standards of liability; and (3) the interrelationships among substantive, procedural, and evidentiary law. Even heroic efforts at law reform can end as empty words on paper—or worse, as producing untoward consequences that no one intended—unless reformers attend to the actual operation of the system in practice.

As is readily apparent from the first two themes, efforts at addressing overcriminalization problems can be fraught with pitfalls and perils. Accordingly, my third theme is to encourage patience, persistence, and modesty in reform efforts. As aptly phrased during the conference in the remarks of Ronald Gainer, himself a long-time veteran of the process,<sup>4</sup> “reform is no sport for the short-winded,”<sup>5</sup> and could backfire, so it may be that “things are bad enough as they are.”<sup>6</sup> The past history of reform efforts, especially at the federal level—both successful and unsuccessful—can be daunting to

---

<sup>4</sup> See Ronald L. Gainer, *Federal Criminal Code Reform: Past and Future*, 2 *BUFF. CRIM. L. REV.* 45 (1998).

<sup>5</sup> See Ronald L. Gainer, *Remarks on the Introduction to Criminal Law Reform*, 7 *J.L. ECON. & POL'Y* 587, 596 (2011).

<sup>6</sup> *Id.* at 590.

the most committed reformer. However, it is doubtful that there is any other responsible choice but to persevere.

Even advocates of reform may differ over how bad the problem has become, but there is no doubt that the level of criminalization in the United States today is in completely uncharted territory. Measured by per capita incarceration rates alone—which is an incomplete indicator of the social consequences of criminalization—the United States is now five *times* higher than the world average, five to ten times higher than other Western industrialized nations with comparable crime rates,<sup>7</sup> and about four to five times higher than its own historical average.<sup>8</sup> My opinion is that, among other consequences, the overuse of the criminal sanction, especially at the federal level, is a significant causative factor in the sluggishness of the U.S. economy over the past several business cycles, and places Americans at a substantial disadvantage in the competitive global economy. But even if those assessments were wrong, it still would be an embarrassment to American values that the Land of the Free also imprisons the largest incarcerated population on earth—both in per capital terms and (with the possible exception of China) in absolute size.<sup>9</sup> How can such a state of affairs be justified? Unless and until we obtain a compelling answer to that question, the impetus to reform will persist.

---

<sup>7</sup> The comparative incarceration rates are based on Walmsley, *World Prison Population List-8th Edition*, KING'S COLLEGE LONDON: INTERNATIONAL CENTRE FOR PRISON STUDIES, www.prisonstudies.org (data as of 2008). The rates (per 100,000 population) are 756 for the United States, versus approximately 150 for the world average, and the following in individual countries: U.K.-152 (England and Wales), Canada-116, Australia-129, New Zealand-185, Belgium-93, Denmark-63, Iceland-44, Sweden-74, Switzerland-76. According to U.N. comparative data, all of the foreign countries mentioned have roughly equivalent or higher rates of crime than the United States. See DIJK, VAN KESTEREN, & SMIT, *CRIMINAL VICTIMIZATION IN INTERNATIONAL PERSPECTIVE*, Ch. 2, Tables 3, 5 (2007).

<sup>8</sup> The historical trends through 2002 are analyzed in U.S. SENTENCING COMM'N, *FIFTEEN YEARS OF GUIDELINES SENTENCING* 39, Figure 2.1 (2004), which comments that “both federal and national imprisonment rates . . . remained fairly steady for fifty years before climbing to over four times their historic levels by 2002.” *Id.* at 40. Federal imprisonment rates grew faster than state rates, with the result that the historical federal share of national prison population had roughly doubled by 2002. See U.S. DEPT. OF JUSTICE, BUREAU OF JUSTICE STATISTICS, *SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS-2002*, Table 6.23. However, imprisoned populations are only part of the picture: by 2008, in addition to a U.S. national prison population of 2.3 million, there were another 5 million people then serving a sentence of “criminal justice supervision,” i.e., on probation, parole, or supervised release. U.S. DEPT. OF JUSTICE, BUREAU OF JUSTICE STATISTICS, *CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2009*, at 1. The combined total of some 7.2 million people (excluding juveniles) currently deprived of their liberty by a criminal sentence of some type represents “about 3.1% of adults in the U.S. resident population.” *Id.* at 2.

<sup>9</sup> As noted by Walmsley, *supra* note 7, China holds only 1.6 million prisoners purportedly for “crime,” but another 800,000 in “administrative detention.” Only if the latter are included does the absolute size of China’s prison population—2.4 million—barely exceed the U.S. total of 2.3 million imprisoned for crime. Of course, whether or not the administrative detentions are counted, the per capita rates are not even close, as China’s total population is four times higher than the United States.

## I. BUILDING CONSENSUS

Over the past several years, a remarkable consensus has coalesced around the recognition of the overcriminalization problem. Exploring the history and potential of that consensus was one of the major themes of our conference. Norman Reimer's opening remarks stressed the emergent bipartisan consensus among members of Congress, which is all the more remarkable within an otherwise highly contentious political environment.<sup>10</sup> Roger Fairfax's paper examined the relationship between the overcriminalization critique and a separate "smart on crime" movement advocating alternatives to traditional criminal justice practices.<sup>11</sup> Darryl Brown's paper examined the relationship between regulation and criminalization, and potential trade-offs between the two.<sup>12</sup>

Of course, the scope of the overcriminalization critique extends beyond the participants and topics involved in this particular conference. A number of other symposia and conferences over the past several years have examined various aspects of the problem.<sup>13</sup> There also has been a notable recent outpouring of monographs and edited books on the subject, also from a variety of perspectives.<sup>14</sup> The overcriminalization critique has brought together groups that do not usually work in tandem, which has captured the attention of the general media.<sup>15</sup>

---

<sup>10</sup> See Norman L. Reimer, *Opening Remarks*, 7 J.L. ECON. & POL'Y 573 (2011).

<sup>11</sup> See Roger A. Fairfax, Jr., *From "Overcriminalization" to "Smart on Crime": American Criminal Justice Reform—Legacy and Prospects*, 7 J.L. ECON. & POL'Y 597 (2011).

<sup>12</sup> See Darryl K. Brown, *Criminal Law's Unfortunate Triumph Over Administrative Law*, 7 J.L. ECON. & POL'Y 657 (2011).

<sup>13</sup> See, e.g., *Overcriminalization: The Politics of Crime*, 54 AM. UNIV. L. REV. 541 (2005) [hereinafter "American University Symposium"]; *Symposium: Corporate Criminality: Legal, Ethical, and Managerial Implications*, 44 AM. CRIM. L. REV. 1269 (2007) [hereinafter "Georgetown Symposium"]; *Symposium: The Criminal Law and Policing Corporate Conduct*, 1 OHIO ST. J. CRIM. L. 373 (2004); *Symposium: Prosecutorial Discretion*, 6 OHIO ST. J. CRIM. L. 367 (2009); *Prosecutorial Power: A Transnational Symposium*, 67 WASH. & LEE L. REV. 1283 (2010).

<sup>14</sup> See, e.g., GENE HEALEY, *GO DIRECTLY TO JAIL: THE CRIMINALIZATION OF ALMOST EVERYTHING* (2004); JOHN HASNAS, *TRAPPED: WHEN ACTING ETHICALLY IS AGAINST THE LAW* (2006); ANGELA J. DAVIS, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR* (2007); DOUGLAS N. HUSAK, *OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW* (2008); RONALD T. LIBBY, *THE CRIMINALIZATION OF MEDICINE: AMERICA'S WAR ON DOCTORS* (2008); TIMOTHY LYNCH, *IN THE NAME OF JUSTICE* (2009); HARVEY SILVERGLATE, *THREE FELONIES A DAY* (2009); PAUL ROSENZWEIG & BRIAN W. WALSH, *ONE NATION UNDER ARREST: HOW CRAZY LAWS, ROGUE PROSECUTORS, AND ACTIVIST JUDGES THREATEN YOUR LIBERTY* (2010).

<sup>15</sup> See Adam Liptak, *Right and Left Join Forces on Criminal Justice*, N.Y. TIMES, Nov. 23, 2009, at A1. Liptak's article features the work of the Heritage Foundation's overcriminalization project, under the leadership of former Attorney General Edwin Meese III and Brian Walsh. A principal partner in that work with Heritage is the National Association of Criminal Defense Lawyers (one of this conference's sponsors), and other participating organizations have included the American Civil Liberties Union, Families Against Mandatory Minimums, the Prison Fellowship, the Constitution Project, Washington

As emphasized by Professor Fairfax's scholarly review of the history of criminal justice reform efforts, crossing ideological, political, or "interest group" lines to seek reform is not a new phenomenon, but it also is not easy to accomplish, and requires everyone to reach out to groups and interests that may be unfamiliar. He illustrates his points by a careful examination of the "smart on crime" movement, which is conventionally unconnected with the overcriminalization critique, but is shown to stem from many of the same concerns. The broader point I take from this aspect of his work is that the overcriminalization critique may have many more allies than it yet knows, and that consensus-building is an unfinished task.

Professor Brown's paper examines the other side of the subject, which is that consensus-building can be hindered by disagreements on other issues, such as the extent of regulation or the proper role of state versus federal governments. Judging from reactions given at the conference, while such pitfalls do exist, they need not impair the effort: disagreements over such things as federal-state division of powers do not logically (or legally) impinge on the scope of criminalization, and therefore should not undermine the consensus on that separate issue. With the exception of specific provisions relating to offenses against international law and counterfeiting U.S. coin and securities,<sup>16</sup> the Constitution provides no enumerated authority for Congress to define federal crimes. Outside of those areas, and with the arguable exception of federal enclaves,<sup>17</sup> Congress's power to criminalize is certainly no broader than its authority to enact civil legislation.<sup>18</sup>

Professor Brown may be correct in suggesting that members of Congress and voters alike may be seduced by the "crime" label, together with the "tough on crime/soft on crime" dichotomy that Professor Fairfax discusses. Of course, as applied to nearly all federal crime-defining legislation, that political narrative is a rhetorical trick: deciding whether something should be a "crime" is what Congress is doing; Congress cannot fall back on any broader background assumption of our law, because it long ago

---

Legal Foundation, the Cato Institute, the Institute for Justice, Texas Public Policy Foundation, and the Association of American Physicians and Surgeons, among others. Even that partial list suggests the breadth of the emerging critical consensus. For more information on the Heritage project, see the project website at [www.overcriminalized.com](http://www.overcriminalized.com).

<sup>16</sup> U.S. CONST. art. I, § 8, cl. 6, 10.

<sup>17</sup> U.S. CONST. art. I, § 8, cl. 17.

<sup>18</sup> To the contrary, the text of the federal Constitution gives far more attention to limiting federal powers to operate in areas traditionally related to criminal prosecution, as in: the Habeas, Attainder, and Ex Post Facto clauses, U.S. CONST. art. I, § 9, cl. 2, 3; the special attention to limiting the previously-abused offense of treason, U.S. CONST. art. III, § 3; imposing procedural restrictions on the trial of crimes, U.S. CONST. art. III, § 2, cl. 3; and the Bill of Rights, U.S. CONST. amds. I-X, where the principal thrust is to limit criminal law enforcement. The Fourth, Fifth, Sixth, and Eighth Amendments are primarily or exclusively concerned with that subject.

exhausted the list of traditional or common law crimes.<sup>19</sup> Nevertheless, Professor Brown's observations should make us vigilant against new variations on the divide-and-conquer strategy employed by rulers against citizens since antiquity. That recognition is part of the consensus-building process.

The conference's keynote address<sup>20</sup> by Larry Thompson, former Deputy Attorney General of the United States, also advanced the theme of consensus-building in several important ways.

First, by developing the example of "corporate crime" within this general conference, Thompson's address underscores the commonality of the problems faced in all facets of the criminal justice system, whether "white collar" or "street" crime, and whether individual or corporate.<sup>21</sup>

Second, Thompson's address recognized that consensus-building also involves the joinder of different methodologies, by making explicit reference to law and economics analysis in examining problems of overcriminalization. He gave the example of a corporate compliance regime that requires an industry to incur compliance costs many times greater than the cost of offenses prevented, which makes society worse off. As he acknowledged, "law and economics scholars have been making this same point for many, many years. At the same time, I cannot help but think that the argument needs to be made again and again. The scandal-regulation cycle repeats itself over and over . . . ."<sup>22</sup>

We can generalize this example, which is not limited to the corporate context: any regime of prevention—including deterrence through criminal penalties—that imposes more costs of compliance than the harms avoided will produce a net harm to society. This is what economic analysts mean by "over-deterrence," which has been a much-misunderstood term: it does not refer only, or even primarily, to over-punishing offenders. It also refers to the destructive effects on non-offenders who are forced to divert resources to compliance, which impoverishes all of society.<sup>23</sup> Moreover, the

---

<sup>19</sup> One of the major drivers of overcriminalization has been the proliferation of federal criminal prohibitions, as documented by the work of Professor Baker of LSU, which extended prior work by the ABA. See John S. Baker, Jr., *Revisiting the Explosive Growth of Federal Crimes*, HERITAGE LEGAL MEMORANDUM (Heritage Found., Wash. D.C.), 2008; John S. Baker, Jr., *Measuring the Explosive Growth of Federal Crime Legislation*, FEDERALIST SOC'Y POL'Y STUDY (2004); ABA TASK FORCE, *THE FEDERALIZATION OF CRIMINAL LAW* (1998).

<sup>20</sup> See Larry Thompson, *Keynote Speech*, 7 J.L. ECON. & POL'Y 577 (2011).

<sup>21</sup> For further development of this point from different perspectives, see Sara Sun Beale, *Is Corporate Criminal Liability Unique?*, 44 AM. CRIM. L. REV. 1503 (2007), and Jeffrey S. Parker, *Corporate Crime, Overcriminalization, and the Failure of American Public Morality*, in F.H. BUCKLEY, *THE AMERICAN ILLNESS: ESSAYS ON THE RULE OF LAW* (forthcoming 2011).

<sup>22</sup> Thompson, *supra* note 20, at 583.

<sup>23</sup> One of the earliest, and still one of the best, demonstrations of this effect was given in Michael K. Block, *Optimal Penalties, Criminal Law, and the Control of Corporate Behavior*, 71 B.U. L. REV. 395 (1991). What Block shows is that even relatively minor misspecifications of either penalty levels or

destructive effect of criminalization increases not only with the level of penalties and the burden of compliance, but also with the attenuation of *mens rea* requirements.<sup>24</sup> The strict liability regime of federal corporate criminal prosecution is a dramatic current example, but it is only part of the larger problem of *mens rea* attenuation. And in turn, even that effect is only part of a still more general problem that any legal regulation or prohibition can impose more cost than benefit, because legal standards are not a “free lunch,” either, even to the law-abiding. Criminal prohibitions are among the most costly of legal policies, because they involve severe consequences, to both offenders and non-offenders, that are difficult to predict or control in their incidence.<sup>25</sup>

Third, and perhaps most importantly, Thompson’s address acknowledges that part of the overcriminalization problem may lie in prosecutorial procedures and decision making. In this, he joins a growing number of former senior Justice Department officials in recognizing that a more responsible use of the prosecutorial power must be part of the solution to overcriminalization problems.<sup>26</sup>

Among those officials is former Attorney General Dick Thornburgh, who, though not present at our conference, gave an important speech just two weeks earlier under the title of *Overcriminalization: Sacrificing the Rule of Law in Pursuit of “Justice.”*<sup>27</sup> Among other solutions, Thornburgh advocated several “steps which could be taken by the Department of Justice itself to aid in the process of reducing overcriminalization,” including “pre-

---

compliance standards can cripple or destroy firms or entire industries. The growth of global competition over the past twenty years makes this problem all the more severe today: even a slightly less efficient U.S. industry can be obliterated by foreign competition. Moreover, while Block focused his analysis on corporate actors, the point is a general one. So, as criminal offenses and compliance regimes proliferate in their effects on small businesses, entrepreneurs, and professionals, their destructive effects on both economic and human values become more profound and widespread.

<sup>24</sup> This is the main point of Jeffrey S. Parker, *The Economics of Mens Rea*, 79 VA. L. REV. 741 (1993).

<sup>25</sup> See Jeffrey S. Parker, *The Blunt Instrument*, in DEBATING CORPORATE CRIME ch. 4 (Lofquist, Cohen, & Rabe eds., 1997).

<sup>26</sup> Former U.S. Attorneys General Meese and Thornburgh have been particularly active. In addition to his work in leading the Heritage overcriminalization project, Meese has written on the subject. See Edwin Meese III, *Introduction*, in ONE NATION UNDER ARREST, *supra* note 14; Georgetown Symposium, *supra* note 13, at 1545 (closing commentary). In addition to the speech discussed here, Thornburgh made an important contribution to that same symposium, in *The Dangers of Over-Criminalization and the Need for Real Reform: The Dilemma of Artificial Entities and Artificial Crimes*, 44 AM. CRIM. L. REV. 1279 (2007). But Meese and Thornburgh are not alone; in April 2010, they (along with Thompson and other former senior Justice Department officials) joined with four other former U.S. Attorneys General (of both major political parties), in writing a letter to the district court judge opposing the “severe injustice” of the government’s sentencing position in *United States v. Rubashkin*, a widely noted case. See Julia Preston, *27-Year Sentence for Plant Manager*, N.Y. TIMES, June 22, 2010, at A18.

<sup>27</sup> See Dick Thornburgh, *Overcriminalization: Sacrificing the Rule of Law in Pursuit of “Justice”*, HERITAGE LECTURES (Heritage Found., Wash. D.C.), 2011.

clearance by senior officials of novel or imaginative prosecutions of high-profile defendants” and “a revitalized Office of Professional Responsibility [which] should help ensure that ‘rogue’ prosecutors are sanctioned for their overreaching.”<sup>28</sup> In other words, “[t]he Department of Justice must with greater vigor ‘police’ those empowered to prosecute.”<sup>29</sup>

I will have more to say about this topic below.<sup>30</sup> However, for present purposes, the remarks of Thompson, Thornburgh, and others<sup>31</sup> identify another important aspect of consensus-building, which is to reach across the various functional roles in the criminal justice system to find agreement. In the case of prosecutors, this will be difficult—perhaps next to impossible with currently serving prosecutors—but is both necessary and feasible with the prosecutorial bar more generally. This is where the statesmanlike remarks of Thompson and Thornburgh can be helpful. Nearly everyone who has served as a public official recognizes that even the best of intentions can go awry, and that untoward consequences rarely are apparent to the office holder at the time. That is why prosecutors, like every other public official, need to operate under a system of checks and balances, governed by the rule of law, and subject to public scrutiny of their actions. The fair-minded among them should acknowledge those principles. If they do, then prosecutors too can become an important part of a growing consensus for reform.

## II. AN INSTITUTIONAL PERSPECTIVE ON REFORM

A criminal justice system is more than a collection of substantive and procedural laws; it also involves a variety of operating institutions—legislatures, regulatory and investigative agencies, prosecuting authorities, courts, probation officials, prisons, and even the defense bar—that function under a variety of both formal and informal rules, customs, policies, and practices, that involve some degree of discretionary judgment, and that include individuals who are presented with sometimes divergent incentives. Like other complex systems (such as business firms), it may seem to have a “mind” of its own, which does not coincide with the intentions or policies of any of its constituent parts or reflects a dysfunctional synergy between the incentives of multiple actors. This phenomenon is often referred to as the “law of unintended consequences,” and has been the recognized bane of

---

<sup>28</sup> *Id.* at 6.

<sup>29</sup> *Id.*

<sup>30</sup> Part II.A, *infra*.

<sup>31</sup> In addition to the former AG’s, Deputies, and SG’s, other former prosecutors have joined the critique. See, e.g., Andrew Weissmann & David Newman, *Rethinking Criminal Corporate Liability*, 82 IND. L. J. 411 (2007) (former head of the DOJ Enron Task Force); Anthony S. Barkow & Beth George, *Prosecuting Political Defendants*, 44 GA. L. REV. 954 (2010) (former line prosecutor in the DOJ).

law reformers for centuries, as is captured in Ronald Gainer's attribution to Bentham of resistance to reform on the grounds that "things are bad enough as they are." However, I am not sure that "unintended" is the correct term, as it grants too much slack to erstwhile reformers: "unforeseen," or perhaps "unacknowledged," may be more accurate.

My own prior experience with these effects concerns the last major reform to the federal criminal justice system, which was the Sentencing Reform Act of 1984<sup>32</sup> and its mandate for determinate sentencing guidelines. While the criticisms of that system were many, two major problems best illustrate the "unintended consequences" effects of ignoring adjoining institutions. One was the effect on Congress itself, which was enabled to dabble in the details of the sentencing system with the now-familiar result of cranking up the "one-way ratchet" toward greater severity and less flexibility.<sup>33</sup> Another was the result, in effect, of shifting unreviewed discretion from the sentencing judge to the charging prosecutor.<sup>34</sup> Neither effect appears to have been either intended or foreseen in advance by the enacting Congress, and yet both perhaps should have been completely predictable by examining the institutional structures and incentives surrounding the changes in sentencing procedures. Moreover, both effects appear to have persisted beyond the rejection of the mandatory guidelines system by the Supreme Court in its 2005 *Booker* decision,<sup>35</sup> which indicates that institutional memory can become entrenched, even within a relatively short period.

From this perspective, one of major contributions to our conference was Larry Ribstein's highly original paper, *Agents Prosecuting Agents*.<sup>36</sup> In that paper, Professor Ribstein presents an analysis of corporate criminal liability standards alongside the comparable problems of regulating prosecutorial conduct, analyzing both in terms of agency cost theory, in essence treating the prosecutorial function as analogous to the control problems of a business firm. The comparison is quite stark: while corporate agents are subject to a plethora of legal, institutional, and market constraints, there is very little analogous control of similar or even more severe agency cost problems in criminal prosecutions. Professor Ribstein limits his discussion

---

<sup>32</sup> Pub. L. No. 98-473, tit. II, ch. 2 (Oct. 12, 1984).

<sup>33</sup> See Jeffrey S. Parker & Michael K. Block, *The Limits of Federal Criminal Sentencing Policy; Or, Confessions of Two Reformed Reformers*, 9 GEO. MASON L. REV. 1001 (2001).

<sup>34</sup> See, e.g., Kate Stith & Jose A. Cabranes, *Judging under the Federal Sentencing Guidelines*, 91 NW. U. L. REV. 1247 (1997); KATE STITH & JOSE A. CABRANES, *FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS* (1998).

<sup>35</sup> See *United States v. Booker*, 543 U.S. 220 (2005). The Sentencing Commission's own study found very little effect on such factors as sentencing severity and the incidence or grounds for departure from the now-advisory guidelines. U.S. SENTENCING COMM'N, *FINAL REPORT ON THE IMPACT OF UNITED STATES V. BOOKER ON FEDERAL SENTENCING* (2006). Whether this result is holding over the longer term is still an open question, and is discussed in Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117 YALE L.J. 1420 (2008).

<sup>36</sup> See Larry E. Ribstein, *Agents Prosecuting Agents*, 7 J.L. ECON. & POL'Y 617 (2011).

to his immediate context of corporation criminal prosecution, but I would like to emphasize the broader methodological lesson of his work, which is the value of taking the institutional perspective on reform. Had such an analysis been performed before federal sentencing reform was enacted, then it may have been easier to predict—and therefore prevent—the untoward consequences that rippled through the federal criminal justice system for the next twenty years, creating problems that still persist today.

More generally, treating all actors in the criminal justice system as imperfect agents, whose actions will be influenced by their institutional structures and personal incentives within the frictions of an imperfect operating system, represents a sound and clear-headed approach to reform. Otherwise, even very well-intentioned efforts at law reform can be ineffectual or even counter-productive. Indeed, a similar effect is part of the overcriminalization problem itself: legislators or prosecutors may be reacting to the issue or scandal du jour, and it may be impracticable to operate directly on their personal or political motivations, and therefore a structural constraint may be needed.

Fortunately, this is not a new problem in American constitutional government, but was quite familiar to the Framers of our federal Constitution. Their principal solution was to divide governmental powers among the three branches, and to establish competing checks and balances among the branches that could neutralize abuses. Unfortunately, in the context of overcriminalization, the branch most likely to strike this balance—the federal judiciary—has been desultory in that role. While several participants in the conference suggested revived judicial development of constitutional doctrine as one possible solution to overcriminalization problems, it seems unlikely that judicial action alone will be sufficient. As Dick Thornburgh's speech concluded, the overcriminalization problem will require the attention of all three branches "if productive change is to be forthcoming."<sup>37</sup> As the judiciary is reticent to act alone, and the executive institutionally resistant, meaningful solutions will require congressional participation, which will be difficult but not impossible, provided that there has been sufficient attention to consensus-building.

If Congress can be induced to act, then what can or should be done? I will focus here on three types of systemic reform that were discussed during the conference, and that I believe have some potential to make important inroads on the overcriminalization problem: (a) constraining prosecutorial discretion; (b) restoring *mens rea* requirements and reforming the rule of lenity; and (c) procedural reform.

---

<sup>37</sup> Thornburgh, *supra* note 26, at 6.

A. *Bringing Prosecutorial Discretion Within the Rule of Law*

I am mindful of the risk that bringing the near-sacred subject of prosecutorial discretion explicitly into the discussion may be perceived as stepping on the “third rail” of criminal justice policy, and motivating the opposition of the most powerful anti-reform lobbyist in Congress. However, for the reasons developed in Part I above, it is not clear whether anything useful can be done without engaging the prosecutorial bar. Moreover, the subject continually appears in many papers given at this and other conferences, and in books and papers published elsewhere, almost always treated with the delicacy and euphemism reserved for such a subject. I certainly am willing to adopt the usual disclaimers that “most” or “the overwhelming majority” of our prosecutors are honest, forthright, and dedicated public servants who would never do anything knowingly wrong, etc., because those reservations are beside the point. Raising concerns about prosecutorial discretion and prosecutorial abuse is not an attack on the prosecuting bar; it is the invocation of the more fundamental principle of the rule of law. Prosecutors are neither demons nor angels; they are, like the rest of us, only human.

Therefore, even with all such disclaimers imaginable, I do not think that it is wise or even possible to avoid the subject, for three main reasons.

First, prosecutorial discretion is ubiquitous throughout the criminal system, and largely dominates its outcomes. Especially in the federal system, it covers every phase of a prosecution—prosecutors decide who to investigate, how to investigate, who to charge, what to charge, how many redundant charges to present, what evidence to present, how that evidence is presented, who is not charged, who is immunized (and therefore probably a prosecution witness), who is implicated but not immunized (and therefore denied as a defense witness), what to take up under the asymmetrical criminal appeals statute, whether to plea bargain, how to plea bargain, what is in the plea bargain, and so on, *ad infinitum*—and all largely beyond any judicial scrutiny whatsoever.<sup>38</sup> Under the grand jury secrecy rule of Criminal Rule 6, and the limited discovery obligations under Criminal Rule 16, much of their work is held secret from the public (and from the defense and the court). In the federal system, over 90% of all convictions are obtained by guilty pleas, usually under plea bargains, whose outcome is influenced by the unreviewed selection of charges and evidence (and therefore sentencing ranges under the guidelines), and the prosecution’s unlimited access to public resources. They are subject only to cursory review under the standards of Criminal Rule 11. For these reasons, virtually any reform short of broad-ranging repeal of most criminal prohibitions could be easily circumvented

---

<sup>38</sup> For a general survey of American practice, see Peter Krug, *Prosecutorial Discretion and Its Limits*, 50 AM. J. COMP. L. SUPP. 643 (2002).

by the unreviewed discretion of the prosecutor at one or more of these stages.

Second, prosecutorial discretion is virtually unique in American law as violating the fundamental precept of official accountability under the rule of law. There is no other place in our law where so many official decisions profoundly affecting a person's life, liberty, and property are taken behind closed doors, with no judicial review and no enforceable rules to govern official discretion. As noted by Ron Cass, current deference to broad prosecutorial discretion "pulls our practice away from the rule of law."<sup>39</sup> In this respect, overcriminalization has exacerbated a preexisting anomaly into a serious problem.<sup>40</sup> Under traditional criminal law, this pocket of unaccountable official action was both limited and temporary: the prosecution ultimately had to justify its legal and factual case at trial; criminal prohibitions were simple and few; and penalties were finite. But under current law, the myriad of criminal prohibitions can be combined into a multiplicity of vague and overlapping counts that often defy common logic, and present innovative theories of liability, providing a credibly threatened sanction of complete destruction of the defendant,<sup>41</sup> which produces a conviction by plea bargain in most cases.<sup>42</sup> Whether or not this is fair to defendants, it always deprives the public of a full vetting of the prosecution's case and its tactics, and it raises serious questions about the overall accuracy of the criminal adjudication process.

Third, even if one grants that abuses of prosecutorial power are the exception rather than the rule, they are far from rare. The overcriminalization literature is replete with examples, and Professor Ribstein's paper presents statistical data. There is a gross disparity between documented instances of prosecutorial misconduct and disciplinary action against the miscreants. Even former Attorney General Thornburgh refers to the need for a stronger

---

<sup>39</sup> RONALD CASS, *THE RULE OF LAW IN AMERICA* 29 (2001).

<sup>40</sup> One aspect of this problem was examined by Professor Dervan's paper. See Lucian E. Dervan, *Overcriminalization 2.0: The Symbiotic Relationship Between Plea Bargaining and Overcriminalization*, 7 J.L. ECON. & POL'Y 645 (2011).

<sup>41</sup> The problems that arose under the federal guidelines sentencing system were exacerbated by the adoption of a DOJ policy that federal prosecutors "should charge . . . the most serious offense that is consistent with the nature of the defendant's conduct," with "most serious" defined as "that which yields the highest range under the sentencing guidelines." UNITED STATES ATTORNEYS' MANUAL, § 9-27.300. That policy, coupled with a multiplicity of vague and overlapping offense definitions, extraordinarily broad definitions of the "relevant conduct" that could be considered under the guidelines, and lax judicial standards permitting consideration of uncharged or even acquitted conduct, places enormous bargaining leverage in the prosecutor.

<sup>42</sup> At the same time that overcriminalization has been exacerbating the problems created by broad prosecutorial discretion, the federal courts, led by the Supreme Court, actually have been diluting the level of judicial scrutiny of prosecutorial choices. See Judge James F. Holderman & Charles B. Redfern, *Preindictment Prosecutorial Conduct in the Federal System Revisited*, 96 J. CRIM. L. & CRIMINOLOGY 527, 576-77 (2006). After analyzing that trend, Judge Holderman comments that "perhaps Congress may decide to provide additional legislation." *Id.* at 577.

internal disciplinary structure within the Justice Department.<sup>43</sup> Like the problem of overcriminalization itself, the problem of prosecutorial abuse need not be routine in order to threaten the integrity of the process. This factor often is overlooked.<sup>44</sup> Even a relatively few silly or abusive prosecutions creates a profound threat to the security and prosperity of the citizenry, and undermines public confidence in the rule of law. As prosecutors are wont to say, the commencement of a prosecution in one or a few cases is designed to “send a signal.” What some prosecutors apparently overlook is that the signal can be very destructive, if it discourages productive and lawful activity. In this context also, economic analysis is useful: it is the *marginal* case, not the “typical” or “average” one, that provides the primary effect on future conduct. This is why novel legal theories of prosecution are always bad for human welfare, and incompatible with our rule of law tradition.

For these reasons, the problem of unchecked prosecutorial discretion cannot be overlooked and should not be discounted. Nor is the conventional “third rail” wisdom necessarily correct. As was pointed out in the keynote address by former Deputy Attorney General Larry Thompson, his ultimately controversial “Thompson Memorandum” was motivated by an internal effort to restrain and structure prosecutorial discretion. So, responsible officials within the Department are not necessarily opposed to that idea. And the vast majority of honest, dedicated, and ethical prosecutors probably feel the same way, though they may be constrained by their positions and their collegial relationships from expressing those views in public.

Nor has Congress been averse to legislating on the subject of prosecutorial abuse. Both the Hyde Amendment,<sup>45</sup> and the McDade Amendment,<sup>46</sup> were enacted over the Department’s lobbying opposition. The problems with those statutes are more attributable to parsimonious judicial interpretations.

As indicated by the examples of the Hyde and McDade Amendments, it is not necessary nor perhaps desirable to enact a “code” of prosecutorial discretion.<sup>47</sup> More modest proposals can have important benefits, and oper-

---

<sup>43</sup> See Thornburgh, *supra* note 26, at 6. He is joined by other former Justice officials in the criticism. In response to an expose on the problem published by *USA Today* in late 2010, former U.S. Attorney Joseph diGenova commented that internal discipline was “very, very poor . . . serious discipline is basically non-existent.” Brad Heath & Kevin McCoy, *Federal Prosecutors Likely to Keep Jobs After Cases Collapse*, USA TODAY, Dec. 8, 2010. But here again, prosecutors are essentially the only officials allowed to audit themselves, and in secret. The poor results should come as no surprise.

<sup>44</sup> In my view, some of the discussion during the closing session of our conference with the judicial panel reflected this misperception.

<sup>45</sup> 18 U.S.C. § 3006A (2010).

<sup>46</sup> 28 U.S.C. § 530B (2010).

<sup>47</sup> However, one of the interesting suggestions by Judge Holderman is that Congress simply overrule by legislation what are now DOJ administrative rules, generally respected by the courts, that neither the McDade Amendment nor the United States Attorneys’ Manual create enforceable legal rights in the

ate in more subtle ways. Several examples were presented at our conference: Ronald Gainer proposed a statute limiting the application of criminal penalties in a specified group of “regulatory” offense cases; Lucian Dervan’s proposal for more rigorous review of plea bargains, though based in case law, also could be enacted by statute or amendment to Criminal Rule 11; Darryl Brown presents another option of limiting punishment under overlapping prohibitions.<sup>48</sup> Other types of procedural reform—to grand jury secrecy, to pretrial discovery under Criminal Rule 16, to create more symmetrical standards of interlocutory appeal, or to tighten the standards of “harmless error” review, among others—also have some potential.

In my view, the precise forms of such measures are less important than acceptance of the underlying principle that prosecutors, like all other public officials in our system, are subject under the rule of law to public accountability and review of their actions by an independent branch. If the prosecuting bar is unwilling to accept some form of that principle, then we have more profound problems than any of us now knows. If it does accept that principle—as I believe it must—then the details are negotiable, with the participation of the prosecuting bar. Constructive engagement here is superior to political conflict.

#### B. *Mens Rea, Vagueness, and the Rule of Lenity*

Aside from the sheer proliferation and variety of enactments, one of main problems of overcriminalization is the breadth and vagueness of prohibitions, and this problem is exacerbated by the dilution or omission of *mens rea* requirements. Of course, it also is negatively synergistic with prosecutorial discretion. Accordingly, one of the four plenary sessions of our conference, session four, was devoted to this set of problems.

This session also highlighted one of the important achievements of the current overcriminalization critique, which was the issuance in 2010 of the joint Heritage–NACDL report, *Without Intent: How Congress is Eroding the Criminal Intent Requirement in Federal Law*.<sup>49</sup> That report presents a detailed analysis of the legislative product of the 109th Congress, in order to show “just how far federal criminal lawmaking has drifted from its doctrinal anchor,”<sup>50</sup> and proposes a series of recommended measures designed to correct that trend—including the enactment of default rules for supplying

---

victims of a violation by a Department lawyer. Holderman, *supra* note 42, at 577. See 28 C.F.R. § 77.5; UNITED STATES ATTORNEYS’ MANUAL § 9-27.150.

<sup>48</sup> Professor Brown’s views are presented in more depth in Darryl K. Brown, *Prosecutors and Overcriminalization: Thoughts on Political Dynamics and a Doctrinal Response*, 6 OHIO ST. J. CRIM. L. 453 (2009).

<sup>49</sup> BRIAN W. WALSH AND TIFFANY M. JOSLYN, WITHOUT INTENT: HOW CONGRESS IS ERODING THE CRIMINAL INTENT REQUIREMENT IN FEDERAL LAW (2010) [hereinafter WITHOUT INTENT].

<sup>50</sup> Meese & Reimer, *Foreward*, in WITHOUT INTENT, *supra* note 49, at vii.

*mens rea* standards for federal crimes, codification of the rule of lenity, and reform of legislative procedures to ensure that new criminal statutes are fully considered and clearly drafted.<sup>51</sup>

At our conference session, Geraldine Moohr presented the principal paper on *mens rea*,<sup>52</sup> while Marie Gryphon wrote on the rule of lenity,<sup>53</sup> and Harvey Silverglate addressed the problem of vagueness in federal criminal statutes.<sup>54</sup> Professor Moohr's article traces the history of erosion in federal *mens rea* law, and presents a thorough critical analysis of the solutions proposed by *Without Intent*, in terms of both reforming *mens rea* and codifying the rule of lenity. Gryphon's commenting paper extends the analysis of proposed codification of the rule of lenity. Silverglate's commenting paper calls attention to the distinction between "overcriminalization" in the sense of proliferation of prohibitions, and the perhaps more intractable problem of vagueness in prohibitory language. All three of these papers deserve careful attention as contributing to the development of solutions to overcriminalization problems. However, they are all haunted by the deeper problem that the institutions in question are resistant to the proposed reforms.

Both Moohr and Gryphon make convincing cases that the proposed reforms may be unsuccessful or counter-productive because of resistance by the judiciary, or because of a lack of specification of which institution—courts or Congress—is responsible for giving content to the rules. Silverglate makes a similar point in passing by noting that judicial due process vagueness doctrine has not prevented vagueness problems from continuing to appear routinely in federal prosecutions.

Thus, all three papers in this session call our attention once again to the importance of taking an institutional perspective. The Supreme Court has been somewhat attentive to the problem of *mens rea* specification, but otherwise the federal judiciary's record in spontaneously generating robust standards is very poor. Moohr's analysis suggests that more fully-specified legislative standards could be helpful, while Gryphon suggests that, at least in the case of the rule of lenity, efforts at legislative reform may themselves be subverted through an ongoing debate within the Supreme Court itself on the general topic of statutory construction. Something quite similar might also affect legislative efforts to rein in prosecutorial discretion, as separation of powers "deference" has been used by the courts as a device for evading difficult problems of cross-branch checks and balances.

Even if these cross-branch problems can be overcome, what about the Congress itself? Congress has a poor track record of bonding itself against

---

<sup>51</sup> The recommendations are summarized in *WITHOUT INTENT*, *supra* note 49, at xi-xiii, 26-32.

<sup>52</sup> See Geraldine Szott Moohr, *Playing with the Rules: An Effort to Strengthen the Mens Rea Requirements of Federal Criminal Laws*, 7 J.L. ECON. & POL'Y 685 (2011).

<sup>53</sup> See Marie Gryphon, *The Better Part of Lenity*, 7 J.L. ECON. & POL'Y 717 (2011).

<sup>54</sup> See Harvey Silverglate, *Remarks on Restoring the Mens Rea Requirement*, 7 J.L. ECON. & POL'Y 711 (2011).

future excess, and, with very few and sporadic exceptions, the Supreme Court has been unwilling to constitutionalize either the *actus reus* or *mens rea* doctrines. In a sense, the effort to restore some viability to these doctrines in Congressional legislation is an effort to protect the institutional integrity of the criminal law itself. If the courts are generally unwilling to play that protective role—as I believe they are—then who will?

This is where the “politics of crime” have generated increasing overcriminalization across the past several decades, especially at the federal level. Periodic recodification of criminal law may help to reset the criminalization margin, which is why the failure at the federal level in the 1970s of the last generation of recodifications, based on the Model Penal Code, may have had such dramatic effects. But, as Professor Moohr points out, the federal drift away from *mens rea* standards prevailing in state law pre-dates even that era.

In short, we now have a problem that “unlawful” is often equated with “criminal.”<sup>55</sup> If the courts remain unwilling to constitutionalize the distinction between civil and criminal liability, then Congress needs to find a way. While the types of reforms suggested by *Without Intent*—after further development to answer the critiques given here and elsewhere—are probably worthwhile as creating meaningful impedance to legislative excess, they do not completely solve the Congress’s institutional problem.

As a supplement to those measures, I would endorse and expand upon the suggestion previously made by Paul Rosenzweig that more transparent measures of the costs of criminalization be developed.<sup>56</sup> In this respect, I am guardedly optimistic, given several recent developments that may help Congress learn how to distinguish between the event and the intent.

First, the excesses of “corporate crime” prosecutions have convinced a larger body of opinion that criminal law enforcement is disproportionately destructive as compared with civil enforcement, which is a viable and analytically superior alternative in most situations. This insight can apply *a fortiori* to the types of overcriminalization offenses now being brought against individuals as well as firms. At some point, when speaking of such matters as lobster tail packaging, bush pruning, or mailing label omission, which are the types of offenses now amply documented in the overcriminalization literature,<sup>57</sup> it will become impossible to maintain the “tough on crime” fiction.

Second, our economic woes and the consequent focus on budgetary and financial matters may have convinced Congress of the need to take account of the costs of new legislation it enacts, and more importantly, has

---

<sup>55</sup> See John C. Coffee, *Does “Unlawful” Mean “Criminal”?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B. U. L. REV. 193 (1991).

<sup>56</sup> Paul Rosenzweig, *Overcriminalization: An Agenda for Change*, 54 AM. UNIV. L. REV. 809 (2005), in American University Symposium, *supra* note 13.

<sup>57</sup> These are among the cases documented in ONE NATION UNDER ARREST, *supra* note 14.

educated the public to that need. Debatably improper packaging of lobster tails becomes a distinctly less popular target for criminalization when the public learns of the systemic costs of imposing such sanctions, as compared with civil or administrative alternatives much less costly to the taxpayer and the consumer.

Third, and especially applicable to individuals, the overcriminalization problem simply has become too large to ignore. As noted above, we now have 3.1% of our adult population under criminal justice sentence, and therefore stigmatized as “criminals.” Under very conservative assumptions,<sup>58</sup> that rate eventually will produce a cumulative lifetime exposure of about 15% of the adult population. By 2020, that rate will produce approximately 40 million “criminals” in an adult U.S. population of about 255 million and a total population of about 343 million.<sup>59</sup> As each one of these “criminals” is likely to have at least one other adult family member profoundly affected by the criminal conviction and sentence, this will mean that at least 80 million adults—nearly one-third of the adult population—will be interested directly in the subject. Moreover, there are a number of other individuals—business colleagues, customers, suppliers, and so on—who will be personally though indirectly affected, and still more will be affected through the economic consequences of criminal enforcement. Note that, at the same time, the measures of “index” crime—what the ordinary citizen thinks of as crime—now have been declining in almost every category for the last thirty years, whether incarceration rates are rising, falling, or remaining constant.

So, it is quite plausible that by 2020, something on the order of 30% to 50% of the electorate will have had a personal experience with the criminal justice system, and most of those experiences are likely to be perceived by the voter as negative. These conditions will not necessarily end the calls for criminal prosecution as a response to every misfortune, from financial crises to oil spills, but broader knowledge of the problem will produce a much more sophisticated electorate. In any event, the scale of numbers is such that even the most cynical member of Congress may not safely ignore the subject of overcriminalization.

---

<sup>58</sup> My assumptions are that per capita rates of prosecution and sentence imposition remain constant, that there is a 10% annual net substitution rate (the number of new non-recidivist offenders replacing those who have completed their sentences), and a 40-year lifetime exposure to adult criminal sanctions.

<sup>59</sup> These projected population data are from the recent Social Security Trustees’ report. THE 2011 ANNUAL REPORT OF THE BOARD OF TRUSTEES OF THE FEDERAL OLD-AGE AND SURVIVORS INSURANCE AND FEDERAL DISABILITY INSURANCE TRUST FUNDS (2011), at Table V.A.2.

C. *Substance, Procedure, and Evidence*

Though mentioned only in passing during our conference proceedings, another area where an institutional perspective can be valuable is in considering the interrelationships between substantive law and procedural or evidentiary law.

We already have seen one example in the several suggestions to address similar problems of unchecked prosecutorial discretion, through changes either to substantive legal standards or sentencing rules. The more general point is that there is rarely a single and unique way to address a given problem, and that alternative routes may encounter less political or institutional resistance.

Another example that comes to mind is the Hyde Amendment, which provides for defense fee reimbursement for certain types of unfounded prosecution. Conventionally, the Hyde Amendment is considered as a remedy for prosecutorial “abuse” or “misconduct.” In that role, it has largely failed, because of its grudging interpretation by the courts. There are current proposals to amend the statute to restore its efficacy, and one factor to be considered is that a remedy like the Hyde Amendment can have a number of favorable side effects, beyond compensation to an aggrieved defendant. In particular, the Hyde Amendment provides an incentive to more transparency of both the costs and the tactics involved in federal criminal prosecution. Moreover, the Hyde Amendment could operate to provide a subtle disincentive to one of the more intractable problems of overcriminalization, which is the novel or “innovative” legal theory of prosecution.<sup>60</sup> This is an example of a problem that may be difficult to regulate directly, as through oversight by senior justice officials or explicit review by the courts as such, but could be indirectly regulated by the incentive against novelty embedded in a fee-shifting regime.

A third example concerns the erosion of *mens rea* standards, especially as represented by such things as the “willful blindness” doctrine, that rest on a failure to consider the substantive standard in conjunction with a sophisticated view of evidence law. In actual jury trials, standards of “proof” are so lax that the giving of a “willful blindness” instruction is the equiva-

---

<sup>60</sup> This problem appears in the recent federal indictment returned against John Edwards, the former Presidential candidate. See Katharine Q. Seelye, *Edwards Charged with Election Finance Fraud*, N.Y. TIMES, June 4, 2011, at A1. The theory of prosecution plainly pushes the envelope of criminalization, as it is based on the allegation that Edwards diverted funds that otherwise would have been campaign contributions to his personal use in covering up his affair with one of his staffers. In other words, Edwards is accused of “violating” campaign finance law by avoiding its applicability. In many ways, Edwards is the paradigm of the overcriminalization case: by choosing an unsavory target unlikely to have any public sympathy, the prosecution maximizes its chances of setting a legal precedent it can use against others later, whether or not they are prominent politicians, unsavory or otherwise. Edwards is this season’s “Al Capone.” Now, as then, the price is too high to pay.

lent of allowing juries to convict on negligence, or less. In fact, this is a general problem in criminal trials. Traditionally, criminal prosecutions involved very simple and familiar rules of law, but subtlety in questions of fact; the customs of criminal trials have been shaped accordingly. However, with overcriminalization, legal and factual subtlety are combined, with the result that the apparatus of criminal procedure (minimal pleadings, weak discovery rules, sketchy jury instructions, and a lax enforcement of ordinary evidence rules) are no longer appropriate to the subjects under adjudication, which in many of these cases are more like civil than criminal litigation. This suggests that more borrowing from civil practice and procedure may be a useful course for future criminal procedure reform.

### III. THE LONG HAUL, AND THE IMMEDIATE OPPORTUNITIES

As indicated above, we may now be at an opportune moment to achieve some meaningful reforms that will reduce our overcriminalization problems. Politicians are struggling mightily with the grand issues of public finance and deficit reduction, which ironically might provide an opening for some modest, bipartisan, “good government” initiatives. The state of the art in considering the true costs of criminalization has advanced at the same time that concerns about fiscal austerity and economic performance are at a relative peak. And the problem unfortunately has become so large and commonplace that it can no longer be ignored in the national debates.

Our conference has provided some indicators to a way forward, but I will resist the temptation to lay out a prescribed agenda. For those who wish such an agenda, I endorse and recommend those previously suggested by Paul Rosensweig<sup>61</sup> and by Timothy Lynch.<sup>62</sup> However, I wish to stress that no agenda, however complete, will be either necessary or sufficient to lay this subject to rest, and I acknowledge the risk that things may be “bad enough as they are.” Modest and incremental reform might be the best approach.

The basic subject is a perennial one, as the criminal law paradoxically is at once both the primary protector of our basic freedoms and the most dangerous threat to their exercise. Whether or not any reforms can be accomplished over the next few years, we can be assured that the subject will not go away.

While there is at least some evidence that political dysfunction and a general erosion of constitutional safeguards are partly to blame, another part of the fault may lie in ourselves. Perhaps our elected leaders would be less willing to criminalize for mere convenience or expediency if their con-

---

<sup>61</sup> See Rosensweig, *supra* note 56.

<sup>62</sup> See Timothy Lynch, *Introduction: First Principles of American Criminal Justice*, in *IN THE NAME OF JUSTICE*, *supra* note 14, at vii-xxx.

stituents made fewer such demands. For the legislator, the prosecutor, the judge, and the citizen, the fundamental problem is one of morality. In a free society under the rule of law, there are very few occasions that actually justify the application of violent force against one's fellow citizen. The criminal law is violent force coupled with moral condemnation, and is justified in still fewer occasions. We know that violence begets violence, and moral condemnation without fault begets resentment. We also know that power corrupts. So, before we arrogate to ourselves the power use this extraordinary sanction of last resort, we must be assured that its use is strictly necessary, both in incidence and degree, and that no lesser sanction would suffice. The failure to require that assurance is immoral, and is the essence of overcriminalization.