CRIMINALS AND COMMONERS: CAN WE STILL TELL THE DIFFERENCE?

GO DIRECTLY TO JAIL: THE CRIMINALIZATION OF ALMOST EVERYTHING. Edited by Gene Healy.* Washington, D.C.: Cato Institute, 2004. Pp. 161. $17.95.

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The government possesses a variety of tools to control the populace. Obvious examples include the criminal justice system, administrative regulation, and taxation. Because these tools involve varying degrees of coercion, the federal government's choice of tools in addressing a particular problem has considerable impact on citizens, both financially and in terms of individual rights.

Of the federal government's tools, the most invasive of individual rights are generally the criminal statutes, the enforcement of which often involves loss of personal liberty.[1] In the past twenty-five years, the number of federal crimes on the books has risen by more than thirty percent, to a total exceeding 4000 (p. vii). Clearly, some new statutes address activities that until recently did not exist, such as various crimes involving computers. Are all 4000 federally defined crimes, however, really necessary? Many of these newly defined crimes deal with activities that the federal government previously addressed through other means—such as environmental pollution, generally managed through administrative regulation (pp. 45–49)—or did not handle at all—such as gun-related crime, left primarily to the states (pp. 98–99).

Gene Healy and his fellow contributors to *Go Directly to Jail: The Criminalization of Almost Everything* make the case that criminal statutes have been transformed from a tool intended to address only the most serious of offenses to what Healy calls "merely another item in [the legislature's] regulatory toolkit"

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[1] *See* Adam H. Kurland, *First Principles of American Federalism and the Nature of Federal Criminal Jurisdiction*, 45 EMORY L.J. 1, 66 (1996) (noting "the unique and profound consequences of the criminal sanction—loss of liberty, if not life").

(p. viii).[2] The book, a collection of essays by several authors, includes an introduction, a short general piece, and five longer substantive essays, one by Healy himself.[3]

Healy starts with the background principle that legislators increasingly create new criminal offenses to signal that they are taking a particular social problem seriously, often without considering carefully whether criminal sanctions are appropriate for that particular issue (p. viii).[4]

Considering the authors' stated desire to reverse this trend, their main audience is presumably Congress. It is important to keep this audience in mind when evaluating the effectiveness of the authors' arguments. All of the essays provide compelling evidence of problems in their respective subject areas that should concern any conscientious lawmaker. In addressing Congress, however, one must do more than just demonstrate that a problem exists. Congress obviously has limited resources in terms of time, and cannot address every problem (or at least cannot do so anytime soon).[5] One must therefore explain why a particular problem is more significant than competing issues, and thus deserves Congress's immediate attention. One commentator has noted that

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[2] *See, e.g.*, Stuart P. Green, *Why It's a Crime to Tear the Tag off a Mattress: Overcriminalization and the Moral Content of Regulatory Offenses*, 46 EMORY L.J. 1533, 1615 (1997) ("[L]egislatures must stop enacting statutes that allow identical conduct to be dealt with either criminally or civilly without any indication of which kind of sanction is preferred."). *But see* Tom Stacy & Kim Dayton, *The Underfederalization of Crime*, 6 CORNELL J.L. & PUB. POL'Y 247, 324 (1997) ("The constitutional values of federalism, which are the only sources from which the Constitution's meaning now can be gleaned, decisively support a concurrent national role in enforcing a broad array of offenses. In addition, policy considerations . . . suggest the need to increase the national share of enforcement.").

[3] Each of the five lengthy essays addresses a particular subject area: James V. DeLong, *The New "Criminal" Classes: Legal Sanctions and Business Managers*; Gene Healy, *There Goes the Neighborhood: The Bush-Ashcroft Plan to "Help" Localities Fight Gun Crime*; Erik Luna, *Misguided Guidelines: A Critique of Federal Sentencing*; Timothy Lynch, *Polluting Our Principles: Environmental Prosecutions and the Bill of Rights*; Grace-Marie Turner, *HIPAA and the Criminalization of American Medicine*.

[4] *See also* William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 576 (2001) ("[L]egislators . . . are likely to criminalize conduct ordinary people might innocently engage in—not in order to punish that conduct, but in order to take symbolic stands or to make punishment of other conduct easier.") (emphasis omitted). *But see* Kyron Huigens, *What Is and Is Not Pathological in Criminal Law*, 101 MICH. L. REV. 811, 826–27 (2002) (arguing that Professor Stuntz's observations about pathology of criminalization are flawed).

[5] *See* Note, *Should the Supreme Court Presume That Congress Acts Constitutionally? The Role of the Canon of Avoidance and Reliance on Early Legislative Practice in Constitutional Interpretation*, 116 HARV. L. REV. 1798, 1803 (2003) (noting Judge Abner Mikva's oft-cited assertion that Congress "often overlooks constitutional questions because of the limited time and resources it has to spend on each individual bill").

"Congress is a reactive body unable to enact legislation until the problem at hand reaches crisis proportions."[6] The essays in *Go Directly to Jail* provide powerful arguments and great background on their various topics, but generally do not address sufficiently this issue of congressional priority. In reviewing each essay, it is necessary to examine both the strength of the essay's substantive claims and its efforts to prioritize its message over competing problems.

The crown jewel of the book is Healy's piece, which addresses a different kind of overcriminalization than that discussed in the other essays. Healy explores what occurs when the federal government steps up its enforcement of laws concerning problems that, he argues, are more appropriately left to the states, such as gun-related crimes.

Healy focuses on Project Safe Neighborhoods, a federal program intended to curb gun crime.[7] In essence, Project Safe Neighborhoods dedicates federal money to increasing federal prosecution of gun felonies, including by hiring new federal prosecutors who work only on these cases (p. 93). Healy convincingly argues that federalizing enforcement of these crimes threatens the spirit of federalism.[8] For instance, Healy notes that Project Safe Neighborhoods may extend federal power further than is permissible under the Commerce Clause (pp. 101–02). He shows how parts of Project Safe Neighborhoods are similar to the Gun Free School Zones Act struck down in *United States v. Lopez*.[9] Healy does not spend a great deal of time on the *Lopez* comparison, however, and his policy arguments are more convincing.

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[6] Abner J. Mikva, *How Well Does Congress Support and Defend the Constitution?*, 61 N.C. L. REV. 587, 609 (1983) (arguing that Congress's lack of time leads to insufficient consideration of constitutional implications of statutes).

[7] Project Safe Neighborhoods, *About Project Safe Neighborhoods*, *at* http://www.psn.gov/About.asp (last visited Mar. 11, 2005). Project Safe Neighborhoods is a national expansion of Project Exile, a Richmond, Virginia effort to curb gun crime through increased federal prosecution (p. 94). For a discussion of Project Exile, see Michael Janofsky, *Fighting Crime by Making Federal Case About Guns*, N.Y. TIMES, Feb. 10, 1999, at A12, noting that "Project Exile is being credited for helping reverse a decade of rising crime rates in Richmond by moving gun offenses into the Federal system, where bond is less available, sentences are longer and convicts are sent out of state to serve their terms."

[8] In spite of these concerns, federal gun crime prevention efforts have created strange bedfellows across the political spectrum. Healy notes that "Sarah Brady, Charlton Heston, Sen. Charles Schumer (D-N.Y.), and Attorney General John Ashcroft . . . have lauded Exile for its supposedly tough-minded approach to crime" (p. 94). These efforts have received some attention in the legal literature as well. *See, e.g.*, Daniel C. Richman, *"Project Exile" and the Allocation of Federal Law Enforcement Authority*, 43 ARIZ. L. REV. 369, 374–97 (2001) (describing Project Exile in detail).

[9] 514 U.S. 549, 568 (1995).

Healy argues that Project Safe Neighborhoods presents several public policy problems. Some prosecutors have attempted to use the program to secure racially favorable jury pools by forum shopping between state and federal courts (p. 108). New federal prosecutors hired to work only on gun cases may have less discretion than generalist prosecutors when it comes to charging minor offenses (p. 105).[10] The interaction of federal gun prosecutions with federal mandatory minimums also leads to disproportionate punishments, as these minimums often lead to much longer sentences than would be handed down in state court.[11] In addition, Project Safe Neighborhoods may clog the federal courts with gun cases, making it hard to "provide a legal forum in which citizens with valid federal claims can promptly and dependably vindicate their rights" (pp. 102–03).[12]

Healy does not, however, offer a viable competing solution to the problem of gun crime. He states that "if a more aggressive crime control effort would bring substantial benefits, there is absolutely no reason that it cannot be undertaken by state law enforcement personnel" (p. 111). The fact remains, however, that state law enforcement agencies currently handle most gun crimes, and problems abound.[13] There may be ways to change state efforts to make them much more effective, but Healy does not delve into them deeply.[14] Commentators have suggested various approaches

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[10] As Healy explains, "Whereas other prosecutors are able to shift their focus to other categories of crime once they have charged the most dangerous defendants in a given category of offense, Safe Neighborhoods prosecutors will be expected to continue prosecuting violations of gun laws" (p. 105).

[11] One example of disproportionality is the case of Michael Mahoney, who, as a result of not marking that he was a felon (he had a thirteen-year-old drug conviction) on a gun permit application, received a sentence of fifteen years in prison (pp. 107–08). *See also* Gary Fields, *'Career Felons' Feel the Long Arm of Gun Laws*, WALL ST. J., July 3, 2001, at A16 ("As the Bush administration prepares to step up prosecution of gun crimes, Michael Mahoney represents a cautionary tale of how the drive can have unintended consequences.").

[12] Healy notes the objections of those who argue that federal courts have an important role in dealing with crimes that the states have failed to address: "NRA executive director Wayne LaPierre Jr. attacked federal judges who have criticized the program: 'They consider these nuisance cases . . . . That's shameful. Killing people is wrong, and . . . it needs to be changed. Every cop on the street knows it.'" (p. 112).

[13] *See, e.g.*, Erwin Chemerinsky, *Putting the Gun Control Debate in Social Perspective*, 73 FORDHAM L. REV. 477, 479–80 (2004) ("It has been estimated that economically the cost of gun violence is on the border of $100 billion per year. . . . In 2001, nearly 30,000 Americans died as a direct result of gunfire. . . . An additional 63,012 Americans were injured by firearms.").

[14] Phillip J. Cook & Jens Ludwig, *Principles for Effective Gun Policy*, 73 FORDHAM L. REV. 589, 604 (2004) (suggesting that Project Exile was relatively ineffective because of its "focus on increasing the severity of punishment rather than the likelihood" given that

to the problem of gun crime, such as mandating punishments equivalent to felon-in-possession penalties for those convicted of domestic violence misdemeanors involving firearms.[15] These suggestions are not without their own problems, but, by not offering an alternative, Healy leaves the reader searching for an acceptable solution to the background problem of gun violence.

In addition, Healy does not spend much time explaining why his issue should be a priority for Congress. He makes clear that there are serious problems with the program, as discussed above, but does not demonstrate clearly why these concerns are significant enough to warrant the attention of Congress over other competing issues. More problematic is the fact that Healy's argument is grounded in the theoretical values of federalism and fairness, whereas the counterarguments in favor of federal enforcement address the practical reality of reducing gun violence.[16] Healy could increase the chance of convincing legislators by drawing a closer parallel between the federalism concerns raised by Project Safe Neighborhoods and the concerns raised by other federal enforcement efforts that affect larger groups of people, ideally including those with considerable influence in Congress (unlike felons).[17] However, Healy's essay is well documented, detailed, and specific, and therefore may catch the eye of those skeptical of the increasing power of the federal government.

In contrast to Healy's critique of a particular government program, James DeLong writes generally about what he calls the "New Criminalization": the federal government's creation of criminal penalties in "environmental protection, financial practices, government contracting, employment relations, civil rights, medical practice—indeed, every area of government interaction with society and the economy" (p. 9). DeLong identifies four features of this new criminalization: (1) "increased complexity," (2) "diminished role of intent" (a watered-down intent requirement),

"[d]eterrence research suggests that crime is generally more responsive to changes in the perceived likelihood of punishment, than to changes in the severity").

15 *See, e.g.*, Sharon L. Gold, Note, *Why Are Victims of Domestic Violence Still Dying at the Hands of Their Abusers? Filling the Gap in State Domestic Violence Gun Laws*, 91 KY. L.J. 935, 936 (2003) (arguing that such programs would increase "accountability for domestic violence abusers and sav[e] the lives of battered women").

16 Healy acknowledges that increased federal enforcement seems to have been effective in reducing gun crime: "The homicide rate in Richmond fell 36 percent from 1997 to 1999, the period when Exile was most aggressively enforced" (p. 111).

17 Felons' voting rights are restricted in almost all states, and nationwide felons wield little political power. *See Developments in the Law—The Law of Prisons*, 115 HARV. L. REV. 1838, 1939–40 (2002) (noting that in forty-eight states felons cannot vote while incarcerated, and that eight states disenfranchise felons permanently).

(3) "greater intrusiveness," and (4) "diminished constitutional protections" (p. 14). He demonstrates convincingly that the criminal law has started to take on these features, and shows that it has led to unfortunate results for many individuals.[18] Regrettably, he does not spend much time addressing the arguments in support of such federal criminalization. For example, in discussing the "greater intrusiveness" of new regulatory criminal statutes, DeLong argues that in regulatory crimes, the "burdens are omnipresent, pushing so deeply into the daily life of the managerial, professional, and entrepreneurial classes that it has become impossible to avoid skirting, and almost certainly falling over, the edge of criminality" (p. 25). The case is persuasive, particularly considering his examples. At the same time, however, the reader must wonder: Is there really no reason to have these statutes? Some commentators have argued, for instance, that federal involvement in criminal law can provide uniformity and efficiency.[19] DeLong does not address these arguments satisfactorily nor does he balance them against his own concerns. In addition, DeLong's essay is an abridged version of a work originally published in 1997.[20] In updating the essay, he could have spent more time addressing events of the past few years, which arguably have indicated that punishments for corporate crime are not stringent enough.

Furthermore, DeLong's essay may be too broad to gain the attention of Congress. Although he provides a list of suggested reforms for Congress, most are unhelpfully general—for instance, having Congress "review the penalty policies in every program and provide clear guidelines and limitations" (p. 40). Such suggestions may not inspire action in Congress, because of both the legisla-

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[18] *United States v. Hanousek*, 176 F.3d 1116 (9th Cir. 1999), brings these concerns to the forefront. In that case, "Edward Hanousek Jr., a roadmaster for a railroad company in Alaska, was sentenced to six months in prison when a backhoe operator working under him accidentally ruptured an oil pipeline while sweeping rocks off a section of track" (p. ix). Hanousek was convicted of "negligently discharging a harmful quantity of oil into a navigable water." 176 F.3d at 1120. In his dissent from the Supreme Court's denial of certiorari, Justice Thomas (joined by Justice O'Connor) cautioned that "we should be hesitant to expose countless numbers of construction workers and contractors to heightened criminal liability for using ordinary devices to engage in normal industrial operations." Hanousek v. United States, 528 U.S. 1102, 1103 (2000) (Thomas, J., dissenting from denial of certiorari).

[19] *See* Stacy & Dayton, *supra* note 2, at 285 ("National authority can sometimes promote uniformity, efficiency, and liberty. It also can help avoid a tendency toward under regulation that results from the relatively parochial perspectives of the separate States.").

[20] JAMES V. DELONG, THE NEW "CRIMINAL" CLASSES: LEGAL SANCTIONS AND BUSINESS MANAGERS (Nat'l Legal Ctr. for the Pub. Interest, Briefly . . . Perspectives on Legislation, Regulation, and Litigation No. 10, 1997).

ture's limited time to address particular issues[21] and the lack of a cohesive voting constituency that could put pressure on lawmakers.[22]

Timothy Lynch's piece on environmental crimes provides Congress with a list of more focused reforms (pp. 64–65). Lynch does a great job of tying his evidence to these specific reforms. For example, one of Lynch's suggested reforms is that Congress should "[r]estore the Fifth Amendment guarantee against double jeopardy by flatly prohibiting successive prosecutions by federal and state agencies" (p. 65). His example is *United States v. Louisville Edible Oil Products, Inc.*,[23] a 1991 case in which the federal government charged a company with criminal violations of the Clean Air Act relating to asbestos release.[24] The company filed a motion to dismiss, invoking the Fifth Amendment and claiming that "previous fines levied by a local environmental enforcement agency were, in effect, federal punitive measures carried out through a state agency to regulate the same conduct."[25] The district court denied that double jeopardy was applicable.[26] The Sixth Circuit affirmed, noting that double jeopardy did not apply because "the actions taken by the federal and state governments are those of independent sovereigns" and the elements of proof were not the same.[27] Many readers will be surprised to learn that constitutional provisions such as double jeopardy often do not exist in these contexts. By providing such concrete examples of this phenomenon in practice, Lynch raises questions about the prudence of these statutes.

Lynch does a good job of priority-setting as well, by demonstrating that the injustices he describes can happen to any person or any business.[28] These issues affect many voters, and thereby will generally tend to draw more attention from elected lawmakers.

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21 *See supra* note 5 and accompanying text.

22 *See* John B. Corr, *Thoughts on the Vitality of* Erie, 41 AM. U. L. REV. 1087, 1121–22 (1992) (observing that "Congress remains responsive to both the states and the voters").

23 926 F.2d 584, 585 (6th Cir. 1991).

24 *Id.*

25 *Id.*

26 *Id.*

27 *Id.*

28 Lynch also discusses the experience of Ronald Rollins, a farmer convicted of violating the Migratory Bird Treaty Act (MBTA) for using pesticides on his crops "in the recommended quantities at the appropriate time," because birds ate the pesticides and died. United States v. Rollins, 706 F. Supp. 742, 743 (D. Idaho 1989). Rollins lacked criminal intent, but violation of the MBTA is essentially a strict liability criminal offense. Rollins succeeded in having his conviction overturned on vagueness grounds, but he still suffered a criminal prosecution despite his lack of mens rea. *Id.* at 745.

Grace-Marie Turner's essay on health-care criminal statutes stresses how indecipherable many of them are. She notes that the political discomfort with targeting beneficiaries has channeled government anti-fraud efforts toward doctors (p. 82). An example is colon cancer screening: "If a doctor orders a stool specimen to test for [indications of] early colon cancer . . . [,] the patient doesn't have symptoms and the bill is sent to Medicare, it's a criminal offense because these 'preventive services' aren't covered benefits . . . . The absence of intent to 'cheat' Medicare doesn't matter."[29] This and other examples paint a convincing portrait of a health-care crime enforcement system gone awry for honest doctors.

Turner's essay is comparatively strong as a message to Congress because it primarily targets injustices against doctors, a powerful political group. This essay may spur them to demand action from the congressional representatives whom they support financially.[30]

The book finishes with Erik Luna's strong critique of the Federal Sentencing Guidelines. Luna's argument has been made many times, and readers familiar with the debate surrounding the Guidelines may find the piece a bit rudimentary.[31] For those with little knowledge of the Guidelines, however, this essay is a great introduction. It also provides a heart-wrenching example, in the story of Kemba Smith, of the fallout of strict sentencing guidelines.

Kemba Smith, a college sophomore at Hampton University in Virginia, became involved with a flashy older man named Peter Michael Hall (p. 141).[32] As Luna recounts, "Hall was the kingpin of an East Coast drug ring that moved millions of dollars in cocaine" (p. 141). In response to physical abuse from Hall, Smith

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[29] Philip R. Alper, *Free Doctors from Medicare's Shackles*, WALL ST. J., Nov. 5, 1997, at A22.

[30] *See* Claudia L. Grossman Jaffe, *The Health Care Quality Improvement Act: Antitrust Liability in Peer Review*, 24 TORT & INS. L.J. 571, 591 (1989) (noting physicians' lobbying power in Congress). *Cf.* Anne L. Kelly, *Reinvention in the Name of Environmental Justice: A View from State Government*, 14 VA. ENVTL. L.J. 769, 769–75 (1995) ("[T]he lobbying power of these industry groups should not keep policymakers from actively seeking other perspectives, particularly those of traditionally underrepresented groups.").

[31] *See generally* KATE STITH & JOSE A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS (1998) (discussing Guidelines in detail). Federal judges have been among the harshest critics of the Guidelines. *See* John S. Martin Jr., Editorial, *Let Judges Do Their Jobs*, N.Y. TIMES, June 24, 2003, at A31 (discussing author's decision to retire from federal bench because he "no longer want[ed] to be part of our unjust criminal justice system" that relies on mandatory Guidelines).

[32] *See also* Kemba Smith, *Clinton's Pardon Saved Me, But What About the Others?*, USA TODAY, Nov. 17, 2004, at A11 (describing Smith's case).

acted "as a 'mule' in his drug business" (p. 141). After becoming pregnant with Hall's child, Smith was arrested on charges of conspiracy. The prosecutors offered to drop the charges against her if she would tell them where Hall was, but Hall died from a gunshot wound before she cooperated (p. 141). She had little choice but to plead guilty. She received a sentence of more than twenty-four years in prison, despite the fact that she had "a strong family background and promising future, had no prior record and had never personally sold drugs, had been abused and threatened by the chief culprit in the criminal scheme, and was the mother of an infant child" (p. 142).[33] President Clinton commuted Kemba Smith's sentence in 2000, after she had served more than six years in prison.[34]

Of course, Luna and other opponents of the Federal Sentencing Guidelines have already scored at least a partial victory. Shortly after *Go Directly to Jail* went to press, the Supreme Court decided *United States v. Booker*[35], a case addressing the constitutionality of the Guidelines. Justice Breyer wrote for the majority that "[w]e answer the question of remedy by finding the provision of the federal sentencing statute that makes the Guidelines mandatory incompatible with today's constitutional holding."[36] He then went on to state that "[s]o modified, the Federal Sentencing Act makes the Guidelines effectively advisory."[37] Only time will tell how lower courts and commentators interpret the decision in *Booker*, but it certainly appears to be a step in the right direction for Luna and others who oppose the Guidelines.

Luna largely avoids the problem of priority setting by writing about a topic that already receives enormous public attention.[38] This strategy has the advantage of easy access to readers and the disadvantage of not raising many new arguments.

Overall, *Go Directly to Jail* is a great read. Each essay provides both strong examples of overcriminalization and specific

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[33] *See also* Libby Copeland, *Kemba Smith's Hard Time*, WASH. POST, Feb. 13, 2000, at F1 ("She pleaded guilty in a nation where the drug war is so intense that a low-level participant in a drug operation stands to lose as much as its kingpin.").

[34] Libby Copeland, *Kemba Smith Granted the Gift of Freedom*, WASH. POST, Dec. 23, 2000, at C1 (describing commutation of Smith's sentence).

[35] 125 S. Ct. 738 (2005).

[36] *Id.* at 756 (citation omitted).

[37] *Id.* at 757 (citations omitted).

[38] *See, e.g.*, Linda Greenhouse, *Supreme Court Transforms Use of Sentencing Guidelines*, N.Y. TIMES, Jan. 13, 2005, at A1 ("The guidelines, intended to make sentences more uniform, should be treated as merely advisory to cure a constitutional deficiency in the system, the court held in an unusual two-part decision produced by two coalitions of justices.").

reforms. Despite some weaknesses in conveying the urgency of their problems to Congress, each essay, and particularly Healy's own, provides both an important education in, and a compelling argument against, the overcriminalization of America.