

Is the Criminal Law Important?

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I. INTRODUCTION

Is the criminal law important? I am skeptical. I have come to doubt the relevance of what most of us teach in our courses in criminal law, and of what most of us write when we theorize about the criminal law. I will explain the source of my anxieties, and briefly describe a focus that might help to make our specialty more responsive to the problem I will discuss.

I am painfully aware that insecurity about the significance of one's professional life eventually afflicts just about everyone—legal philosophers (like me) in particular. Non-academics are typically unable to name a single living philosopher, let alone a philosopher of law. My concerns are worth recounting only if they are based on reasons that other specialists in criminal law should share. I believe that this condition is satisfied, and that other teachers and theoreticians should be equally worried about the importance of much of what we do.

In the course of defending my skepticism, I will make no serious effort to describe what most of us teach or write about. The tables of contents of leading casebooks can be used to identify what we tend to cover in our classes. We focus on the “general part” of criminal law as applied to a handful of “core” offenses—especially those contained in the Model Penal Code. Most of us skip the meager sections on criminalization. Generalizations about our writing are more perilous. On a deep level, the nature of criminal theory is controversial.¹ Scholars always debate about the scope and boundaries of their discipline, and criminal theorists are no exception. Still, I am confident that readers of this journal will be reasonably familiar with the nature of the research undertaken by most of the contributors.²

The standard complaint among criminal theorists is that legislatures and courts ignore us. According to George Fletcher, “policy makers in the field of criminal justice should pay more attention to academic criticism.”³ Why does the real world neglect us? Most of us are quick to blame others for consigning us to irrelevance. In particular, we all believe that criminal justice has been too

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¹ These controversies are explored in *CRIMINAL LAW THEORY: DOCTRINES OF THE GENERAL PART* (Stephen Shute & A.P. Simester eds., 2002).

² For suitable introductions, see Larry Alexander, *The Philosophy of Criminal Law*, in *THE OXFORD HANDBOOK OF JURISPRUDENCE & PHILOSOPHY OF LAW* 815 (Jules L. Coleman & Scott Shapiro eds., 2002); Antony Duff, *Theories of Criminal Law*, *STAN. ENCYCLOPEDIA OF PHIL.* (Winter 2002), available at <http://plato.stanford.edu/archives/win2002/entries/criminal-law/>.

³ George P. Fletcher, *The Fall and Rise of Criminal Theory*, 1 *BUFF. CRIM. L. REV.* 275, 281 (1998).

thoroughly *politicized*. The most sensible answers to outstanding issues in criminal theory are unlikely to help candidates get elected or re-elected. Without question, this account contains a great deal of truth. Other commentators have elaborated on the politicization of criminal justice, and I will not try to add to their thoughts here.⁴ In what follows, I will offer a different explanation. To what extent are we at fault for becoming irrelevant?⁵ At what point do we alter our own approach? I want to comment on how much of our predicament is due to our tendency to focus on the trivial and insignificant.

The project of teaching and theorizing about the criminal law is important only if the criminal law itself is important. I believe that the criminal law itself is not important. At the very least, the criminal law is not nearly *as* important as many of us would like to think. If my doubts are cogent, there is much less reason to teach and theorize about the criminal law. The reason is not simply that politicians will ignore our advice—even though we can anticipate that they will. Instead, I believe that the criminal law is not important because it fails to implement the rule of law. The factors that govern whether or not persons will be punished are not much affected by the content of the statutes we teach and write about. Although we will continue to scrutinize these criminal laws carefully and critically, we should not expect that our efforts will have much impact on the actual practice of criminal justice.

At first blush, my allegation may seem unfounded. How could our criminal law fail to implement the rule of law? Most of us are familiar with and teach *Shaw v. Director of Public Prosecutions*,⁶ a 1962 case in which the House of Lords appeared to compromise the principle of legality by struggling to find a basis to punish a scoundrel who engaged in conduct that was not clearly criminal at the time of his arrest. The fact that American textbooks include a 40-year-old British case to illustrate how courts have bent the principle of legality is ample indication that this situation is highly unusual. In fact, our judiciary has done a commendable job preserving the rule of law; courts are not the place to look for contemporary deviations from the principle of legality. Legal philosophers have long noted our obsession with judges to the exclusion of other participants in the criminal justice system, and this observation is equally trenchant today. Our courts have a far better track record in protecting the principle of legality than other players in our criminal justice system.

⁴ See Sara Sun Beale, *What's Law Got To Do With It? The Political, Social, Psychological and Other Non-Legal Factors Influencing the Development of (Federal) Criminal Law*, 1 BUFF. CRIM. L. REV. 23 (1997).

⁵ See Samuel H. Pillsbury, *Why Are We Ignored? The Peculiar Place of Experts in the Current Debate About Crime and Justice*, 31 CRIM. L. BULL. 305 (1995). Pillsbury is prepared to blame ourselves for this sad state of affairs, although his diagnosis differs from mine. He laments, for example, that experts in criminal justice tend to look for long-term solutions when politicians and the public are interested in immediate results.

⁶ [1962] A.C. 220.

I will converge on the problem from two distinct perspectives. In Part II, I will introduce the difficulty in jurisprudential terms. In Part III, I will describe much the same phenomenon by generalizing from criminal codes. In Part IV, I will conclude by mentioning how we theorists might adjust our focus to help salvage the rule of law in contemporary criminal justice.

II. JURISPRUDENTIAL IRRELEVANCE

The occasion for realizing that something is amiss takes place almost every week. When my undergraduates or philosophy graduate students learn that I specialize in criminal law, they anticipate that I'll be able to answer some easy questions. They describe a scenario that may happen or has happened to one of their friends (but not to them personally!) and expect that I'll be able to make a relatively accurate prediction about how legal officials will respond. Let me provide specific examples of the questions my students do and do not ask. To date, no one has inquired how the law will treat a person who has engaged in nonconsensual sexual penetration while making an honest mistake about the existence of consent that is reasonable according to social conventions—the kind of topic I am happy to address in my role as criminal theorist.⁷ But I am frequently asked how the law will respond to a person who uses or sells small quantities of drugs, especially marijuana.⁸ How will the criminal law deal with this individual?

This question is simple and straightforward. Approximately 15 million Americans use illicit drugs on a regular basis, and undergraduates are at or near the age of peak consumption. I am sure that virtually all of my students are acquainted with someone who smokes marijuana. Many of these users occasionally sell drugs. Despite the prevalence of these behaviors and the frequency with which I am asked about them, I am forced to admit that I cannot answer this question with any confidence. My knowledge of the criminal law—and even my specialty in drug policy—gives me little guidance about the probable fate of the person in question.

Should I be embarrassed about this? I think so. I am unable to answer the question that Justice Holmes identified as fundamental to an understanding of the law. According to Holmes, the law consists of “prophecies of what the courts will do in fact, and nothing more pretentious.”⁹ Without endorsing the whole school of jurisprudence that Holmes sought to defend, he clearly identified what is central to what many laypersons are interested in when they make inquiries about the law.

⁷ Douglas Husak & George C. Thomas, *Rapes Without Rapists: Consent and Reasonable Mistake*, 11 PHIL. ISSUES 86 (2001).

⁸ My generalizations about infringements in the rule of law need not have been derived from the selective enforcement of drug offenses. Many other crimes, such as gambling and prostitution, would have served my purposes equally well.

⁹ Oliver W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897), reprinted in HARVARD LAW REVIEW: INTRODUCTION TO LAW, at 50, 54 (1968).

Experts who profess to know the law should be able to make a fairly accurate "prediction that if a man does or omits certain things he will be made to suffer in this or that way by judgment of the court."¹⁰

I assume my students are raising Holmes' question when they ask how the law will respond to their friend who uses or sells drugs. I doubt that they are narrowly fixated on what *courts* will do to this person, but this fact does not undermine the point I have in mind. Although Holmes defined the law as the set of prophecies of what *judges* will do, I am sure he did not intend to disregard the behavior of other participants in our criminal justice system. Police and prosecutors, no less than judges, are and ought to be subject to the rule of law.¹¹ I assume Holmes meant only that courts could not act unless police and prosecutors brought a case before them, and judges have the final power to specify the content of the law by convicting or acquitting. My students, then, should be understood to inquire how the criminal justice system at each level would react to their friend. Will he be arrested? Will he be prosecuted? Will he be punished? If so, how severe will his punishment be? These are the kinds of questions I am asked on a regular basis.

Why am I unable to answer them? I hope that no one will reply that I am not as knowledgeable about the criminal law as I like to pretend. This reply *cannot* be adequate, because other specialists are just as inept as I. Even those scholars with an encyclopedic knowledge of the criminal law—like Paul Robinson or Joshua Dressler—would not be able to predict the fate of the drug-using friend. Thus the phenomenon I have described cannot be attributed to my own ignorance. The real explanation lies elsewhere.

In the event someone suspects that the problem I have described is illusory, we might pause to ask: What *does* happen to persons who smoke or sell marijuana? Although the answer varies radically from one time and place to another, I will hazard a few generalizations. In the first place, the majority of users and sellers manage to avoid detection. But the police do not always confront even those offenders they happen to notice. For five years, I lived in a neighborhood where persons (literally) sold drugs on my sidewalk and driveway. Police frequently observed them, but seemed more interested in ensuring that they did not move to more upscale locations than that they were arrested and prosecuted. Occasional confrontations took place, but arrests were fairly unusual. Police would hassle these offenders, confiscate their drugs, and frighten them away. When no arrests were made, one can only guess what happened to the contraband that was seized. Typically, the same sellers would reappear at a later time. I assume the demeanor of the seller was the most important factor in explaining why some confrontations led to arrests and others did not, but it is hard to be sure. Although I raised these issues with the police in my neighborhood, I was not surprised that they were unhelpful in clarifying their policy.

¹⁰ *Id.* at 51.

¹¹ See JOSEPH RAZ, *THE AUTHORITY OF LAW* 218 (1979).

So we really don't know much about the fate of drug users and sellers. Perhaps our ignorance about these matters is excusable. Our expertise is in criminal law, not in criminology. But what happens after an arrest *is* made? Here, knowledge of the criminal law should come into play. Even at this stage, however, predictions are remarkably tenuous. The variables that lead to decisions about whether an arrestee will be charged are not especially clear. And *what* charges he will face are even more difficult to ascertain. The same uncertainties apply to sentencing. Federal law, at least, imposes mandatory minimums on defendants who are guilty of distributing drugs. But we all know how mandatorics are evaded by such devices as fact-bargaining and charge-bargaining.¹² How frequently do these evasions occur? Only rough guesses are available. Discretion, as many theorists have pointed out, simply shifts from one place to another—and usually settles where it becomes least visible. This invisibility all but guarantees that no one can foresee how discretion will be exercised in particular cases.

One of the few things we *do* know is that race and ethnicity are significant factors in estimating the probability that drug users and sellers will be punished. Contemporary statistics are shocking. Although whites and blacks are roughly comparable in their rates of illicit drug use, blacks are arrested, prosecuted, and punished for drug offenses far more frequently and harshly than whites.¹³ The public does not seem outraged about these inequities. In fact, citizens and officials alike are remarkably complacent about the deterioration in the rule of law I am describing here. I am confident, however, that the drug war would have ended long ago if whites had been sent to prison for drug offenses at the same rate as blacks.

So I take for granted that those of us who teach and theorize about the criminal law would be unable to answer the simple and straightforward questions I have posed. But *shouldn't* we be able to answer them? If knowledge of the criminal law consists in the ability to make reliable forecasts about the conduct that will be punished, it follows that none of the scholars I respect and admire knows the law very well. Can this possibly be true? Even without invoking the realist jurisprudence of Holmes, it is plausible to suppose that the distinction between the conduct that will be punished and the conduct that will not be punished is a function of the criminal law, and experts should know enough about the content of the criminal law to succeed in drawing the contrast. This is a supposed implication of the principle of legality. We are said to be a government of laws, not of men. Whatever else this vague principle might mean, it seemingly entails that the distinction between conduct that is and is not punished should depend on what the criminal laws say.

¹² Some of the maneuvering around these provisions is described by Stephen J. Schulhofer & Ilene H. Nagel, *Plea Negotiations under the Federal Sentencing Guidelines: Guideline Circumvention and Its Dynamics in the Post-Mistretta Period*, 91 NW. U. L. REV. 1284 (1997).

¹³ See Jamie Fellner, *United States: Punishment and Prejudice: Racial Disparities in the War on Drugs*, HUM. RTS. WATCH, May 2000.

We can certainly *imagine* a system of criminal justice in which a comprehensive knowledge of the law would enable us to safely predict the fate of the drug-using friend. One such system would require *full enforcement* of the criminal laws as written. But few commentators insist that the rule of law requires full enforcement.¹⁴ Most theorists agree that full enforcement of existing statutes would be impossible and unjust.¹⁵ Despite the inevitability of selective enforcement in all systems of criminal justice throughout the United States today, candor is surprisingly rare among police and prosecutors. Until fairly recently, police were thought to lack discretion altogether.¹⁶ In any event, we do not suppose that the discretion we vest in legal officials—police and prosecutors—is necessarily incompatible with the principle of legality. For some reason, however, we have rarely applied our insights about the legitimacy of *judicial* discretion to these other actors in our criminal justice system. To be justified, the exercise of judicial discretion must be *principled*.¹⁷ Presumably, the same is true of the discretion exercised by police and prosecutors. At least, I cannot imagine why theorists would want to constrain discretion in one place but not in another. The absence of a (perhaps exceedingly complex) principle to explain why judges convict in one case but not in another would represent a mockery of the rule of law, and the same must be true of police and prosecutors. Perhaps some such principles exist, but they have never been clearly identified.¹⁸ The more plausible possibility is that the rule of law is systematically infringed at these crucial stages in our criminal justice system. The lack of a principle here, as elsewhere, blurs the distinction between the rule of law and naked power.

The better explanation of why experts in the criminal law cannot make accurate predictions is that the fate of the person in question is not a function of the criminal law. More precisely, it is not a function of the criminal law in which we teachers and theorists have expertise. The *real* criminal law, as Holmes would construe it, is in the hands of police and prosecutors. As we all know, they are constrained by almost nothing in performing their jobs. So what *really* happens does not much depend on the content of the substantive criminal law. The criminal law we teach and theorize about turns out not to be very important.

¹⁴ For an exception, see Jeffrey Reiman, *Is Police Discretion Justified in a Free Society?*, in *HANDLED WITH DISCRETION: ETHICAL ISSUES IN POLICE DECISION MAKING 71* (John Kleinig ed., 1996) [hereinafter *HANDLED WITH DISCRETION*].

¹⁵ For the classic account of these matters, see KENNETH CULP DAVIS, *DISCRETIONARY JUSTICE IN EUROPE AND AMERICA 65-67* (1976).

¹⁶ See SAMUEL WALKER, *TAMING THE SYSTEM: THE CONTROL OF DISCRETION IN CRIMINAL JUSTICE, 1950-1990*, at 6 (1990).

¹⁷ Ronald Dworkin, for example, famously denies the existence of what he calls “strong” judicial discretion. Curiously, however, he fails to apply his arguments to other participants in the criminal process. See RONALD DWORIN, *TAKING RIGHTS SERIOUSLY 31-39* (1977).

¹⁸ For some helpful observations, see the chapters in *HANDLED WITH DISCRETION*, *supra* note 14.

III. THE IRRELEVANCE OF STATUTES

I would like to take a different route to introduce much the same problem. I will begin indirectly, by briefly discussing the laws governing traffic and motor vehicles. Everyone is aware that these offenses are numerous and broad. In my state of New Jersey, which is fairly typical in most respects, the Motor Vehicle and Traffic Regulations span some 180 pages of dense text. Although the applicable statutes are relatively easy to find—especially now that they are freely available on the Internet—I daresay that almost no one is aware of the content of the regulations that pertain to him. But widespread ignorance of the law is not the problem on which I will focus. Instead, the problem is that it is nearly impossible (even for those who may know the law) to drive for even a short period of time without committing some infraction or another. A policeman who follows a driver for several minutes is bound to find probable cause to stop him. Even those few individuals who happen to be familiar with the details of the regulations cannot anticipate what conduct would lead the police to detain him. After being stopped, no one has much basis for predicting what behavior will lead to a summons. Under what circumstances are drivers treated more leniently when they produce a PBA (Police Benevolent Association) card? In the health club where I exercise regularly, a few policemen have made unsolicited offers to “fix” any summons I might receive. How pervasive is this state of affairs? Needless to say, reliable data are hard to find.

I am almost embarrassed to offer a specific example of this phenomenon. Speed limits provide a good illustration. Exactly how fast *is* a driver permitted to travel on given highways? Posted limits offer little guidance. Someone who receives a citation for driving slightly above the posted limit is best advised to pay the fine. And even if he is driving below the limit, he may be cited if weather conditions are deemed to be sufficiently hazardous. In other words, the fate of the driver is almost entirely in the discretion of the police. It is hard to understand why this state of affairs has not given rise to howls of protest from those theorists who take the rule of law seriously. It would not be difficult to alter legal conventions so that posted limits meant what they say. Only the minor penalties that are imposed lead commentators to neglect this area of the law. And neglect it we do. I do not recall that this flagrant disregard of the rule of law was ever mentioned throughout my career as a student or teacher of criminal law.

I trust that few will disagree with my brief account of how the enforcement of motor vehicle and traffic regulations systematically infringes the rule of law. What is more controversial is my reason for mentioning these offenses. I claim that much of our criminal law has come to resemble traffic codes in crucial respects. Criminal statutes have multiplied exponentially; no living person can be aware of more than a tiny fraction of them. More alarming is the fact that these offenses have become so all-encompassing that nearly everyone commits an infraction at some time or another. According to William Stuntz, we are coming “ever closer to

a world in which the law on the books makes everyone a felon.”¹⁹ This allegation may be understated. In any event, it is clear that we have already arrived at this world if we include misdemeanors as well as felonies.

Again, the criminal law pertaining to drugs can be used to illustrate my complaint. The Criminal Code of New Jersey, like that of all states, regulates what are called “Controlled Dangerous Substances.” Laypersons might be excused for thinking that this statutory scheme governs only truly dangerous drugs, but its reach includes ordinary prescription medications. Since just about every American fills several prescriptions throughout his life, nearly all of us have possessed (and probably currently possess) one or more controlled dangerous substances. Our use and possession of these drugs is often contrary to the law as written.

I need not refer to the fact that approximately 42% of all Americans over the age of 12 have taken an illicit drug at some time or another. Better support for my conclusion is easier to find. For example, no person is allowed to use or be under the influence of a controlled substance for a purpose other than as lawfully prescribed. Patients who deviate from the terms of their prescriptions—who use medications to treat a condition other than that for which they were originally prescribed—are in violation of the law. If we share these drugs with our spouse or family members, we break the law proscribing distribution. Moreover, these substances must be kept in their original containers. Someone who goes on a two-week vacation and places his pills in a different bottle becomes a disorderly person. I have no reliable data on how often individuals engage in these behaviors, but I assume they are done casually and routinely.

These problems are not peculiar to drug offenses. William Stuntz concludes that “anyone who studies contemporary state or federal criminal codes is likely to be struck by their scope, by the sheer amount of conduct they render punishable.”²⁰ I cannot improve on his examples. California prohibits knowingly allowing the carcass of a dead animal to remain within 100 feet of a street or alley, selling alcohol to a common drunkard, or cheating at cards. Ohio proscribes homosexual propositions. Texas criminalizes overworking animals.²¹ As Ronald Gainer illustrates, federal law is probably even worse in this respect. Federal law imposes criminal penalties on persons who disturb mud in a cave on federal land, walk a dog on the grounds of a federal building, or sell a mixture of different kinds of turpentine.²² It is hard to believe that many of us have not committed countless state and federal offenses.

Still, relatively few of us have actually been punished. Why? The answer cannot be that we have not violated the law as written. Clearly, we have been

¹⁹ William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 506, 511 (2001).

²⁰ *Id.* at 515.

²¹ *Id.* at 516.

²² Ronald Gainer, *Federal Criminal Code Reform: Past and Future*, 2 BUFF. CRIM. L. REV. 45, 74 (1998).

spared through exercises of discretion. That police and prosecutors wield such discretion is nothing new. What *is* new is the power to arrest and prosecute nearly everyone—a power that derives from the ever-expanding scope of the criminal law as written. The combination of these phenomena—unfettered discretion coupled with all-encompassing offenses—is destructive of the rule of law. If I have correctly described the way criminal justice really operates, it follows that the criminal law—and a firm knowledge of the criminal law—are not so very important.

The consequences of this erosion of the rule of law are monumental, and I cannot hope to explore them here. Suffice it to say that many of the theories we philosophers of law hold dear are jeopardized. Many of us believe, for example, that criminal justice should implement a theory of desert, which requires *inter alia* that the severity of the punishment should be proportionate to the seriousness of the crime. This principle was (and continues to be) instrumental in favor of adopting sentencing guidelines that removed discretion from judges.²³ Two persons with relevantly similar criminal histories who commit relevantly similar offenses should receive comparable punishments. Unfortunately, the principle of proportionality is violated under a number of circumstances, including: (a) when some but not all relevantly similar offenders are arrested; or (b) when some but not all relevantly similar arrestees are prosecuted; or (c) when some but not all relevantly similar prosecutees are charged with different crimes. We have tried (with limited success) to ensure that sentences are proportional. But this effort is undermined by our failure to take the rule of law seriously at earlier stages of the criminal process.

IV. WHAT TO DO?

If I am correct, why do we persist in doing what we do? Few of us should be happy to continue to pursue an expertise that we admit to be unimportant. Many of the answers to this question are perfectly adequate to *explain* our complacency, but none, I fear, serve to *justify* it. Psychological and economic explanations are abundant. We love what we do, and isn't that what really matters? We are guaranteed employment, because students are required to take our courses. Laypersons respect us; how could knowledge of the criminal law be irrelevant? We enjoy reading and critiquing each other's work, so we are assured of a small but smart audience of academics. For these reasons, I doubt that even those readers who are fully persuaded by my train of thought will retool and change their research orientation. Nonetheless, I fear that much of what we do fails to give our lives the kind of value we all would like them to have.

What change in our focus might help to improve this predicament? I said that criminal theory is important only if the criminal law is important. I should have said that criminal theory is important only if the criminal law *that we have* is

²³ See ANDREW VON HIRSCH ET AL., THE SENTENCING COMMISSION AND ITS GUIDELINES (1987).

important. But the criminal law that we have is not the criminal law that we ought to have. There is good reason to reform the criminal law to restore the rule of law. In other words, there is good reason to have a criminal law that is important.

Imaginative responses to the problem I have described present a formidable challenge for criminal theorists. I do not insist that only one solution is viable.²⁴ Perhaps the single best contribution a theorist could make, however, would be to produce a theory of criminalization that would radically reduce the number and scope of criminal offenses. As long as jurisdictions persist in criminalizing far more conduct than they could ever hope or want to punish, knowledge of the content of statutes will not help us predict who will or won't incur criminal liability. Removing given crimes here and there will not rectify the situation, since existing codes tend to include layers of overlapping offenses. Thus, a single instance of criminal conduct simultaneously violates any number of distinct offenses.²⁵ What is needed to remedy this problem, I suspect, is nothing less than a systematic overhaul of state and federal criminal codes.

Criminal theorists have shown relatively little interest in defending principles of criminalization and applying them to reshape criminal codes. I do not mean to suggest that teachers and theorists are sanguine about the mess in state and federal codes today. But the motivations that lead them to initiate reforms are seldom parallel to those expressed here. Consider, for example, the Herculean efforts of Paul Robinson to rewrite criminal codes.²⁶ Robinson is mostly interested in providing better *notice* to citizens of the kind of conduct that is proscribed. To this end, he proposes to subdivide codes into two parts: rules of conduct and rules of adjudication. Whatever the merits of this ambitious project, it takes only a tiny step toward addressing the difficulty I have identified here. What reasons do we have to believe that knowledge of Robinson's subdivided code would help us to make better predictions about the fate of citizens in the real world? And why should we think that the separation of rules of conduct from rules of adjudication would narrow the scope of the law so that fewer of us would engage in criminality as we go about our everyday lives? Clearly, Robinson's goals are quite unlike those that animate me.

I don't suggest for a moment that the efforts of academics in defending and applying a theory of criminalization will really *solve* the problem I have raised. Almost certainly, criminal practice will go on as before, unaffected by our ideas. But we have little hope of restoring the importance of the criminal law unless we

²⁴ Admittedly, alternative solutions to the much the same problem I have described have been proposed. See, for example, the model of "transparent policing" endorsed by Erik Luna, *Principled Enforcement of Penal Codes*, 4 BUFF. CRIM. L. REV. 515 (2000).

²⁵ See Jeffery Standen, *An Economic Perspective on Federal Criminal Law Reform*, 2 BUFF. CRIM. L. REV. 249 (1998). Standen maintains, for example, that federal law contains "exactly three hundred and twenty-five provisions that prescribe criminal penalties for fraud." *Id.* at 289.

²⁶ PAUL ROBINSON, *STRUCTURE AND FUNCTION IN CRIMINAL LAW* (1997).

are willing to do the hard work of producing a criminal code that has some prospects of implementing the rule of law.

