

Many Failed Efforts to Count Nation's Federal Criminal Laws 1

By Gary Fields and John R. Emswiler

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WASHINGTON—For decades, the task of counting the total number of federal criminal laws has bedeviled lawyers, academics and government officials.

"You will have died and resurrected three times," and still be trying to figure out the answer, said Ronald Gainer, a retired Justice Department official. 1

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In 1982, while at the Justice Department, Mr. Gainer oversaw what still stands as the most comprehensive attempt to tote up a number. The effort came as part of a long and ultimately failed campaign to persuade Congress to revise the criminal code, which by the 1980s was scattered among 50 titles and 23,000 pages of federal law.

Justice Department lawyers undertook "the laborious counting" of the scattered statutes "for the express purpose of exposing the idiocy" of the system, said Mr. Gainer, now 76 1 years old.

It can often be very difficult to make a call whether or not something counts as a single crime or many. That task fell to one lawyer, Mr. Gainer says, who read the statutes and ultimately used her judgment to decide: If a particular act fell under multiple crime categories—such as forms of fraud that could also be counted as theft—she had to determine whether it could be prosecuted under each. If an offense could be counted in either of two sections, she counted them separately, Mr. Gainer said.

The project stretched two years. In the end, it produced only an educated estimate: about 3,000 criminal offenses. Since then, no one has tried anything nearly as extensive. 1

The Drug Abuse Prevention and Control section of the code—Title 21—provides a window into the difficulties of counting. More than 130 pages in length, it essentially pivots around two basic crimes, trafficking and possession. But it also delves into the specifics of hundreds of drugs and chemicals.

Scholars debate whether the section comprises two offenses or hundreds. Reading it requires toggling between the historical footnotes, judicial opinions and other sections in the same title. It has also been amended 17 times.

In 1998, the American Bar Association performed a computer search of the federal codes looking for the words "fine" and "imprison," as well as variations. The ABA study concluded the number of crimes was by then likely much higher than 3,000, but didn't give a specific estimate.

"We concluded that the hunt to say, 'Here is an exact number of federal crimes,' is likely to prove futile and inaccurate," says James Strazzella, who drafted the ABA report. The ABA felt "it was enough to picture the vast increase in federal crimes and identify certain important areas of overlap with state crimes," he said.

None of these studies broached the separate—and equally complex—question of crimes that stem from federal regulations, such as, for example, the rules written by a federal agency to enforce a given act of Congress. These rules can carry the force of federal criminal law. Estimates of the number of regulations range from 10,000 to 300,000. None of the legal groups who have studied the code have a firm number.

"There is no one in the United States over the age of 18 who cannot be indicted for some federal crime," said John Baker, a retired Louisiana State University law professor who has also tried counting the number of new federal crimes created in recent years. "That is not an exaggeration."

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