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Making It a Federal Case: An Inside View of the Pressures to Federalize Crime

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Trimming back the federal criminal code by eliminating offenses that should be investigated and prosecuted by the states has long been a goal of policy experts and good-government advocates.¹ This exercise in federalism is worthwhile both for its constitutional merits and for its effect on government accountability, as it would clarify which agencies are responsible for fighting which types of crime. Nevertheless, it is an uphill battle. Simply put, there is currently little political profit in advocating for less federal law enforcement. That reality has sapped support in Congress and the executive branch for broad reforms. Instead, change must be pursued incrementally, with an understanding of the practical and political dynamics contributing to the over-federalization of crime.

Political and Public Pressures to Federalize

Over the past several years, I have heard expressions of frustration that the current Administration has not done more to combat over-federalization. With so many federalism-minded conservatives in the Department of Justice, people seem to think, we ought to see more inroads against the over-federalization of crime. While such sentiments are understandable as a matter of principle, they do not account for political reality. Without intending either to criticize or defend the Department, I can say from experience that it is not surprising that the federal agency charged with preventing, solving, and punishing federal crimes is not aggressively attempting to shrink

Talking Points

- The federal criminal law's size and scope far exceed constitutional and prudential limits.
- Federal criminal law should be trimmed back to eliminate offenses that could best be handled by the states.
- A lack of public understanding of the problem of over-federalization results in political pressures that make it difficult for the executive branch to combat the problem.
- Reform must be pursued incrementally for now, and reform advocates should focus on making the practical benefits of federalism part of the public discourse while eliminating the most egregious examples of over-federalization.

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the federal criminal code. Nor should it surprise anyone that the Congress has not pursued this project either, due to the lack of popular understanding of the over-federalization issue and the corresponding lack of public support for reform.

Pressures within the Executive Branch. Two major dynamics explain why the Department of Justice has not, and—barring any changes to the current political climate—likely will not prioritize efforts to combat over-federalization. First, the Department, like any federal, state, or local agency, is responsive to public opinion in setting its policy agenda, and federalism simply is not a refrain that resonates in the public debate. This may be because the benefits of—and constitutional basis for—federalism are almost never discussed in political discourse or in the media. Whatever the reason, neither the press nor the people are crying out for law enforcement agencies to promote constitutional federalism. To the contrary, when an especially horrific crime occurs, the press and the public demand to know what law enforcement is doing about it. And the pressure on law enforcement to *do something* often becomes pressure on *federal* law enforcement to do something. It might be a high-profile carjacking, a rash of violence by the gang MS-13, or the increasing prevalence of identity theft. Most people don't seem to care whether the responding officer's badge says FBI or LAPD; they just want somebody to apprehend and punish the offender, stop the outbreak of crime, and make them feel safe.

Most small-government conservatives would acknowledge that in some of these cases, a federal response to the latest high-profile crime is entirely appropriate. Identity theft, for example, is increasingly an interstate crime because it is so often perpetrated across state boundaries via the Internet. However, the amount of pressure placed on federal

law enforcement officials to take action usually does not depend on whether the appropriate response is federal or local.

In response to the latest crime trend, this pressure to *do something* comes from multiple sources. For instance, the press will cover the crimes in great detail, and reporters will call the Department asking how it plans to respond. Law enforcement associations will ask the Department to commit more resources to the issue and to provide more support to state and local agencies. Perhaps most important, Congress will hold hearings and demand to know what the Department is doing to protect their constituents. For the Department then to respond, “Sorry, carjackings are supposed to be investigated and prosecuted by local authorities, and we can't do anything about it,” simply will not fly politically. And whenever crimes are committed and the public is at risk, the agents and prosecutors at the Department naturally want to do everything within their power. So the Department must see what it *can* do. Although political considerations can never trump constitutional obligations, the combination of a legitimate desire to fix a demonstrable problem and political pressure to do so can push concerns about federalism to the back burner.

In addition to the demands to *do something* in response to the high-profile crime of the moment, the Department feels pressure to show that it has a positive, big-picture agenda. This dynamic is not unique to the Department of Justice—every agency at every level of government faces it. But setting a public agenda can be tricky in a law enforcement agency. The Attorney General can announce that he intends to prioritize, say, immigration-related prosecutions. He can, to the extent permitted by the budget and federal personnel rules, allocate more prosecutors to focus on these crimes and to work in districts where these crimes are the most preva-

1. The most up-to-date study reports that there are now at least 4,450 criminal offenses in the federal code. See John S. Baker, Jr., *Revisiting the Explosive Growth of Federal Crimes*, Heritage Foundation Legal Memorandum No. 26, June 16, 2008, at 1. In addition, there are thousands of federal administrative regulations that may serve as a basis for the federal government to impose criminal penalties. See Criminal Law Division, American Bar Association, *THE FEDERALIZATION OF CRIMINAL LAW* 10 (1998) [hereinafter ABA, *Federalization Report*] (reporting that approximately 10,000 federal regulations expressly mention possible criminal or civil penalties); John C. Coffee, Jr., *Does “Unlawful” Mean “Criminal”?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. Rev. 193, 216 (1991) (estimating that “there are over 300,000 federal regulations that may be enforced criminally”).

lent. But the nation's chief law enforcement officer must be careful about the extent to which he promises an increase in the number of prosecutions. Telling prosecutors they must increase a certain category of prosecutions may lead to a perception that prosecutors are bringing cases regardless of the strength of the evidence. Some prosecutors themselves may perceive such pressure where none is intended. Therefore, even if the Department's management decides to devote more prosecutorial resources to a particular type of prosecution, it is unlikely to promise more prosecutions or to order the field to bring them.

Promising to reduce crime in a certain category is similarly tricky. In the case of drug abuse, for example, federal law enforcement can have a salutary impact through public education campaigns. But rarely are they in a position to promise a particular result—too many variables are outside their control.

In light of the downsides of promising increased prosecutions or decreased crime, proposing new criminal legislation becomes an increasingly attractive part of a policy agenda. Some small-government conservatives may cringe at the notion, but it is important to remember that, even from a federalist perspective, not all expansions of federal criminal law are constitutionally suspect. There are areas of true federal concern—terrorism, immigration fraud, human smuggling across our nation's borders, an ever-increasing number of crimes committed across state boundaries via the Internet—where technological advances or changes in the way criminals do business necessitate changes to the law. It would be foolish not to expand the reach of terrorism statutes to include crimes committed via the Internet and with cell phones when these media are favored by terrorists. Similarly, distribution of child pornography—often memorializing horrific sexual abuse—has become a predominately multi-state crime committed mostly via the Internet. Changing the law to reflect this reality is entirely appropriate. At the other end of the spectrum, of

course, is legislation that would federalize entirely new areas of criminal law, such as the Violence Against Women Act (VAWA). Unfortunately, there seems to be little correlation between the extent to which criminal legislation is appropriate from a federalism perspective and its popularity in the press, in the public mind, and on Capitol Hill.

Proposals to eliminate provisions of the federal criminal code could be portrayed—rightly or wrongly—as *weakening* criminal law. It should go without saying that legislative efforts carrying this negative perception will not win the Department points with any of its key constituencies. Nor will such actions be popular with Congress, which leads to the second dynamic.

The Department of Justice is not likely to spend much time or effort developing a legislative proposal that is not going to go anywhere in Congress. There is an overwhelming number of pressing criminal justice issues that are legitimately federal. The demands of dealing with these issues can be crushing. The Department is staffed with thousands of lawyers working hard to prevent terrorism, prosecute immigration offenses, ferret out public corruption, bring human traffickers to justice, and stanch the increasing tide of fraud and other crimes committed via the Internet, among many other priorities. To be very practical about it, there aren't enough hours in the day—even in the twelve-hour days that many Department lawyers work—to spend much time thinking about cleaning up the federal criminal code, especially when Congress is unlikely to have an interest in the project.

Yet it would not be accurate to say that the Department of Justice does not consider federalism or never pushes back on suggested expansions of federal crime. It does. For example, the Department currently opposes legislation that essentially would federalize the prosecution of adult prostitution—a vice that always has been investigated and prosecuted by state and local agencies.² And federalism concerns have guided internal discussions

2. See, e.g., “The William Wilberforce Trafficking Victims Protection Reauthorization Act of 2007 As Passed by the House of Representatives on December 4, 2007,” Office of Legal Policy, U.S. Department of Justice (undated position paper), <http://www.usdoj.gov/olp/pdf/doj-position-on-hr3887.pdf>.

on numerous criminal justice policy issues throughout the Bush Administration. In setting the Department's agenda, the Administration has not proposed, for example, broad expansions of federal criminal law into areas previously policed entirely by state and local authorities, such as occurred in VAWA.

Pressures within Congress. To date, Congress itself has not shown much institutional interest in fixing the over-federalization of crime. To the contrary, Congress feels the same pressures to mount a federal response to local crime problems as the Department does. Congress regularly looks for ways to show what it is doing to fight crime around the country, both by passing legislation and by appropriating money for law enforcement grants. When their constituents cry out for something to be done about the increase in violent crimes in their neighborhoods, Members of Congress naturally want to take action. In the current political climate, responding that the Constitution assigns responsibility for the latest high-profile crime to state and local governments and that Congress has no role will not win many votes.³ Nor will proposing a wholesale overhaul or streamlining of the criminal code. When the message is filtered through the popular press, federalism is not an applause line. To the contrary, because the public has become so used to the federal government attempting to fix every social problem, federalism arguments often sound like a cop out.

One brief example illustrates how the dynamics leading to the over-federalization of crime can

influence members of both major parties. In 1992, the nation was appalled by a senseless and tragic carjacking in which Pam Basu was dragged to death near her home in suburban Maryland as she tried to prevent her attackers from driving off with her two-year-old daughter still in the car.⁴ Outrage about this crime sparked bipartisan and bicameral support for legislation introduced by then-Rep. Charles Schumer (D-NY) transforming carjacking into a federal offense. President George H. W. Bush signed the legislation⁵ and issued glowing remarks about its benefits.⁶ All of this happened despite the fact that in the vast majority of cases, violent crimes, including carjackings, are investigated and prosecuted by state and local law enforcement. Moreover, Basu's attackers were brought to justice under existing state law; both were charged and convicted in state court, and both received life sentences.⁷ Nevertheless, the graphic brutality of the crime, the extensive press coverage of it, and the resulting national outrage fueled support for federal legislation in both the legislative and executive branches, and a Republican President signed the bill.

Opportunities for Immediate Reform

In this presidential election year, a fresh opportunity is available to those who want to restore constitutional and prudential limits on the government's propensity to federalize crime. As the next Administration takes office, it will be important to remind the new leadership of the importance of federalism. One way to do this is to make the

3. In its final report, the American Bar Association Task Force on the Federalization of Crime, chaired by former Attorney General Edwin Meese, reported that it had received evidence of this same dynamic:

The Task Force was told explicitly by more than one source that many . . . new federal laws are passed not because federal prosecution of these crimes is necessary but because federal crime legislation in general is thought to be politically popular. Put another way, it is not considered politically wise to vote against crime legislation, even if it is misguided, unnecessary, and even harmful.

ABA, *Federalization Report*, *supra* note 1, at 2.

4. See Graciela Sevilla, *Basu's Slayer Sentenced to Life Without Parole*, WASH. POST, Aug. 19, 1993, at B1.

5. See Statement of President George H.W. Bush upon Signing H.R. 4542, Anti Car Theft Act of 1992, Pub. L. No. 102-59 (Oct. 25, 1992), 1992 U.S.C.C.A.N. 2903, available at 1992 WL 435825.

6. See *id.*; see also Remarks by President George H.W. Bush in St. Louis, Missouri, Federal News Service (Sept. 28, 1992), available at Lexis-Nexis Library, Fednew File.

7. See *Man's Trial Moved in Carjacking Death*, WASH. POST, Mar. 23, 1993; see also Sevilla, *supra* note 4, at B1.

practical benefits of federalism part of the public discourse. There are good reasons for keeping enforcement of local crimes local. While the people can elect a new sheriff, district attorney, or state attorney general, they cannot throw the FBI Director out of office for too much or too little enforcement in their community. Moreover, giving federal agencies enforcement authority over a subject normally left to local government could cause inaction by law enforcement at all levels. For instance, if there is a rash of thefts and the local police fail to respond, the police chief and the mayor are on the hook. But if theft could be investigated by the FBI and law enforcement at all levels failed to respond, the local police department could complain that the feds weren't doing their job, while the FBI could prioritize theft behind international drug trafficking and terrorism, arguing that the locals should handle the theft problem. The public does not benefit from a situation where no one is responsible because everyone is responsible.

As for rolling back the expansion of the federal criminal laws, the dynamics discussed above will make it difficult to accomplish this goal in a single grand project. Until the importance of federalism pierces the public consciousness, incremental change remains the only viable approach. In the meantime, opponents of the over-federalization of crime must play defense by paying attention to every proposed amendment to the criminal code.

Expansions of federal law rarely take place as wholesale federalizations of areas of criminal law that were theretofore left to the states. More often, the reach of federal law is extended by lowering *mens rea* standards or expanding jurisdictional provisions. Some of these amendments will be appropriate, but others may not be. Those opposed to over-federalization also can take the offensive by pushing to pare back federal law where it most obviously oversteps its bounds and where amendments to scale it back can be explained in politically viable terms. Enacting a few of these small amendments and airing their practical benefits and constitutional virtues in the public debate will begin to set the foundation for the more significant reforms that are needed.

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