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Nora V. Demleitner
Washington and Lee University School of Law, demleitnern@wlu.edu

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NORA V. DEMLEITNER

Professor, St. Mary's University School of Law, San Antonio

Inspired by Judge Deanell Reece Tacha, a former member of the U.S. Sentencing Commission, this Issue analyzes the impact of the federalization of crime and sentencing on the federal and state criminal justice systems. Federalization refers to the growing number of federal statutes that criminalize behavior traditionally within the purview of state and local law enforcement. In addition, it encompasses federal legislation that mandates states to institute changes in their criminal justice systems either in response to grant incentives or under threat of withdrawal of federal funding.

The vast growth of federal criminal jurisdiction raises not only constitutional concerns but unprecedented structural and financial burdens for the federal government and federal courts as well. As the recently published ABA Task Force Report on Federalization indicates, federalization does not appreciably affect the types of violent crime of most concern to Americans. Because of their limited use, federal criminal statutes are often more of symbolic than practical value. Nevertheless, they impact the federal structure of our government and, in the words of the Report's Executive Summary, constitute "an unwise allocation of scarce resources needed to meet the genuine issues of crime."

Federal mandates will ultimately create more uniform standards for the states. While such a development could be considered advantageous, it undermines the principles of federalism and leads to diminished experimentation by states.

I. Federalizing Local Crime

While the federal government has always had jurisdiction over criminal offenses that impact uniquely federal interests, general criminal jurisdiction has traditionally rested with the states. Within the last two decades, Congress has increasingly federalized offenses that were already part of state penal codes. Among recent enactments that expanded federal jurisdiction were the Anti-Car Theft Act of 1992 and the Violence Against Women Act of 1994. The federalization of street crime, including marginal drug behavior, was summarized poignantly by Ronald Weich: "When President Kennedy was assassinated in 1963, his death was investigated by the Dallas Police Department, and if Oswald had lived, he would have been tried in Texas state court. Thirty-five years later, even street corner drug dealers routinely face federal criminal charges."[1]

Chief Justice Rehnquist and Scott Wallace of the National Legal Aid and Defender Association (NLADA) agree that two juvenile bills currently pending before Congress further raise the specter of federalization. As Chief Justice Rehnquist put it to the American Law Institute on May 11, 1998, the proposed legislation would "eliminate the traditional preference for state prosecutions of juvenile defendants [ ]" Wallace considers federalization an "important paradigm shift – from a presumption that states should handle crimes committed within their borders, to a presumption that the federal government should handle any crime that [ ] is 'serious'."

Judge Tacha sees the reasons for the federalization of local crime as manifold, encompassing societal, economic and legal factors. A national fear of violent, drug and sexual crimes is amplified by instantaneous national media coverage of such offenses. The U.S. Sentencing Commission, established to promote greater uniformity in federal sentencing, has "fueled the federalization of prosecution and adjudication," in the words of Judge Tacha. Federal prosecutions are favored by some because of the severity and certainty of federal sentences combined with the speed at which criminal cases make their way through federal courts. And, until the Supreme Court's decision in *United States v. Lopez*, circuit courts condoned Congress's cavalier

use of the Commerce Clause to federalize hundreds of offenses.

Congress has also increasingly criminalized behavior that had previously been subject only to civil or administrative action. The politicization of issues ranging from corporate misbehavior to environmentalism through the national media has accelerated this trend.

Despite the combined pressure of these social, economic and legal forces to federalize yet more activities, several proposed statutes to further increase the federal government's general police power did not pass during the last Congress.

II. Growing Opposition to Federalization

Much federalization occurs in response to highly publicized crimes without critical analysis as to its necessity and constitutionality. Many members of Congress pay lip service to principles of federalism, but as the Chief Justice put it, "the question of whether the states were doing an adequate job in this particular area was never seriously asked."

However, opposition to further federalization has been developing based on constitutional, structural and budgetary concerns. Much of this opposition, as Scott Wallace notes, comes from groups usually considered "tough on crime." Political conservatives, led by former Attorney General Meese, together with local prosecutors, state legislators and state judges have voiced criticism. Besides demanding adherence to principles of federalism and state power, they are troubled by the prospect of federal and state prosecution for the same conduct and the discriminatory punishment that arises from disparities between state and federal sentences. Moreover, the federal judiciary, led by Chief Justice Rehnquist, has continuously objected to federalization of more offenses because of the disproportionate burden criminal trials and sentencing create for federal courts.

a. Constitutional Objections

Congress has justified the federalization of crime under the Commerce Clause because the offenses affect interstate commerce. Numerous commentators, however, argue that the growing federalization of local crimes finds Congress exercising a general police power traditionally reserved to the states. The ABA blue ribbon Task Force on the Federalization of Criminal Law, chaired by former Attorney General Meese, eloquently voices these concerns. As Professor James Strazzella, the Reporter for the Task Force, outlines, the Report registers trepidation that inappropriate federalization will cause long-term damage to the political structure of the country.

The Supreme Court in *United States v. Lopez* struck down the Gun-Free School Zones Act of 1990, holding it to exceed Congress's power under the Commerce Clause.[2] Wallace points out, however, that while promising to stop federalization in its tracks, *Lopez* turned out to be virtually meaningless in light of later appellate decisions that denied *Lopez* challenges to a panoply of federal legislation that continued to use the Commerce Clause merely as a fig leaf.

Because of their historic involvement in crime control and public safety, states have accumulated substantial experience in those areas. Judge Tacha warns that federal prosecutions depersonalize the criminal justice system and "withdraw[ ] it from the daily experience of the people . . . ." The system may ultimately come to be regarded as oppressive and unresponsive to citizen demands. In addition, federal and state criminal justice systems may often not pursue identical goals. For example, by moving juvenile offenders from the state into the federal system, offenders will have less access to rehabilitative measures — a matter of special concern to local communities — since ultimately almost all them will return there.

b. Structural Objections

In his 1998 Year-end Report of the Federal Judiciary, Chief Justice Rehnquist bemoans "the growing caseload in the federal Judiciary resulting from continued expansion of federal jurisdiction." He ascribes this growth primarily to the increase in federal criminal law. A few years ago, Sara Sun Beale argued that while the absolute number of criminal cases in the federal system has not increased dramatically, "the makeup of the federal criminal caseload has changed significantly, requiring more judicial resources."[3] Ultimately, she and Chief Justice Rehnquist arrive at the same question: What impact will the increased caseload have on the structure of the federal judiciary? While it is feasible to expand the federal judiciary, subject to fiscal constraints, the Chief Justice fears that a substantial increase in federal judgeships may dramatically alter the character of

federal courts.

Already the increased criminal burden on the federal courts has led to the displacement of civil cases. The resulting trade-offs may contribute to substantial changes in the way civil litigation is conducted.[4]

Substantial structural changes have occurred in prosecutorial resources and work arrangements as well. The number of federal prosecutors and investigators has grown dramatically since 1985.[5] State and federal cooperation and joint task forces have proliferated in many cities. Frequently state and federal prosecutors and law-enforcement officials are cross-designated to allow them to work in both systems. State law-enforcement officials are often encouraged to refer state cases for federal prosecution.[6]

c. Budgetary Objections

Should Congress not share the Chief Justice's fears of structural alterations in the federal judiciary, eventually it will have to allocate funding for additional judgeships at a time of balanced budgets and limited government. In the present atmosphere such expenditure could probably only be justified if it were perceived as a genuinely needed "crime-fighting" measure similar to recent enlargement of the Border Patrol.

The federalization of crime combined with long sentences under federal sentencing guidelines and mandatory minimum and habitual offender statutes will require increased congressional spending on building and maintaining federal prisons and housing federal prisoners in state or private facilities. As Robert Wilkins outlines in his description of the revised sentencing scheme in the District of Columbia, the latter is a troublesome issue. Federal legislation requires that by September 30, 2003, at least 50 percent of all D.C. offenders be housed in private prisons. If replicated nationally, such a mandate raises the specter of private prison lobbies influencing Congress to impose yet longer sentences, the criminalization of more behavior, and the further federalization of street crimes. The long-term financial impact of mandatory sentences and an aging inmate population may not become obvious until the next century.

Even if these considerations are not sufficient to halt federalization, guidelines need to be developed to channel it and to prevent dislocations.

III. Proposed Limitations on Federalization

The most frequently cited model to circumscribe federalization is the Long Range Plan for the Federal Courts, adopted by the Judicial Conference of the United States. It suggests limiting federal criminal jurisdiction to five types of cases: "offenses against the federal government or its inherent interests; criminal activity with substantial multistate or international aspects; criminal activity involving complex commercial or institutional enterprises most effectively prosecuted using federal resources or expertise; serious high-level or widespread state or local government corruption; criminal cases raising highly sensitive local issues." While in individual cases these criteria provide only limited guidance, they attempt to delineate a principled restraint on federal power and distinguish situations in which federal action is required to "remedy demonstrated state failure," as the Chief Justice put it, from those in which the federal government merely prefers different priorities and a different allocation of limited resources. Scott Wallace considers the present time conducive to the adoption of a narrow standard for federalization. As the opposition to federalization is growing and has found adherents in ideologically diverse groups, he foresees the possibility of at least slowing federalization down. While the precise standards proposed vary slightly, the ABA Task Force also joins the ranks of those advocating a coherent limitation on federalization.

The Department of Justice is another player that should develop principled guidelines to circumscribe federalization. The availability of state and federal legislation criminalizing the same behavior combined with limited federal resources requires federal prosecutors to determine which defendants to charge and which to leave to the state's criminal justice system. That decision is often driven by projected expenditure as well as by the sentences available in the state and federal systems. While the U.S. Attorneys' Manual contains "some general standards for the exercise of prosecutorial discretion, [ ] they are written so broadly that they provide little guidance."[7] In the absence of standards or a centralized approval process, the charging standards of

U.S. Attorneys across the country can be expected to vary widely.

The ABA Report on Federalization warns that "rare use of many federalization statutes calls into question the belief that federalization can have a meaningful impact on street safety and local crime. . . ." Equally importantly, infrequent application of federal law creates disparity of sentences between similarly situated defendants, some of whom will be prosecuted federally, others by states. This form of Russian roulette violates the notion that similar offenders should receive similar sentences. Even if Congress is more concerned about perceived leniency for criminals than state-federal disparity, the ABA Report's Executive Summary notes that "[t]he presence of federalized state crime in the U.S. Code does present a possible opportunity for selective prosecution, with inherent disparity and for shifting prosecutorial priorities that, without open political debate, can alter the traditionally limited federal presence in local matters."

Jonathan Schmidt and Laurel Beeler's article on state and federal prosecutions for domestic violence documents one example of potentially random case selection. By July 1998, only 108 indictments had issued under the Violence Against Women Act of 1994 and the Anti-Stalking legislation of 1996. Schmidt and Beeler indicate that the federal cases were substantially more egregious than most of the domestic violence cases prosecuted in state courts and were often more easily provable because victims were willing to testify. However, the U.S. Attorneys' Manual provides only limited guidance as to which domestic violence cases should be prosecuted federally. It says that the federal government should prosecute where state penalties are "inadequate." This lack of standards is aggravated by the defendant's exposure to a substantially longer incarcerative sentence in federal court, the absence of treatment options in federal prisons, and the lesser likelihood of a successful plea bargain for reduced charges. Schmidt and Beeler note that many federal cases could have been prosecuted in state court and that a number of the 108 cases did not require reliance on federal domestic violence statutes because they were already covered by other federal statutes, such as kidnaping.

So far, no circuit court that has addressed the disparate outcome of federal prosecutions has permitted downward departures based on the discrepancy between a potential state sentence and the actual guideline sentence imposed. Despite the Supreme Court's decision in *Koon* which appeared to provide lower courts with more discretion to depart, the First Circuit recently declined to affirm a departure based on the striking disparity between federal and state sentences. In *United States v. Snyder*, the district court had departed downward from a guideline range of 235-293 months to a mandatory minimum sentence of 180 months. The sentencing judge expressed dismay with "'the unfettered and unreviewable discretion of the United States Attorney' to prosecute in federal court the 'local' offense of carrying a firearm'" which would have carried a sentence of 30-60 months in Massachusetts. The First Circuit rejected the departure stating that uniformity concerns pertain only to federal sentences. "Endeavoring to make a federal sentence more closely approximate that which a state court might impose for similar criminal activity would recreate the location-based sentencing swings that Congress sought to minimize when it opted for a guideline paradigm."

The *Snyder* decision raises the question what "uniformity" means in a federal system: Should similarly situated offenders prosecuted for substantially identical offenses in federal court in San Francisco, San Antonio and Boston receive the same sentence? Or should similarly situated offenders prosecuted for substantially identical offenses in federal and state courts in Boston receive the same sentence? Even if agreement exists that "it may be appropriate to let public will be reflected in sentences at the state level in a way it would not be at the national level because there is no such national consensus,"[8] unregulated prosecutorial discretion can thwart such an expression of popular will.

The structural inequality caused by dual jurisdiction is aggravated by the lack of other judicial remedies for disparities resulting from intermittent federal prosecutions. As the *Snyder* court stated, as long as the defendant's prosecution was lawful, it will not second-guess his selection for federal prosecution. A showing of unlawful, selective prosecution faces a high threshold even for discovery purposes. Based on recent case law it is very difficult for a defendant to establish selective prosecution on unlawful grounds, such as race or religion. Solely to gain access to discoverable material, the defendant must produce credible evidence that similarly situated offenders of other races or religions could have been but were not prosecuted.[9]

IV. The Impact of Federal Mandates and Incentive Legislation

While the Supreme Court has held that the federal government may not compel states to enact or administer federal regulatory programs,[10] it can condition federal funding upon certain state actions. In recent years Congress has increasingly attached incentive grants to federal crime legislation. Alternatively, it has passed bills mandating the forfeiture of federal funding if a state does not comply with federal standards. Under Megan's Law, for example, local law-enforcement agencies must release the names of such sexual offenders described in the act in a manner "sufficient to protect the public." States that fail to require their law-enforcement agencies to comply with this mandate will lose 10 percent of the federal funds allotted to their criminal justice budgets.[11] On the other hand, the Violent Crime Control and Enforcement Act of 1994 provides incentive grants for the building or expansion of prisons to states with truth-in-sentencing (TIS) laws requiring violent offenders to serve at least 85 percent of their imposed sentence. As the General Accounting Office Report reprinted in this Issue indicates, for 15 of the 27 states that receive TIS funds the grant money was a partial or key factor in passing TIS legislation.

Since federal mandates leave it within the discretion of states to change their laws, they preserve state autonomy. However, some states may not be able financially to reject or relinquish promised federal funding. Under the guise of state powers, therefore, a certain level of uniformity is achieved between the states, and state experimentation is stifled. Federal funds have not always operated in this manner. The Law Enforcement Assistance Administration, established in the 1960s, for example, provided federal funding and encouraged innovation.[12] This is the model Robert Wilkins and Jon Sands would adopt for the District of Columbia and Indian reservations, respectively.

Wilkins notes that the Revitalization Act requires the District of Columbia to make yet more sweeping changes in sentencing and parole practices in exchange for federal funds than is required under federal TIS standards and gives federal officials power to determine their implementation. In addition, the Act separates fiscal responsibility from criminal justice policy-making, a development Wilkins considers dangerous since it allows for the imposition of ever longer sentences without consideration of their cost to the taxpayer and the community.

Wilkins calls for greater home rule in the District of Columbia, and Jon Sands asks that Indian tribes be given increased responsibility over their criminal justice systems. Even though the situation of Native Americans living on Indian reservation is substantially different from that of other defendants in federal court, the U.S. Sentencing Commission did not consider the special circumstances of Native Americans in drafting the guidelines. And even though as Sands notes "federal courts have recognized the uniqueness of Indian crime" and permitted downward departures, the impact of the federal guidelines on Native American defendants has been dramatic. Therefore, he argues for less federal oversight and more tribal independence. Sands urges Congress to treat the tribes as separate political entities and allow them to choose the appropriate and desired level of federal involvement. To develop their own criminal justice systems, Sands asks that the federal government fund tribal incarceration and train tribal prosecutors.

Ronald Weich's article parallels the above calls for greater flexibility but urges that Congress grant such flexibility to federal judges. He compares the developments in managed care and in sentencing reform since "each involves a politically sensitive congressional effort to structure the work of a large number of professional decision makers in order to dispense an important and complex commodity to many individuals." He argues that genuine flexibility is needed in decision-making and urges the abolition of mandatory sentencing laws. This argument can be extended to federal mandates in states. Rather than funding a "my way or no way" approach to crime and sentencing, Congress should affirmatively provide the states with funding for criminal justice experiments which would allow for genuine flexibility.

V. Conclusion

The federalization of crime and sentencing has opened large questions about the role of federalism in the next century. It requires us to re-consider the meaning of uniformity and the value of experimentation in our country's criminal justice systems. In addition, we have to learn to respond responsibly to media reports about horrendous crimes. We should ask what, if anything,

should happen to the federalization legislation passed during the last decade. Should it be repealed? Hopefully, such discussions will be possible once Congress confirms new commissioners and the Commission takes up Judge Tacha's charge to "assume more of a leadership role in shaping federal sentencing policy . . . "[13] and to think about large, systemic questions rather than micro-manage the current guideline system.

Notes

[1] Ronald Weich, *Address at Federal Public Defenders' Training Conference, Las Vegas, NV* (Sept. 14, 1998).

[2] 514 U.S. 549 (1995).

[3] Sara Sun Beale, *Federalizing Crime: Assessing the Impact on the Federal Courts, 543* ANNALS AM. ACAD. POL. & SOC. SCI. 39, 48 (Jan. 1996).

[4] *Id.* at 46-48, 50-51.

[5] *Id.* at 50.

[6] Dennis E. Curtis, *The Effect of Federalization on the Defense Function*, 543 ANNALS AM. ACAD. POL. & SOC. SCI. 85, 88-89 (Jan. 1996). *See, e.g., United States v. Navarro*, 160 F.3d 1254 (9th Cir. 1998).

[7] Sara Sun Beale, *Too Many and Yet Too Few: New Principles to Define the Proper Limits for Federal Criminal Jurisdiction*, 46 HASTINGS L.J. 979, 999 (1995).

[8] Deanell Reece Tacha, *Serving This Time: Examining the Federal Sentencing Guidelines After a Decade of Experience*, 62 MO. L. REV. 471, 481 (1997).

[9] *See United States v. Armstrong*, 517 U.S. 456 (1996).

[10] *See Printz v. United States*, 521 U.S. 898 (1997).

[11] 42 U.S.C. § 14071 (1998) ("Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Program," commonly known as Megan's Law).

[12] Philip B. Heymann & Mark H. Moore, *The Federal Role in Dealing with Violent Street Crime: Principles, Questions, and Cautions*, 543 ANNALS AM. ACAD. POL. & SOC. SCI. 103, 106-07 (Jan. 1996).

[13] Tacha, *supra* note 8, at 479.