GUILT BY PRESUMPTION
Defending the DWI Suspect
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Cover photograph: Comstock

Criminal Justice (ISSN 0887-7785) is published by the ABA for the Section of Criminal Justice. Editorial offices: ABA, 750 N. Lake Shore Drive, Chicago, IL 60611; (312) 988-6077 or 988-6076. Manuscript submissions are encouraged. Articles may be subject to editing and become the property of Criminal Justice, unless special arrangements are made. Section offices: ABA, 1800 M Street, NW, Washington, DC 20036, 202/331-2260. Copyright © 1989, American Bar Association. All rights reserved. Subscription for Section Members ($10) is included in dues. Individuals and institutions not eligible for membership in the American Bar Association and the Section of Criminal Justice may obtain an annual subscription for $33 or $38 if mailed outside the U.S. Single copies of published issues may be purchased for $8.50 per copy plus $1 handling fee per order. Copies may be obtained from ABA Order Fulfillment Dept., 509, 750 N. Lake Shore Drive, Chicago, IL 60611. Orders must be prepaid by check, money order, VISA or MasterCard. In placing credit card orders, please be sure to provide your name, the name of the card (VISA or MasterCard), expiration date, card number, your authorizing signature, and phone number. Checks should be made payable to the American Bar Association. Notices on changes of address and inquiries concerning missing issues also should be sent to ABA Order Fulfillment. Opinions expressed in the magazine do not necessarily reflect the policies of the editorial board, Section, or the American Bar Association.
The Consequences of Federalizing Criminal Law
Overloaded courts and a dissatisfied public
BY ROGER J. MINER
The power of Congress to define federal crimes has been exercised more and more in recent years to criminalize conduct primarily and traditionally the concern of the several states. This development often is referred to as the federalization, or more properly the nationalization, of criminal law, and is a phenomenon that has had and continues to have some serious consequences worthy of our attention. Before reviewing those consequences, however, it is necessary to examine how and why the federal government has come to be involved in the prosecution of crimes historically handled at the state level.

In urging ratification of the Constitution, the Framers assured their countrymen that "internal order," as they called it, would be a state responsibility. The Constitution itself refers to only a few specific crimes: counterfeiting; treason; piracies and felonies committed on the high seas; and offenses against the law of nations. The earliest Congresses found authority in these provisions, in their enumerated powers, and in the Necessary and Proper Clause ("the Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution the [enumerated] Powers. . . .") to classify as criminal various types of conduct generally thought to be detrimental to the operations of the central government. Customs offenses, crimes committed within federal enclaves and interference with the federal courts fell within this category of exclusive federal jurisdiction. All other varieties of crimes were defined by state legislatures and prosecuted in state courts.

As the nation expanded and the population increased in the aftermath of the Civil War, new forms of antisocial conduct came to the attention of Congress. In response to the "green cigar" scam (the offer of counterfeit bills at a substantial discount from face value) and other quaint frauds then current, Congress included an antifraud provision in the 1872 codification of the postal laws. Thus was born the notion that the national interest required federal prosecution of any scheme or artifice to defraud as long as the mails were involved. The sponsor of the postal legislation said that the mail fraud provision was necessary "to prevent the frauds which are mostly gotten up in the large cities . . . by thieves, forgers, and rapscallions generally, for the purpose of deceiving and fleecing the innocent people in the country." Cong. Globe, 41st Cong. 3d Sess. 35 (1870) (remarks of Rep. Farnsworth). Although Congress could point to its constitutional power to establish post offices as authority for the legislation, this concept of fraud as a federal crime marked the first serious trenching on state criminal jurisdiction.

**Interstate commerce and criminal jurisdiction**

At the turn of the century, Congress discovered the Interstate
Commerce Clause as a source of criminal jurisdiction. The Supreme Court approved, and the criminal law never has been the same. The supposed need to protect the channels of interstate commerce led to the enactment of the Lottery Act, prohibiting the interstate transportation of lottery tickets, and the Mann Act, prohibiting the transportation of women across state lines to engage in immoral practices. The latter statute impelled Judge Henry Friendly to ask this rhetorical question in his 1972 lecture on federal jurisdiction: “Why should the federal government care if a Manhattan businessman takes his mistress to sleep with him in Greenwich, Connecticut, although it would not if the love-nest were in Port Chester, N.Y.?” Judge Friendly questioned whether federal criminal prosecutions of this type serve any true federal interest. I question whether such prosecutions constitute a threat to the dual system of government so carefully constructed by the Framers of our Constitution.

Misuse of the channels of commerce has formed an important theoretical underpinning for the ongoing expansion of federal criminal jurisdiction. Under this rubric, Congress has replicated many state criminal statutes, adding only an interstate element: kidnapping, theft, transportation of stolen vehicles, flight to avoid prosecution, sexual exploitation of children, firearms offenses and gambling are some examples. As recently as 1984, a whole new slew of state-type offenses were federalized on the basis of interstate movement. These included the counterfeiting of credit cards and theft of livestock having a value in excess of $10,000. Yes, cattle rustling is now a federal crime!

Roger J. Miner is a judge of the U.S. Court of Appeals for the Second Circuit. This article is adapted from a speech Judge Miner delivered at the 1988 Attorney General’s Conference on the Criminal Justice System: Approaches to Reform.

When the Supreme Court approved congressional regulation of activities affecting commerce, it sanctioned the most expansive basis for criminal intervention in crime control yet invoked. This concept provided the shaky constitutional support necessary for such legislation as the Hobbs Act, which reaches the local crimes of robbery and extortion, and the Extortionate Credit Transaction Act, which reaches the local crime of loan-sharking. The Drug Abuse Prevention and Control Act, which now generates more than 20 percent of all federal criminal prosecutions, includes a congressional declaration that federal prosecution of intrastate drug trafficking is necessary for control of the interstate incidents of trafficking. Here again, the “affecting commerce” concept was called upon as authority for federalizing crimes punishable in all states of the Union. The Racketeer Influenced and Corrupt Organizations Act not only is grounded in the same interpretation of the commerce power but also includes in its definition of racketeering activity a list of specific crimes chargeable under state law. The Travel Act (prohibiting interstate travel in aid of “unlawful activity” variously defined) is another example of a statute involving a wholesale incorporation of state crimes. The list goes on.

The impetus for the expansion of federal criminal law into areas of state and local concern has come from three directions: from Congress, from federal prosecutors, and from local and state governments themselves. In the case of Congress, it is common practice to identify a problem involving unacceptable conduct in one state or region, classify that conduct as criminal, and define it as a new federal crime, regardless of whether it is already a state crime. This procedure is often unaccompanied by any determination of the willingness or ability of state government to deal with the problem. Federal prosecutors have been known to argue for expansive interpretations of federal criminal legislation in an effort to fill perceived gaps in local criminal prosecution. An example is the use of the mail fraud statute to prosecute local criminal corruption. Unfortunately, the courts often go along with these arguments. Former Chief Justice Burger once opined that, as new types of frauds develop, the mail fraud statute can be used as a stopgap device to deal with the new phenomenon on a temporary basis until specific legislation is enacted. Finally, state and local governments, complaining of a lack of resources, find it convenient to defer to federal prosecution rather than to face up to issues they are actually in a better position to confront. At times, of course, a breakdown in local law enforcement leaves federal intervention as the only alternative.

Important consequences

Some of the consequences of the federalization of criminal law are obvious and some are not so obvious, but they all implicate important pragmatic and constitutional problems. The most obvious consequence is the overloading of federal courts resulting from the prosecution of cases lacking in any direct federal interest or involvement. We see such cases every day and can only wonder why they are not prosecuted in the state courts, which are fully equipped to handle them. That a bank is federally in-
sured, for example, does not seem to create a very great federal interest for conferring jurisdiction on federal courts to hear cases involving $100 bank thefts. Yet there is a statute that confers federal jurisdiction in just such cases. The federal courts should be reserved for such important direct federal interest crimes as capturing or killing carrier pigeons owned by the United States, 18 U.S.C. § 45; interstate transportation of water hyacinths, 18 U.S.C. § 46; false crop reports, 18 U.S.C. § 2072; and false weather reports, 18 U.S.C. § 2074. Between 1983 and 1987, criminal filings in the U.S. district courts increased by 25 percent to 42,000. In some districts, the courts have little time for anything but criminal trials. This detracts from other important work that those courts should perform, including what I consider to be their most important work—the protection of individual civil rights and civil liberties when the states have failed to do so.

Every time Congress rushes to enact a criminal statute to deal with a problem that exists in one state or region there is an undermining of the dual system of government structure erected by the Founders of the Republic. What may be considered serious antisocial conduct in one part of the country may not be considered quite so serious elsewhere. Gambling may be offensive to the citizens of Utah, but not to the citizens of Nevada. The states must be allowed to accommodate such differences and to experiment with innovative approaches to the prosecution of crime. Many states already have charted new courses in the areas of sentencing, plea bargaining, victims' rights and other criminal procedures, as well as in the definition of substantive crimes. State supreme courts have interpreted state constitutions to create in criminal cases rights not guaranteed by the U.S. Constitution.

President Franklin Roosevelt said that a state experiment that fails has little effect on the rest of the nation. It is also true that states can modify or repeal unworkable methods and approaches much more quickly than can the national government. By contrast, federal legislation affects the entire nation, is cumbersome to change, and often remains on the books long after it loses any value it once may have had. In this regard, I refer you to 18 U.S.C. § 336, which imposes criminal liability upon one

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\text{I am afraid of the discretion of federal prosecutors}
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who issues a check for less than $1.00, intending it to circulate as money. Since checks for less than $1.00 are quite rare in today's economy, it safely may be said that this statute has outlived its usefulness.

Federal courts now are bound to sentence according to guidelines established by the Sentencing Commission. Although the constitutionality of the legislation establishing the commission now is beyond comment, I do question the wisdom of turning the federal judiciary into a corps of mechanics required to impose criminal punishment without regard to family considerations or local conditions. All of this is done in the name of eliminating disparity, a goal that is at least questionable. A sentence imposed by a federal court, without individualized consideration, and which would be much different if imposed by a state court, serves neither the needs of the defendant nor his or her community. The excision of conduct detrimental to society must be accomplished by a scalpel rather than a chain saw.

I am afraid of federal prosecutors. They have extraordinary discretion in deciding what crimes to prosecute, and that discretion is one of the consequences of the federalization of criminal law. I once was a state prosecutor. State prosecutors are not quite as fearsome as their federal counterparts because their discretion is much more limited. When police agencies or private individuals came to me as district attorney with evidence of crime, I was constrained to prosecute, unless the evidence was so deficient that no case could be made. United States Attorneys labor under no such constraints. How could it be otherwise? Priorities must be assigned. There are only so many federal prosecutors, and they cannot be tied up in prosecuting the interstate transportation of water hyacinths. When I was a federal district judge, I remember visiting a federal prison facility in my district. The warden begged me to persuade the U.S. Attorney to prosecute some cases of assault on prison guards. The U.S. Attorney had declined to prosecute those cases in favor of what he considered more important matters. As federal crimes proliferate, there are more declinations, some of which seem quite arbitrary and capricious to federal law enforcement agencies. When there are many offenders but only a few are chosen to be prosecuted, the public perceives that the process is unfair. Moreover, in making the critical decisions about what types of antisocial conduct are worthy of attention, the prosecutor invades the domain of the legislator, and the separation of powers is blurred.

There is another major consequence of the ongoing expansion of the federal criminal code. I call it "the disappointment of promises unfulfilled." A more harsh description might be "the deception of the public." As Congress passes laws purportedly to solve various problems through the federal criminal justice system, the public often assumes that the law is the solution. (Continued on page 39)

**Direct measurement of driving impairment**

It would be most consistent with our goals of promoting public safety and developing fair and consistent statutes to directly measure population-compared driving impairment, and to penalize it when appropriate. Until recently, there was no easy way to measure an individual's driving ability shortly after a traffic stop. Microcomputer technology, which has produced computer games resembling driving simulators, such as Atari's Pole Position, is currently available. This type of testing would be an excellent starting point for developing appropriate measures of driving impairment. J. Cowan, "The Complex Relationship Between Blood Alcohol Concentration and Impairment," in R. Erwin, ed.: Defense of Drunk Driving Cases: Criminal and Civil, 14–36 (1985). The technology for developing a reasonably priced, realistic driving simulator for detecting driving impairment is now available. J. Cowan and A. Stein, "Development of a Driving Simulator for Routine Impairment Measurement," Presentation to the National Safety Council Committee on Alcohol and Other Drugs, Orlando (October, 1988). After a series of validation studies with this simulator, a standard operator's performance and a cut-off point for unacceptable driving impairment could be determined, as originally suggested by the Subcommittee on Human Factors of the National Safety Council Committee on Alcohol and Other Drugs.

A testing device for use in a police station could then be developed. This would permit an initial screening of the driving ability of every suspect, including his reaction to simulated emergencies. Failing this screening would constitute the (only) probable cause for an investigation of the reason(s) for this impairment, including a blood alcohol test. Prosecution could then be based on demonstrating both a blood level and driving impairment, along with evidence of observations to confirm the drug effect. This procedure would also help to solve a parallel problem, which is recognized as a major flaw in prosecution for driving under the influence of drugs—the lack of a demonstrable relationship between any drug blood level and impaired performance. See National Institute on Drug Abuse, "Drug Concentrations and Driving Impairment," 254 Journal of the American Medical Association 2618 (1985). The benefits of measuring driving ability with a simulator are potentially much greater than those from focusing solely on alcohol, since the other causes of impairment could then be investigated and modified. Drivers who were impaired because of medical problems, prescription medication, or old age could also be screened out and nonpunitive remedial actions taken. This approach may be particularly appropriate for commercial drivers of trucks, buses, and taxis, who log hundreds of thousands of miles a year.

Although the research necessary to develop a precise and valid measurement of unacceptable driving impairment will take years, work could be started with relatively modest funding.

In the meantime, DWI statutes and their related jury instructions must be revised to comply with both scientific truth and constitutional law. The factfinder should act unbound by any mandatory presumptions or unproven permissive presumptions, upon all the admissible evidence in the individual case.

**Federalization**

(Continued from page 19)

Obviously, it is not. To illustrate: Everybody knows that most narcotic transactions are punishable under federal law. The ordinary citizen has every right to expect that violations will be prosecuted vigorously. Yet nobody makes it clear that only an infinitesimal portion of the 55,000 narcotics arrests made in New York City in one year can be prosecuted federally. The federal resources simply are not there. Congress can convert state crimes into federal crimes forever, but United States courts and United States prosecutors will never be able to handle more than a tiny portion of the tens of thousands of crimes committed in the nation each year. Great expectations lead to great disappointments, an unfortunate consequence of too much federal criminal law.

It seems almost unnecessary to observe that two laws on the same subject lead to duplication—duplication in investigation, duplication in prosecution and duplication in punishment. Recently, there was an unseemly competition between state and federal authorities in New York City over who should pursue some cases of municipal corruption. The clash ended in an agreement to divide the work. It is true, of course, that conflicts between state and federal agencies have diminished greatly as the result of the Justice Department's promotion of Law Enforcement Coordinating Committees. This program replaces competition with cooperation among
law enforcement agencies and has been very successful. There really is no need for double punishment, however, and sentences by state and federal courts for the same crimes, although not violative of the constitutional prohibition against double jeopardy, appear to violate its spirit.

Effect on citizen participation

In many important respects, the federalization of criminal law discourages individual involvement and personal participation in the democratic process. Probably the greatest danger to the republic today is the apathy of the citizenry.

Caseweighting

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Budget Presentation, published by the National Legal Aid and Defender Association in 1985. The manual leads a public defender manager through budget preparation by providing step-by-step examples like the following. The hypothetical public defender manager has a caseweighting system, so he is able to pick out which cases he believes are exceptional, such as violent crime and cases disposed by jury trial. He lists these special categories, along with the number of cases in these categories which the office has represented in the past year. Using a calculator, he projects the next year's caseload by multiplying last year's percentages in these special categories by next year's projected totals. The next year's projected totals are arrived at by using an equation to calculate the current rate of increase or decrease in caseload. He may make increases where he believes there will be a change, such as a new prosecutor indicating an interest in decreased pleas and more jury trials. This is translated into a number of additional hours of attorney effort. Using local bar association and law office estimates about the number of billable hours for private attorneys, he estimates how many new attorneys he will need for the increased hourly workload. If his system is particularly sophisticated, he may be able to estimate the amount of time attorneys spend on different aspects of the case such as legal research, and he may recommend, instead of using expensive attorney hours to research, that the funding source save money by providing public defenders with paralegals or law clerks.

At the budgetary hearing, the public defender would then present his information, showing that a typical case ending with a guilty plea may consume 6.4 attorney hours, whereas a trial consumes almost six times this amount of effort: 38.4 hours. If the county prosecutor has already indicated to the funding sources that plea bargaining will be decreased, the public defender could estimate the number of trials would increase from 10 percent for all felony cases to approximately 30 percent for all felony cases. If that was the case, by calculating projected increases, he could then show the additional public defender manhours needed because of this policy change. The public defender could also indicate the need for increased levels of support staff.

For additional information on caseweighting and/or the Amicus System, managers can contact the NLADA. That group maintains a list of public defender offices who use the Amicus System and are willing to share information and expertise.

A national standard

Over the years, numerous national caseload standards have been established by the American Bar Association, NLADA National Study Commission of Defense Services, and others. None of these standards, except one, included any numbers. For that reason, they have not been used by public defenders or funding sources. The one standard that has been widely used, and has become the defacto standard for maximum caseload, is the 1973 President's National Advisory Committee on Criminal Justice Standards and Goals. In that report, the maximum caseload for public defenders was established as follows:

The caseload of a public defender office should not exceed the