The Enforcement MAZE

Over-Criminalizing American Enterprise

Compendium

National Association of Criminal Defense Lawyers®

U.S. Chamber Institute for Legal Reform

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SYMPOSIUM PROGRAM AGENDA

Panels available for viewing at:
https://www.nacdl.org/EnforcementMaze/
and
http://www.instituteforlegalreform.com/events/the-enforcement-maze

8:55 — 9:10 a.m. **Morning Keynote Address: The Honorable Bob Goodlatte**, U.S. House of Representatives (R-VA 6th District) and Chairman, House Committee on the Judiciary*

9:10 — 9:20 a.m. **Opening Remarks: Norman L. Reimer**, Executive Director, National Association of Criminal Defense Lawyers

9:20 — 10:25 a.m. **The Rise of Over-Criminalization:** This panel discussed the inappropriate criminalization of what are truly civil or regulatory/administrative problems/disputes as well as inadequate criminal intent requirements and the problem with strict liability crimes.

Reginald J. Brown, Partner and Chair, Financial Institutions Group, Wilmer Cutler Pickering Hale and Dorr LLP
John F. Lauro, Principal, Lauro Law Firm
Kate C. Todd, Senior Vice President and Chief Counsel, U.S. Chamber Litigation Center
Moderated by: **John D. Cline**, Principal, Law Office of John D. Cline

10:25 — 11:30 a.m. **Bearing Down:** This panel addressed over-charging/overzealous enforcement and the pressures on businesses and individuals under investigation and engaging in plea bargaining, including collateral consequences for companies (debarment, exclusion) and for individuals (jail, loss of licenses).

John H. Beisner, Partner, Skadden, Arps, Slate, Meagher & Flom LLP
Beth J. Hallyburton, Assistant General Counsel, GlaxoSmithKline
Kurt Mix, Former Deepwater Drilling Engineer, BP America
Barry J. Pollack, Member and Chair, White Collar & Internal Investigations Practice, Miller & Chevalier
Moderated by: **Harold H. Kim**, Executive Vice President, U.S. Chamber Institute for Legal Reform

11:30 — 11:50 a.m. **The Symbiotic Relationship Between Over-Criminalization and Plea Bargaining:** This TED Talk-inspired presentation discussed the manner in which these two phenomena relied on each other to come to dominate our modern criminal justice system.

Lucian E. Dervan, Associate Professor of Law, Belmont University College of Law

12:00 — 1:00 p.m. *Special Remarks*: **Lisa A. Rickard**, President, U.S. Chamber Institute for Legal Reform

Keynote Address: **The Honorable David W. Ogden**, Partner, Wilmer Cutler Pickering Hale and Dorr LLP and Former Deputy Attorney General of the United States

1:15 — 2:00 p.m. **A Lack of Balance in the System: Criminal Discovery & Grand Jury Inadequacies & Abuses:** This discussion featured two legal experts and explored the inadequacies and abuses of two important facets of criminal procedure that combine to create an unfair playing field for persons and entities.

Ross H. Garber, Partner, Shipman & Goodwin LLP
Timothy P. O'Toole, Member and Chair, Pro Bono Committee, Miller & Chevalier

2:00 — 2:20 p.m. **The Shadow Regulatory State: A Look at Federal Deferred Prosecution Agreements:** This TED Talk-inspired presentation discussed the ways in which federal prosecutors have increasingly pressured corporations to enter into deferred or non-prosecution agreements that entail not only hefty fines but significant changes to business practices, with no showing of wrongdoing or judicial supervision.

James R. Copland, Senior Fellow and Director, Legal Policy, The Manhattan Institute

2:20 — 3:20 p.m. **The New Prosecutorial Focus: Individuals in the Age of Over-Criminalization:** This panel explored the impact of the recent "Yates Memorandum" — a directive from Sally Quillian Yates, Deputy Attorney General of the United States, regarding individual accountability for corporate wrongdoing.

Lisa A. Mathewson, Principal, The Law Office of Lisa A. Mathewson
Matthew S. Miner, Partner, Morgan, Lewis & Bockius LLP
Ellen S. Podgor, Gary R. Trombley Family White-Collar Crime Research Professor and Professor of Law, Stetson University College of Law
Moderated by: **Barry Boss**, Co-Chair, Criminal Defense & Internal Investigations, Cozen O'Connor

3:20 — 4:20 p.m. **The Public Policy Consequences and the Road to Recovery:** This panel addressed the erosion of respect for criminal law, costs incurred by taxpayers, over-incarceration, and the squashing of business ingenuity and growth, and explored solutions to these problems.

Christopher Bates, Counsel to Senator Orrin Hatch, Senate Committee on the Judiciary
Douglas A. Berman, Robert J. Watkins/Procter & Gamble Professor of Law, The Ohio State University Moritz College of Law
Joseph Luppino-Esposito, Policy Analyst, Center for Effective Justice & Right on Crime
Shana-Tara O'Toole, Director of White Collar Crime Policy, National Association of Criminal Defense Lawyers
Moderated by: **Jonathan Bunch**, Vice President & Director of External Relations, The Federalist Society

4:20 — 4:30 p.m. **Afternoon Keynote Address: The Honorable Orrin Hatch**, U.S. Senate (R-UT), Chairman, Senate Finance Committee and Former Chairman, Senate Judiciary Committee

ACKNOWLEDGEMENTS

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*All affiliations as of the May 2016 symposium.

Reforming the Federal Criminal Code Will Restore Fairness to the American Criminal Justice System

John D. Cline

Congress has revised the federal criminal code a handful of times over the last century and a half, most recently in 1948. It is past time for another comprehensive revision. That effort should focus on five main points: (1) reducing the number of federal crimes; (2) ensuring that the revised federal criminal code strikes a proper balance between federal and state criminal enforcement; (3) clearly defining the different levels of *mens rea* and applying those definitions in a fair and rational way to federal offenses; (4) establishing uniform rules of construction; and (5) revising the overly harsh punishment system that has produced an excessive federal prison population.

I. Reducing the Number of Federal Crimes

The list of federal crimes has grown from a handful in the Crimes Act of 1790 to thousands today — how many thousands? No one is quite sure. This growth has occurred in part because the country has become more technologically sophisticated, more complex, and more interconnected — and thus the need for offenses that can address crime that occurs in multiple states and even overseas has expanded. But the number of federal crimes has also increased because every national crisis seems to breed new federal crimes to address the problem. This has often occurred, regrettably, without sufficient inquiry into whether a criminal sanction is necessary at all — as opposed to civil and administrative remedies — and, if so, whether existing federal criminal statutes, many of which are broadly worded, suffice to punish the conduct at issue. This process functions like a ratchet, going only one way: statutes are regularly added to the federal criminal code, but they are almost never removed.

The result of the urge to enact federal criminal legislation in response to each new crisis is a morass of often overlapping statutes. For example, there are more than two dozen different false statement and fraud statutes in Chapter 47 of Title 18.[1] There are eight different fraud statutes in Chapter 63 of Title 18.[2] And there are at least nineteen different obstruction offenses in Chapter 73 of Title 18.[3] Of course, these are just some of the federal offenses addressing these topics; there are other false statement, fraud, and obstruction offenses scattered throughout Title 18 and still more in other titles of the federal code.

It is past time for another comprehensive revision. That effort should focus on five main points: (1) reducing the number of federal crimes; (2) ensuring that the revised federal criminal code strikes a proper balance between federal and state criminal enforcement; (3) clearly defining the different levels of mens rea and applying those definitions in a fair and rational way to federal offenses; (4) establishing uniform rules of construction; and (5) revising the overly harsh punishment system that has produced an excessive federal prison population.

Federal offenses lurk as well in regulations promulgated by various agencies. These regulatory crimes are especially pernicious because they rarely, if ever, receive careful scrutiny from Congress. They represent a dangerous confluence of power: the Executive Branch that prosecutes these crimes also creates and defines them.

From the perspective of a criminal defense lawyer, the proliferation of federal offenses has two main practical consequences. First, the sheer number of crimes creates a notice problem. Justice Holmes declared long ago that "fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed."[4] But with the statutory scheme that now exists, "fair warning" is a fiction. Not even the most sophisticated and experienced criminal practitioner can say, without extensive research, whether certain courses of conduct violate federal law; pity the non-lawyer who must make that determination. If we are to presume that everyone knows the law — a maxim courts repeat with some regularity — we must make the law knowable.

Second, the existence of multiple federal statutes that address the same conduct encourages federal prosecutors to overcharge. The Antitrust Division, to its credit, typically brings a one-count indictment in criminal price-fixing cases, charging a violation of the Sherman Act. That commendable practice gives the jury a clear choice: guilty or not guilty. Unfortunately, this example is the exception and not the rule.

Instead, many federal prosecutors take advantage of overlapping federal criminal offenses to charge the same course of conduct under two, or three, or more different statutes or regulations. Instead of a one-count indictment charged under a single statute, the jury might have ten or twenty or a hundred counts charged under several different statutes. The result is often jury compromise. Jurors cannot agree unanimously whether the defendant is guilty, so, as a compromise, they convict on some counts and acquit on others.

What jurors are not told — and cannot be told in the federal system — is that for sentencing purposes a conviction on even one count is often the same as conviction on all counts.[5] When jurors compromise, they likely think they are giving each side a partial victory. But they are wrong; in practical terms, a guilty verdict on even one of a hundred counts is often the same as a guilty verdict on all counts.[6] Prosecutors know this, and some take advantage of it by unfairly overcharging defendants. Pruning the federal criminal code will reduce this practice and help to ensure fairness.

The process of reducing and making rational the federal criminal code affords the opportunity to address other troublesome areas, beyond the sheer number of federal offenses. For example, the law of conspiracy is long overdue for careful examination. As it stands now, the federal criminal code has a number of conspiracy provisions. Some require an overt act, as well as a criminal agreement.[7] Others do not.[8] None of the conspiracy statutes clearly defines the *mens rea* necessary for conviction. The offense of conspiracy to defraud the United States is particularly amorphous; that statute has been interpreted to encompass almost any effort to interfere with a function of the federal government through deceit.[9]

Justice Jackson warned many years ago about the "elastic, sprawling, and pervasive" conspiracy offense, which he described as "so vague that it almost defies definition."[10] A revision of the federal code affords an opportunity to rethink conspiracy and ensure that only those truly deserving of criminal punishment are swept up in its net.

As part of the reconsideration of conspiracy law, it is worth examining the so-called *Pinkerton* rule. In *Pinkerton v. United States*,[11] the Supreme Court held that a conspirator is criminally liable for the foreseeable substantive crimes of his co-conspirators in furtherance of the conspiracy, even if the conspirator himself played no part in the substantive offense and did not intend that it occur. *Pinkerton* thus expands the already vast sweep of conspiracy to include substantive offenses as well. The case stands alone in the federal system as a common-law, judge-made theory of criminal liability. If such a basis for conviction is to exist, it ought to be based on a careful legislative judgment and not on the decree of federal judges.

Another example of a statute in need of reform is 18 U.S.C. § 793, the principal statute used to prosecute improper disclosures of classified information. Section 793 has been criticized for decades because of its convoluted language and uncertain scope.[12] The statute has gained heightened prominence of late, with the prosecution of alleged leakers undertaken by the Department of Justice. Recent judicial decisions have underscored the uncertainty surrounding the *mens rea* necessary for conviction and the scope of the key phrase "information relating to the national defense."[13] Here too a revision of the federal criminal code affords an opportunity to fix a long-festering problem.

Of course, there are still other such troublesome parts of the federal criminal code; the two examples above are merely illustrative. A comprehensive

reform of the code affords an opportunity to think through these problems and resolve them in a rational, systematic, and fair way.

II. Restoring the Federal-State Balance

Reform of the code affords another, closely related opportunity: To restore the balance between federal and state law enforcement.

Our federalist system initially contemplated that law enforcement would be primarily a state function. There were only a few federal offenses, and those offenses focused on the protection of clearly federal interests. Although the Supreme Court has recognized the need to exercise caution in altering this traditional federal-state balance in law enforcement,[14] federal criminal jurisdiction has expanded so voraciously that now almost any culpable conduct can be brought within the federal ambit, through a wiring, a mailing, or a potential effect on interstate or foreign commerce.[15]

As a result, we see — to cite examples from my own practice — vote-buying in local elections, punishable under state law with a short prison term, being charged as a federal RICO violation, with a potentially massive prison term and forfeiture. We see nondisclosure under state campaign finance laws, punishable as a misdemeanor offense or through civil penalties, being charged as a federal wire or mail fraud offense, felonies that carry a loss of civil rights, in addition to draconian punishment. And we see violation of state and local anti-patronage laws, with relatively modest potential punishments, being charged as federal honest services fraud, again with a lengthy prison term, stiff financial penalties, and the disabilities of a federal conviction.

Some may argue — though I would disagree — that federal interests justify treating these essentially local matters as federal crimes. Regardless of where Congress ultimately strikes the federal-state balance in law enforcement, the issue deserves careful, systematic consideration. Reform of the federal criminal code affords that opportunity.

III. Reforming *Mens Rea*

A comprehensive reform of the federal criminal code affords an ideal opportunity to establish uniform terminology for different levels of *mens rea* and to assign to each offense in the revised federal criminal code an appropriate mental state.[16] Two areas in particular are worthy of attention as part of a reform of the federal criminal code.

First, it is important to determine when the government must prove that the defendant knew his conduct was illegal, and with what degree of specificity. Federal courts routinely recite the old maxim that ignorance of the law is no excuse, and no federal criminal statute of which I am aware expressly requires proof that the defendant knew his conduct was illegal. But given the extraordinary complexity of federal crimes and the constitutional imperative of fair notice, courts have interpreted the *mens rea* element of certain federal offenses to require knowledge of illegality. These cases do not typically require proof that the defendant knew the precise statute he was violating, or even that his conduct violated a criminal statute — but they do require proof that he knew what he was doing was unlawful.[17]

Courts generally find the requirement of knowledge of illegality in the statutory term "willfully."[18] But, as the Supreme Court has observed, "willfully" is a word of many meanings, ranging from mere intentional conduct to an intentional violation of a known legal duty.[19] Because "willfully" has no clear definition, and because there is rarely legislative history illuminating its meaning in specific statutes, courts are left to decide for themselves what the term means in any given context.

This comes close to the common-law crime creation that the Supreme Court long ago forbade,[20] and it creates serious notice problems as well. Reform of the federal criminal code affords the opportunity to decide, in a reasoned and systematic way, when knowledge of illegality should be required and how specific that knowledge must be.

A second area that deserves comprehensive reform is the judge-created doctrine of willful blindness — also known as deliberate ignorance or conscious avoidance. According to this doctrine, when Congress requires the government to prove that the defendant acted with knowledge of a particular fact, the government can satisfy that burden by showing that, although the defendant did not have the required knowledge, he was aware of a high probability that the fact existed and took deliberate actions to avoid learning the truth.[21]

This judicially created substitute for knowledge was originally used in drug cases — where, for example, mules caught driving cars with drugs hidden in secret compartments would deny knowing

that the drugs were there.[22] Courts insisted that the doctrine was to be rarely used.[23] But as the years passed the courts threw caution to the wind.[24] Now federal district courts routinely give a willful blindness instruction in almost any case where the defendant does not expressly concede knowledge, and courts even let the government argue actual knowledge and willful blindness in the alternative.[25]

The widespread use of willful blindness instructions creates grave danger for defendants. In many — perhaps most — federal criminal cases, *mens rea* is the only element that is seriously disputed. Any instruction that waters down the required *mens rea* has the inevitable effect of tilting the playing field in the prosecution's favor. Willful blindness instructions are especially pernicious because, despite cautionary language, they may cause lay jurors to blur the line between negligence or recklessness, which typically are not criminal, and knowledge, which can be.[26]

The decision to permit conviction based on something less than actual knowledge is a quintessentially legislative one; in our federal system, where common law crimes are anathema, that decision should not be made by judges. Congress has on occasion chosen to include willful blindness provisions in criminal statutes — in the Foreign Corrupt Practices Act, for example.[27] But the question of when, if ever, a conviction can rest on a deliberate lack of knowledge, rather than on knowledge itself, should be resolved comprehensively and systematically as part of an overall reform effort.

IV. Establishing Uniform Rules of Construction

Courts have adopted certain rules of construction to interpret criminal statutes, the most prominent of which is the rule of lenity. Because these rules are judge-made, however, their application can seem random. And they may conflict with other rules of construction, such as the admonition in the RICO statute that its terms are to be liberally construed to effect its remedial purposes.[28] Reform of the federal criminal code affords an opportunity to establish uniform rules that courts can apply in construing federal criminal statutes.

Two such rules are worth highlighting. First, the rule of lenity — that doubts about the scope of a criminal statute should be resolved in the defendant's favor — should be codified and made applicable to all federal crimes. The rule of lenity, especially in conjunction with a strong *mens rea* requirement, gives meaning to the basic constitutional requirement of "fair warning."

Second, courts often struggle to determine the reach of a criminal statute's *mens rea* element. Does the requirement that the defendant act "knowingly," for example, extend to all aspects of the conduct that makes up the offense? Does it extend to jurisdictional elements, such as the use of interstate commerce? Does it extend to circumstances that make the conduct criminal, such as the age of a victim of sexual misconduct? Does it extend to elements that affect punishment, such as the quantity of drugs involved?[29] Many of these difficult questions of interpretation can be resolved with a simple, generally applicable rule that the specified *mens rea* applies to all elements of the offense unless the statute creating the offense specifically provides otherwise.

These and possibly other straightforward rules of construction will increase uniformity — and thus fairness — in the interpretation of federal criminal statutes. They will also conserve judicial resources that are now devoted to interpreting federal criminal statutes on a case-by-case, ad hoc basis.

V. Establishing a Rational System of Punishment

Finally, revision of the federal criminal code affords an opportunity to rethink punishment. Most significantly, the use of mandatory minimum sentences should be carefully reviewed and, in my view, abandoned or greatly restricted. Mandatory minimum sentences are a harsh, blunt tool that leads to the prolonged incarceration of many men and women who could be punished and returned to society through less draconian means.

It is worth considering as well other means of reducing the bloated federal prison population without diminishing deterrence or jeopardizing public safety. Among the possible reforms worth considering are: the re-institution of federal parole, expanding the amount of "good time" a federal prisoner can earn, and increasing the power of federal judges to reduce or alter the conditions of federal prison terms in light of certain hardships. Through these means or others, federal

prisoners who have received just punishment and present no danger can return to their families and become productive members of society, rather than a burden on taxpayers.

VI. Conclusion

For the first time in my 30 years as a criminal defense lawyer, the political climate has shown signs of favoring reform of the federal criminal code. Republicans and Democrats, liberals and conservatives, in Congress and on the bench, recognize that the federal criminal code has drifted far from its moorings in federalism and fair notice. The reforms proposed here mark a starting point for returning the federal code to its proper, limited role in the criminal justice system. We must not let this opportunity pass.

Notes

1. 18 U.S.C. §§ 1001-1007, 1010-1033, 1035-1040.

2. 18 U.S.C. §§ 1341-1344, 1347-1348, 1350-1351.

3. 18 U.S.C. §§ 1501-1513, 1516-1521.

4. *McBoyle v. United States*, 283 U.S. 25, 27 (1931).

5. This is largely, although not exclusively, a result of the relevant conduct rules under the federal sentencing guidelines. *See, e.g.,* U.S. Sentencing Guidelines Manual, § 1B1.3 (2016).

6. For example, when a New York jury acquitted Mohamed Ghailani on 284 out of 285 counts a few years ago, many — possibly including the jurors — viewed the outcome as a victory for the defense and a repudiation of the prosecution case. But Ghailani received a life sentence on the single count of conviction — the same sentence, in practical terms, he would have received had he been convicted on all counts.

7. *E.g.*, 18 U.S.C. § 371.

8. *E.g.*, 18 U.S.C. § 1956(h); *Whitfield v. United States*, 543 U.S. 209 (2005).

9. *See, e.g., United States v. Coplan*, 703 F.3d 46, 59-62 (2d Cir. 2012), *cert. denied*, 134 S. Ct. 71 (2013); Abraham S. Goldstein, *Conspiracy to Defraud the United States*, 68 YALE L.J. 405 (1959).

10. *Krulewitch v. United States*, 336 U.S. 440, 446 (1949) (Jackson, J., concurring).

11. 328 U.S. 640 (1946).

12. *See, e.g., United States v. Morison*, 844 F.2d 1057, 1085-86 (4th Cir. 1988) (Phillips, J., concurring); *United States v. Rosen*, 445 F.2d 602, 613 & n.7 (E.D. Va. 2006); Harold Edgar and Benno C. Schmidt, Jr., *The Espionage Statutes and Publication of Defense Information*, 73 COLUM. L. Rev. 929, 998 (1973).

13. *E.g., United States v. Kim*, Case No. 1:10-cr-225-CKK, Memorandum Opinion (Docket No. 137) at 6-12 (D. D. C. July 24, 2013).

14. *See, e.g., Bond v. United States*, 134 S. Ct. 2077, 2086-90 (2014); *Cleveland v. United States*, 531 U.S. 12, 24-25 (2000); *United States v. Bass*, 404 U.S. 336, 349-50 (1971); *Rewis et al. v. United States*, 401 U.S. 808, 812 (1971).

15. In a handful of cases, the Supreme Court and the courts of appeals have attempted to place limits on the vast sweep of federal criminal power. *See, e.g., United States v. Morrison*, 529 U.S. 598 (2000); *United States v. Lopez*, 514 U.S. 549 (1995); *Waucaush v. United States*, 380 F.3d 251, 256-57 (6th Cir. 2004). But these cases mark only brief interludes in the steady expansion of federal criminal jurisdiction. *See, e.g., Gonzales v. Raich*, 545 U.S. 1, 23-33 (2005) (reading *Morrison* and *Lopez* narrowly).

16. Sections 2.02 through 2.05 of the Model Penal Code represent an effort to establish and define a hierarchy of *mens rea* requirements. The MPC *mens rea* provisions may work well for a typical state criminal code, but they are inadequate for the more complex offenses that appear in the federal code. Among other deficiencies, the MPC does not adequately address the need for proof of knowledge of illegality in the context of broadly worded federal offenses.

17. *See, e.g., Bryan v. United States*, 524 U.S. 184, 196 (1998); *United States v. Bishop*, 740 F.3d 927, 932-34 (4th Cir. 2014).

18. *E.g., Ratzlaf v. United States*, 510 U.S. 135, 143-49 (1994); *Cheek v. United States*, 498 U.S. 192, 198-99 (1991).

19. *E.g., Ratzlaf*, 510 U.S. at 141; *Spies v. United States*, 317 U.S. 492, 497 (1943).

20. *See United States v. Coolidge*, 14 U.S. (1 Wheat.) 415

(1816); *United States v. Hudson and Goodwin*, 11 U.S. (7 Cranch) 32 (1812).

21. *E.g., Global-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754, 769 (2011).

22. *See, e.g., United States v. Jewell*, 532 F.2d 697 (9th Cir. 1976) (en banc).

23. *E.g., United States v. Hilliard*, 31 F.3d 1509, 1514 (10th Cir. 1994); *United States v. Ojebode*, 957 F.2d 1218, 1229 (5th Cir. 1992).

24. *E.g., United States v. Heredia*, 483 F.3d 913, 924 n.16 (9th Cir. 2007) (en banc) (overruling prior decisions stating that the willful blindness instruction is "rarely appropriate" and "should be used sparingly").

25. *See, e.g., United States v. Carlo*, 507 F.3d 799, 802 (2d Cir. 2007).

26. *See United States v. Giovannetti*, 919 F.2d 1223, 1228 (7th Cir. 1990) (Posner, J.); Ira P. Robbins, *The Ostrich Instruction: Deliberate Ignorance as a Criminal Mens Rea*, 81 J. CRIM. L. & CRIMINOLOGY 191 (1990) (discussing legal and philosophical flaws in use of conscious avoidance as a substitute for actual knowledge); *Global-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754, 772-74 (2011) (Kennedy, J., dissenting) (criticizing conscious avoidance doctrine); *United States v. Heredia*, 483 F.3d 913, 930-33 (9th Cir. 2007) (en banc) (Graber, J., dissenting) (same).

27. 15 U.S.C. § 78dd-2(h)(3)(B).

28. *See, e.g., United States v. Turkette*, 452 U.S. 576, 587, 587 n. 10 (1981); *United States v. Banks*, 514 F.3d 959, 967-68 (9th Cir. 2008).

29. For examples of the Supreme Court struggling with this interpretive task, see *Fowler v. United States*, 563 U.S. 668 (2011) (analyzing intent element of federal witness tampering statute) and *Staples v. United States*, 511 U.S. 600 (1994) (analyzing mens rea for 26 U.S.C. § 5861(d)).

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Half-Baked: The Yates Memo Calls for Charging More Offenders,But How Do We Sentence Them?

Barry Boss, Rebecca Brodey, & Emily Gurskis

When the Deputy Attorney General issued what has become her eponymous memorandum, many in the criminal justice community praised the Department's focus on individual prosecutions. In the wake of the financial crisis where executives appeared to get off scot-free, the memorandum let everyone know that federal prosecutors were going to re-focus their efforts on putting more white-collar offenders behind bars. But, this focus on prosecuting more individuals and obtaining greater punishment cannot occur in a vacuum. There is a crisis in the federal criminal justice system presently: sentences in white collar cases are often disproportionate and irrational. If the Yates memorandum becomes a reality and more individuals are criminally prosecuted, this crisis will be exacerbated.

Take for example the sentencing guidelines that are applicable in most white collar cases. These guidelines are widely criticized by both judges and practitioners as being "useless" and having "so run amok that they are patently absurd on their face." *United States v. Adelson*, 441 F. Supp. 2d 506, 515 (S.D. N.Y. 2006) (Rakoff, J.). Because the guidelines for white collar cases tether prison sentences to the dollar amount associated with the crime, a single stock tip can yield a sentence of 20 years while an armed robbery is punishable only by 10 years, sexual assault is punishable by 5 years, and child abuse is punishable by 12 years. As recognized by judges, practitioners, legal scholars, and even Judge Patti B. Saris, chair of the Sentencing Commission, the white collar guidelines are "fundamentally broken."[1] Although the Guidelines are advisory in nature, the judge must consider them in determining the sentence, and sentences within the Guideline range are presumed reasonable on appeal by many appellate courts.[2]

While white collar offenders, such as Bernie Madoff, have become the face of villainous greed, most of the people are first offenders and far less damnable: a home health care provider in Florida is serving a 12-year sentence for submitting claims to Medicare for supplemental oxygen he provided to patients that did not have the requisite certification (although there was no problem with the product);[3] a CEO, after relying on legal advice that no state rebate was due, faced a 20 year sentence under the Guidelines for his company's failure to rebate premiums to a state agency;[4] and a 70-year-old business owner is serving a 7-year sentence after submitting false inventory and account information to a lender, enabling his business to borrow more than it otherwise would have after the company fell on difficult times.[5]

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White collar sentencing guidelines are, of course, not the only guidelines which have come under fire (there are also major movements to reform drug guidelines and other guidelines that target poor communities), but they are the guidelines which will be most implicated by Yates-inspired DOJ policy changes.

The harmful reach of the draconian sentencing guidelines extends well beyond individual offenders. The rate of imprisonment in the United States is now four times the world average, with approximately 2.2 million people in prisons or jails.[6] An ever-increasing number of these individuals are first-time, non-violent offenders. Lengthy sentences for this growing number of non-violent offenders is a costly drain on society

with little or no benefit to protecting the community or rehabilitating offenders. The total per inmate cost averaged $31,286 annually.[7] Studies show that lengthening prison sentences has no deterrent effect on crime — one of the chief purposes of sentencing.[8] New research also suggests that incarceration and lengthier prison sentences could increase recidivism.[9]

While there has been some sentencing reform in recent years, changes are made at a glacial pace. In 2015, after years of criticism prompted the Sentencing Commission to conduct a multiyear study of the white-collar guidelines, the Sentencing Commission adjusted the loss table for inflation. So, for instance, the sentencing enhancement that was previously triggered by a $7 million fraud, is now set at $9.5 million. The commission also amended the "victim enhancement" and "intended loss" so that certain sentencing enhancements are more tailored to the crime. These changes are indeed welcomed but they are modest — and, as sentencing expert Jim Felman points out, they do not "address the fundamental and profound deficiencies" in the current guideline which include an "overemphasis on loss" and a "cumulative piling on of specific offense characteristics."[10] Thus, they will have little impact on the exaggerated sentences in high loss cases.[11] Even with the recent amendments, any executive of a public company convicted of a criminal offense relating to the company's business operations likely faces a sentence under the Guidelines of life imprisonment or close to it.[12]

If we are moving forward with more individual prosecutions in white collar cases, then there should be a concomitant focus on how those individuals are sentenced. In 2015, the American Bar Association's Criminal Justice Section Task Force on the Reform of Federal Sentencing for Economic Crimes crafted an alternative sentencing structure. The ABA approach would be an excellent starting point for true sentencing reform. Referred to by practitioners and judges as the "shadow guidelines," the task force proposal considers loss as one of several factors in fashioning a sentence and places greater emphasis on overall offender culpability. Commentators have praised this alternative approach as a way to achieve more just and proportionate sentences, and judges have begun to rely on them in making sentencing decisions.[13]

People will debate whether the Yates memorandum makes good sense from a policy perspective, but what is indisputable is that if more people are prosecuted, it must be accompanied by a more rational sentencing scheme. Otherwise, the Yates memorandum will result in the opposite of its intended effect: greater injustice.

Notes

1. Hon. Patti Saris, *Keynote Address*, Regulatory Offenses and Criminal Law Conference (Apr. 14, 2015), *available at* http://www.ussc.gov/sites/default/files /pdf/news/speeches-and-articles/speech_saris_20150414.pdf.

2. *See Gall v. United States*, 552 U.S. 38, 50 (2007) (holding that the Guidelines shall be the "starting point and the initial benchmark"); *United States v. Tucker*, 629 Fed. Appx. 572, 572 (4th Cir. 2016) (unpublished) (holding that, upon review, "any sentence that is within or below a properly calculated Guidelines range is presumptively reasonable").

3. *See United States v. Bane*, 720 F.3d 818 (11th Cir. 2013).

4. *See United States v. Farha*, 8:11-cr-00115 2011 WL 12844360 (M.D. Fla. 2011) (indictment).

5. *See United States v. Massaro*, 1:12-cr-00148 (E.D. Va. 2012) (Brinkema, J.) (sentencing order).

6. Jason Furman and Douglas Holtz-Eakin, *Why Mass Incarceration Doesn't Pay*, N.Y. Times (Apr. 21, 2016), *available at* http://www.nytimes.com/2016/04/21/opinion/why-mass-incarceration-doesnt-pay.html.

7. *Id.*

8. *E.g.*, Zvi D. Gabbay, *Exploring the Limits of the Restorative Justice Paradigm: Restorative Justice and White Collar Crime*, 8 Cardozo J. Conflict Resol. 421, 448-49 (2007) ("[T]here is no decisive evidence to support the conclusion that harsh sentences actually have a general and specific deterrent effect on potential white-collar offenders."); David Weisburd, et al., *Specific Deterrence in a Sample of Offenders Convicted of White Collar Crimes*, 33 Criminology 587 (1995) ("There is generally no significant association between perceptions of punishment levels and actual levels . . .implying that increases in punishment levels do not routinely reduce crime through deterrence mechanisms.").

9. Nat'l Inst. of Justice, *Five Things About Defense*, (May 2016) *available at* https://www.ncjrs.gov/pdffiles1/nij/247350.pdf.

10. James Felman, *Reflections on the United States Sentencing Commission's 2015 Amendments to the Economic Crimes Guideline*, 27 Fed. Sent. r. 288, 290 (2015).

11. *Id.* at 288.

12. James Felman, Am. Bar Ass'n, *Testimony on Economic Crimes to the U.S. Sentencing Comm'n* (Mar. 12, 2015) ("A result of these numerous increases in guideline penalties is that a typical

officer or director of a public company who is convicted of a securities fraud offense now faces an advisory guidelines sentence of life without parole in virtually every case.")

13. *United States v. Faibish*, Sentencing Hearing, at 23:2-25, No. 1:12-cr-00265. (E.D. N.Y. Mar. 10, 2016) (expressly relying on ABA shadow guidelines in sentencing defendant to 63 months for his role in a check kiting scheme instead of the life sentence requested by the government); Robert J. Anello and Richard F. Albert, *Rise of ABA Task Force's "Shadow Sentencing Guidelines,"* 255 NYLJ 64 (Apr. 5, 2016).

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The Five Areas in Which Discovery Reform Is Most Needed

Timothy P. O'Toole

In *Brady v. Maryland*, the Supreme Court interpreted the due process clause to include a requirement that the government look for and disclose to the defense favorable information within the possession of the prosecution team.[1] In the 53 years since *Brady*, the Supreme Court has repeatedly reaffirmed the importance of this constitutional protection, and its importance has also been repeatedly confirmed at all levels of government. As the Department of Justice recognized in the wake of the *Brady* violations that tainted the trial of Senator Ted Stevens, the failure to timely and completely disclose such information can seriously impact the administration of justice:

> Any discovery lapse, of course, is a serious matter. . . . [E]ven isolated lapses can have a disproportionate effect on public and judicial confidence in prosecutors and the criminal justice system. Beyond the consequences in the individual case, such a loss in confidence can have significant negative consequences on our effort to achieve justice in every case.[2]

Despite this recognition, discovery failures — and particularly *Brady* violations — have persisted. As noted by one member of the Ninth Circuit in *United States v. Olsen*, "*Brady* violations have reached epidemic proportions in recent years, and the federal and state reporters bear testament to this unsettling trend."[3] Indeed, several Circuit Courts, including the Second,[4] Fourth,[5] Sixth,[6] and Ninth,[7] have all commented on the epidemic of *Brady* violations in recent years, ranging from failing to disclose witness biases and credibility concerns to plainly hiding exculpatory evidence. In light of these persistent issues, the question is whether anything can be done to ensure uniform adherence to the *Brady* rule. I propose here five reforms that would amount to a good start.

I. Eliminate the So-Called "Materiality Requirement" in the Pre-Trial Context

In my opinion, the biggest cause of *Brady* errors arises from confusion created by the context in which the Supreme Court's *Brady* cases have been decided. The *Brady* case itself, as well as every other case examined by the Supreme Court involving the *Brady* rule, arose in the post-conviction context — that is, the trial was over, the defendant had been convicted, favorable evidence was discovered that was known to the prosecution but not disclosed to the defense, and the question before the Supreme Court was whether the suppression of this evidence warranted a new trial. In this context, the Supreme Court developed a materiality requirement — a rule, similar to a harmless error rule, in which the Court will reverse a conviction only if the suppressed evidence, if known to the jury, would have created a reasonable probability of a different result. Like most harmless error rules, even this standard requires a certain amount of legal creativity, in asking a reviewing court to imagine a different trial and then imagine what the likely outcome of that trial would be. But, at least in the post-trial context, there is some reasoned basis for doing so, as there is a complete trial record and 50 years of Supreme Court guidance about how to apply the materiality test to the trial record.

Serious problems arise, however, when this materiality concept is applied in the pre-trial setting. In that setting, a prosecutor in possession of a piece of favorable evidence has no reasonable basis to determine materiality — there is no trial record, a prosecutor has little or no idea what the defense investigation has produced or what the potential defenses are, and the prosecutor has little basis for estimating the ultimate strength of his or her own trial evidence. Nonetheless, and despite several suggestions from Supreme Court Justices that the materiality concept has no application in the pre-

trial setting,[8] federal prosecutors (and many state prosecutors) attempt to apply this materiality rule in deciding whether to disclose favorable evidence at the pre-trial stage — in effect asking themselves before they have seen their own witnesses at trial and before they are likely to have any meaningful understanding of the defense: Having seen this new piece of favorable defense evidence, am I still reasonably confident I will prevail at trial?

The mere identification of the standard suggests why it is so fraught with peril. Any prosecutor, including one acting in complete good faith, is unlikely to view a particular piece of evidence as creating a reasonable possibility of a different result at trial. Indeed, if the evidence placed significant doubts in the prosecutor's mind about the defendant's guilt or the government's ability to pursue the case, the prosecutor likely would drop the case. Thus, if the new evidence doesn't persuade them to drop the case, *ipso facto*, the evidence is not material, and need not be disclosed. This is the sort of simplistic reasoning that I have seen used to justify withholding evidence in many cases, and it is the sort of reasoning that a pre-trial materiality requirement necessitates because there is no record to go on and a prosecutor is thus left to speculate about the power of a particular piece of evidence in the dark. This sort of speculation is an impossible task, and one that often results in critical evidence not being subjected to the adversarial process and potentially to scrutiny by the factfinder. The impossibility — and some would say irrationality — of this inquiry is also why many courts have eliminated the materiality requirement in the pre-trial context, both as a matter of law,[9] and as a matter of ethics.[10] If courts would uniformly adopt such a rule, or if the Supreme Court would state forthrightly that *Brady* requires the disclosure of favorable evidence pre-trial, but necessitates reversal post-trial only if a non-disclosure was material, it would go a long way toward reducing the number of *Brady* disputes that arise and the number of *Brady* violations that ultimately occur.

II. Impose concrete timing requirements for the disclosure of Brady evidence

Another important way in which the criminal discovery system is failing involves timing. *Brady* says nothing about the timing of disclosures. To fill this gap, most lower courts use a flexible standard that requires disclosure in time to make effective use of the evidence at trial. On its face, this standard seems reasonable, since the point of requiring disclosure is to allow use of the evidence, and the point of any timing requirement is to require disclosure in time to allow the evidence to be used effectively. But in practice, such a malleable deadline creates the opportunity for gamesmanship. When must a certain piece of evidence be disclosed in time for use at trial? The answer to that question often depends on who's asking, with prosecutors timing their disclosures to how much time they believe the defense needs to make effective use of the evidence. Not surprisingly, the defense often disputes these timing estimates, complains about eve-of-trial disclosures, and courts are left to speculate about how much time is required for a defendant to incorporate new evidence into a defense theory as trial is approaching.

Recognizing that this sort of ambiguity is a recipe for unfairness and unnecessary disputes, some courts have taken a different route, imposing concrete deadlines for disclosure of favorable evidence. The most common deadline used by court rule is to require disclosure within 14 days of arraignment.[11] Courts have also taken it upon themselves to impose such deadlines by standing order.[12] If courts would uniformly adopt these concrete rules, it would go a long way in reducing or eliminating disputes about timing — disputes the current rules virtually compel, since the prosecution and defense will rarely agree about how far in advance of trial disclosures must occur to allow for effective use of the evidence.

III. Establish a procedure by which the government can document and justify for the court any decision to withhold favorable evidence for compelling reasons

Another important discovery reform involves the establishment of a procedure for use by the government if it seeks judicial permission to withhold otherwise disclosable evidence. The *Brady* rule is important, but in some cases there are legitimate reasons to excuse the government from its disclosure obligations. For example, if the government can demonstrate that a disclosure would threaten witness safety or national security, then a procedure should exist that would allow courts to limit or excuse the government from its discovery obligations. Such a procedure is important in its own right, and its existence would blunt or eliminate many of the government's stated concerns about discovery reform.

To be more specific, whenever the topic of discovery reform is mentioned, the government often

invokes concerns about witness safety or national security as reasons to disallow discovery entirely. But because there are many criminal cases in which no such concerns exist, the government's interests can be fully satisfied by addressing these issues on a case-by-case basis, in which the government is permitted to modify its obligations upon a showing that a disclosure would compromise witness safety, national security, a sensitive law enforcement technique or any other substantial government interest. But at the same time, such a rule would allow for full discovery in cases where those concerns do not exist, and would require that the government actually make some showing, generally subject to adversarial scrutiny, so that merely mouthing the terms "witness safety" or "national security" do not automatically prevent the disclosure of important evidence. Likewise, such a rule would allow courts to narrowly tailor any reduced disclosures in such a way — through redactions or protective orders — to ensure that discovery is provided to the fullest extent possible, consistent with any countervailing concerns.

IV. Mandate disclosure of evidence in a usable format

Another discovery issue that has been arising with more and more frequency in the electronic age involves disclosure of the evidence in a usable format. Many criminal investigations now involve the accumulation of rooms full of electronic information. When the government — which has often spent years accumulating and reviewing the evidence — discloses this evidence, it is important that it does so in a way that provides the evidence in usable form. This means that (1) the information is searchable if the original form is searchable; (2) the exculpatory material is readily identifiable (i.e., not buried in a "document dump" of largely irrelevant material); and (3) disclosure of information is made in a way that will allow the defense to reasonably investigate it (e.g., names and contact information for witnesses who possess favorable, material information).[13]

V. Empower courts to remedy *Brady* violations

A final reform to consider is the empowerment of courts to remedy *Brady* violations when they occur. To be sure, courts currently have such power, but the scope of their ability to dismiss cases or to take other serious action in response to a *Brady* violation often varies from court-to-court. On this issue, it is important to ensure that courts understand that they have a wide variety of tools available to remedy *Brady* violations. These may include (1) dismissal with or without prejudice, (2) an order precluding the introduction of a particular item of evidence, (3) an order that the government make a witness available to the defense, or (4) an instruction to the jury about the import of the government's suppression of evidence. It is also important to identify possible factors courts should consider in imposing a remedy for a *Brady* violation. These should include (1) the extent to which the suppression of evidence interfered with the defense investigation or preparation of the case, (2) the disappearance of witnesses that would have been available if timely disclosure had occurred, and (3) a showing that any tardy disclosure was made to secure a strategic advantage in the case. For a rule of constitutional disclosure to actually work in practice, it is important for courts, the government and the defense to understand what likely will happen when disclosure does not occur as mandated.

In sum, the sound administration of justice and fairness depends on such criminal discovery reforms like these occurring sooner rather than later.

Notes

1. 373 U.S. 83 (1963).

2. David W. Ogden, Deputy Attorney General, *Memorandum for Department Prosecutors dated January 4, 2010 re: Issuance of Guidance and Summary of Actions Taken in Response to Report of the Department of Justice Criminal Discovery and Case Management Working Group*. *available at* http://www.justice.gov/dag/dag-memo.html. The memo summarizes the findings and recommendations of a working group convened after Senator Stevens' conviction in the United States District Court for the District of Columbia was vacated due to *Brady* violations. The Deputy Attorney General issued two *other related memos on the same day: (1) Guidance for Prosecutors Regarding Criminal Discovery available at* http://www.justice.gov/dag/discovery-guidance.html, and now codified at Section 165 of the United States Attorney's Criminal Resource Manual, and (2) *Requirement for Office Discovery Policies in Criminal Matters*, available at http://www.justice.gov/dag/dag-to-usas-component-heads.html

3. 737 F.3d 625, 631 (9th Cir. 2013) (Kozinski, C.J., dissenting from denial of rehearing en banc) (collecting cases); *see also United States v. Morales*, 746 F.3d 310, 311 (7th Cir. 2014) ("One would think that by now failures to comply with [*Brady*] would be

rare. But *Brady* issues continue to arise. Often, non-disclosure comes at no price for prosecutors, because courts find that the withheld evidence would not have created a 'reasonable probability of a different result.'").

4. *See*, *e.g.*, *United States v. Mahaffy*, 693 F.3d 113, 133 (2d Cir. 2012) ("The government's failures to comply with *Brady* were entirely preventable. On multiple occasions, the prosecution team either actively decided not to disclose the SEC deposition transcripts or consciously avoided its responsibilities to comply with *Brady*.").

5. *See*, *e.g.*, *United States v. Parker*,790 F.3d 550, 554 (4th Cir. 2015) (vacating the defendant's conviction because federal prosecutors failed to disclose that key witness was under investigation by the SEC for fraud); *United States v. Bartko*, 728 F.3d 327, 338 (4th Cir. 2013) (finding *Brady* violation (but no prejudice) where federal prosecutors did not disclose proffer agreements with two government witnesses).

6. *See*, *e.g.*, *United States v. Tavera*, 719 F.3d 705, 714 (6th Cir. 2013) (vacating conviction based on *Brady* violations where federal prosecutors failed to disclose plainly exculpatory and material statements by government witness).

7. *See*, *e.g.*, *United States v. Mazzarella*, 784 F.3d 532 (9th Cir. 2015) (finding *Brady* violations (but no prejudice) where federal prosecutors failed to disclose bias information for several government witnesses, including an informal promise of immunity and communications about potential employment with the FBI); *United States v. Sedaghaty*, 728 F.3d 885, 892 (9th Cir. 2013) (concluding "that the government violated its obligations pursuant to *Brady v. Maryland* . . . by withholding significant impeachment evidence relevant to a central government witness" and remanding for a new trial).

8. Bidish Sarma, *Do Supreme Court Justices Understand How Prosecutors Decide Whether to Disclose Exculpatory Evidence?* (March 17, 2016) *available at* https://www.acslaw.org/acsblog/will-the-supreme-court-reinvigorate-the-brady-doctrine-in-turner-and-overton/.

9. *United States v. Safavian*, 233 F.R.D. 12, 16 (D.D.C. 2005) ("The only question before (and even during) trial is whether the evidence at issue may be `favorable to the accused'; if so, it must be disclosed [under *Brady* and its progeny].")

10. *In re Kline*, 113 A.3d 202, 213 (D.C. 2015) (interpreting D.C. Rule of Professional Conduct 3.8(e) as requiring disclosure without regard to materiality and without regard to any sort of "triviality" analysis),

11. *See, e.g.*,N.D. N.Y. L. Crim. R. 14.1(a).

12. *See, e.g., United States v. Rodriguez,* No 08-cr- 1311, 2009 WL 2569116, at *12 (S.D. N.Y. 2009) (Patterson, J.) (court ordered government to turn over "*Brady* material . . . as it is discovered by the Government" and "*Giglio* material . . . twenty-one days before the commencement of trial"); *United States v. Smith,* No 02-cr-1LN, 2008 WL 906526, at *2 (S.D. Miss. 2008) (Lee, J.) (noting the magistrate's issuance of a "standard" order requiring the government "to produce as soon as possible all . . . *Brady* exculpatory materials").

13. *United States v. Rodriguez*, 496 F.3d 221, 226 (2d Cir. 2007) (requiring disclosures that are "sufficiently specific and complete" to permit effective use); *Eastridge v. United States*, 372 F. Supp.2d 26, 60 (D. D. C. 2005) (production of favorable grand jury transcripts to the defense was a "constitutional necessity").

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Criminal Justice Reform Through a Focus on Federalism: The need to stay engaged at the state level and to pull back the bounds of federal power

Joe Luppino-Esposito

Introduction

Perhaps it is cliché to say that Washington DC exists in a "bubble," but on criminal justice reform issues, it bears repeating. Though states, including particularly conservative states, have made major changes to their sentencing and corrections systems and to criminal intent standards over the last several years, criminal justice reform seems to be a novel concept to the good people of our nation's capital. Please forgive the advocates who roll their eyes at the headlines about "strange bedfellows" who want to improve criminal justice reform. Those stories do not faze those who have been working in such coalitions over the years.

"States are the laboratories of democracy" has also been a cliché for some time, but for good reason.[1] States are able to test policy and other states, or the federal government, can take lessons from that success or failure.

Perhaps this author's bias is showing here, but it seems that when a policy idea that begins in the states finds its way to Washington, there is some apprehension about using it, because the states are so incredibly different from the *important* work of the federal government. To be fair, many issues that Congress tackles have no analogue. For example, there will never be (hopefully) a state that has engaged in a foreign military action. Criminal law, in which Congress ought to be limited in its purview, is not such a policy arena.

Nonetheless, federalism still matters. Of course, the discussion of "federalism in law enforcement" is a broad one that includes discussions on civil asset forfeiture, terrorism, and a whole host of issues that will not be discussed here. Rather, this essay will focus on two main themes. First, that the states as laboratories can serve as good examples for improvements to sentencing, corrections, and criminal intent. Second, that over-federalization of criminal law remains a problem and that the continued expansion of federal power is unjustified.

Why Consider State Models

Spoiler alert: *Examining the Myths of Federal Sentencing Reform*, the paper accompanying this symposium essay, explains that by analyzing the success of state reforms for sentencing low-level, non-violent drug offenders, the federal system can take a similar approach and wind up with similar results.[2] It seems rather logical: if you can follow someone else's model of success, you should do so.

As a matter of First Principles, Congress rarely asks if it ought to be involved in legislating behavior. And once that question is summarily skipped, Congress rarely pauses to consider if a criminal penalty is appropriate, either.

The examples of state success are powerful tools for advocates. For the sake of full disclosure, this is something that *Right on Crime* does regularly.[3] Using the Texas Model, which has led to a precipitous drop in crime and incarceration rates,[4] we work in states to share that knowledge, and to improve their criminal justice systems as well. States often suffer from their own form of "Special Snowflake Syndrome"[5] but there are still some reforms that translate well across borders. And it is especially important for states to learn from other states, more so than the federal government to learn from states or to dictate to states.[6]

Ignoring for a moment the blatant political

maneuvering and messaging that occurs during the criminal justice reform debate, there are two lines of attack that the reform opponents can use. First, that the drop in crime over the past several decades can be attributed to harsh sentencing policies at the federal level. This is the weaker of the two arguments, because it fails to recognize that far more criminal prosecutions occur in the states and assumes some causal relationship between federal drug trafficking penalties and crime across the board and at different levels of sovereignty. Second, opponents of reform may argue that state reforms cannot be translated into the federal system.[7] This is not the place to litigate the accuracy of that thesis, but it speaks to the importance of using those examples and getting them right.[8]

States have also led in improving criminal intent reform. Michigan and Ohio are the most recent states to add a default standard of *mens rea* into their criminal laws.[9] Though the federal government still has an unknown number of criminal penalties on the books,[10] we know that it is likely more than the also hefty 3,100 on the books in Michigan.[11] And this was an effort supported by both conservative groups and the state chapter of the ACLU, leading to a unanimous vote.[12]

Simple legislation to protect one of the most basic tenets of criminal law does not have a home in Washington, DC, it appears. Progressives, who used to favor this legislation, and will likely favor it again when a conservative returns to the Oval Office, have used the issue to slow sentencing and corrections reform.[13] Rather than looking to the states that have made these reforms with no known negative consequences, progressives are convinced that all businesses are run by 19th century robber baron caricatures who want to poison the air and water as a means of improving profit margins and that undefined *mens rea* standards are the only way to achieve justice, their armies of attorneys notwithstanding.[14]

It is the state work that will encourage progress in other states and at the federal level. Though the national media focus has turned to the federal government's potential reforms in this legislative session, that is an incomplete story. This is all to say that advocates on both sides of the debate should not assume that success or failure of reform will be determined by the actions of the federal government. Most criminal justice still happens at the state and local level, despite the overreaches by the federal government described below.

The Over-Federalization Factor

As a matter of First Principles, Congress rarely asks if it *ought* to be involved in legislating behavior. And once that question is summarily skipped, Congress rarely pauses to consider if a criminal penalty is appropriate, either.[15]

There is a tendency for many to assume that because the federal government is stepping into a policy area it means that *now* the issue will be taken seriously and that government will get it right. It is especially disturbing to hear conservatives make this argument. The legend of Rudolph Giuliani's "federal day" prosecutions of drug dealers may not stand up to scrutiny, but the premise that the feds simply do criminal justice better persists.[16]

It is unclear why this happens except for the attention that federal cases often get. Plea rates for states and federal courts are comparable — and extremely high — and are not necessarily an indicator of better justice.[17] What is different is the "severity gap" between the federal and state sentencing systems. This is problematic with the increased overlap of crimes that can be found in both the state and federal systems. The federal government, with no regard for budgets and high regard for the symbolism behind its taking action on crime, processes far more cases than one would suspect.[18] The growth of the ranks of federal prosecutors, from 1,500 in 1980 to roughly 7,500 today, has us asking the "chicken and egg" question about why so many more cases are prosecuted by the federal government today.[19]

One of the more interesting debates on the federalization of criminal law comes from the Federalist Society's 1997 National Lawyers Convention.[20] Though nearly two decades old, the discussion is very relevant today. Judge D. Brooks Smith argued that the federal government should be careful to not prosecute a case unless a truly federal interest was involved, not merely a tangential one.[21] On the other side, Richard K. Willard countered that the public expects government to step up and do more to prevent crime, and that the case of states' rights has already been lost.[22] But the comments of former attorney general Edwin Meese III hold up the best over time.[23] Meese outlined how the federal government went from nearly no involvement to supporting local law enforcement to taking a leading role as a means of showing the public that Congress cares. Meese argues that arson, carjacking, and even the

assassination of President John F. Kennedy could have been adjudicated in state courts. There is nothing stopping those states from imposing the harshest penalties for crimes that have been enforced since time immemorial.[24]

No longer is there an understanding that the state and federal government will cooperate, as necessary, and that the federal government will only involve itself in criminal enforcement where it is truly needed. Instead, we now have a system where those calling for more federal criminal enforcement ignore that states exist at all.

With that said, leaving everything to the states can be problematic as well. Federalism that is too decentralized can lead to double the penalties and regulations in a world where it is unlikely that the federal government will back down. If states do decide to step up to the plate and go after every offense that falls within their purview, there could be a rise of regulatory enforcement that would make things worse for professionals who already seem to require a team of lawyers just to open up shop.[25]

Conclusion

Criminal justice reform advocates must keep the principles of federalism in mind, especially when working at the federal level. The tit-for-tat politicking in Washington can easily get in the way of good policymaking for even the most seemingly agreeable reforms. With an understanding of federalism, advocates are equipped with a legal and ideological argument that will prove successful.

Notes

1. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

2. Greg Glod and Joe Luppino-Esposito, *Examining the Myths of Federal Sentencing Reform*, Texas Public Policy Foundation Policy Perspective, March 2016, http://www.texaspolicy.com/library/doclib/2016-03-PP03-MythsFedPrisonReform-CEJ-GregGlodJoeLuppinoEsposito.pdf.

3. Right On Crime is "the one-stop source for conservative ideas on criminal justice. It is a project of the Texas Public Policy Foundation in cooperation with the American Conservative Union Foundation and the Prison Fellowship." For more information, see Right on Crime, *About Us*, *available at* http://rightoncrime.com/about/.

4. *See* Greg Glod, *Texas Adult Corrections: A Model for the Rest of the Nation*, Texas Public Policy Foundation Policy Perspective, October 2015, http://www.texaspolicy.com/library/doclib/PP-Texas-Adult-Corrections-A-Model-for-the-Rest-of-the-Nation.pdf.

5. Though not a perfect analogy to states, "Special Snowflake Syndrome" is defined in part as "the belief that she is rare in her qualities, despite, in reality, being an only slightly less common cliché." *See Definition of Special Snowflake Syndrome,* Urban Dictionary, *available at* https://www.urbandictionary.com/define.php?term=Special%20Snowflake%20Syndrome.

6. Reihan Salam, *'Laboratories of Democracy' and What Works Where*, National Review, (Mar. 17, 2013) http://www.nationalreview.com/agenda/343218/laboratories-democracy-and-what-works-where-reihan-salam

7. David W. Murray and Brian Blake, *Why Texas' Criminal Justice Reforms Don't Translate to the Federal Level*, Hudson Institute, Mar. 6, 2016, http://www.hudson.org/research/12476-why-texas-criminal-justice-reforms-don-t-translate-to-the-federal-level.

8. Among the many errors made in the piece cited above include: the misrepresentation of the "drug trafficking" charge at the federal level, applying an assumption that all those charged as such are "high-level" offenders, which is not accurate; assumptions regarding the pleas of certain prisoners; and just to keep this brief, the insinuation that the impact of the Texas reforms is "disputable," which is not accurate, as research across the nation shows that states that have adopted similar reforms and lower incarceration rates have seen

greater reductions in crimes in the states that have not done so.

9. Josh Siegel, *How Michigan and Ohio Made It Harder to Accidentally Break the Law*, Daily Signal, Jan. 27, 2016, http://dailysignal.com/2016/01/27/how-michigan-and-ohio-made-it-harder-to-accidently-break-the-law/.

10. John S. Baker, *Revisiting the Explosive Growth of Federal Crimes*, Heritage Foundation, Legal Memorandum #26, June 16, 2008, http://www.heritage.org/research/reports/2008/06/revisiting-the-explosive-growth-of-federal-crimes.

11. *Id.*

12. Michael J. Reitz, *Michigan Legislature Unanimously Passes Criminal Intent Reform*, Mackinac Center for Public Policy, Dec. 17, 2015, https://www.mackinac.org/22003.

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