

A person is walking through a maze, symbolizing a complex path or a search for a solution. The maze is composed of light-colored walls and paths, and the person is seen from behind, walking away from the viewer.

## 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.<sup>1</sup> 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.<sup>2</sup> 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.<sup>3</sup> Using the Texas Model, which has led to a precipitous drop in crime and incarceration rates,<sup>4</sup> 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”<sup>5</sup> 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.<sup>6</sup>

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.<sup>7</sup> 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.<sup>8</sup>

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.<sup>9</sup> Though the federal government still has an unknown number of criminal penalties on the books,<sup>10</sup> we know that it is likely more than the also hefty 3,100 on the books in Michigan.<sup>11</sup> And this was an effort supported by both conservative groups and the state chapter of the ACLU, leading to a unanimous vote.<sup>12</sup>

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.<sup>13</sup> 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 19<sup>th</sup> 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.<sup>14</sup>

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.<sup>15</sup>

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.<sup>16</sup>

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.<sup>17</sup> 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.<sup>18</sup> 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.<sup>19</sup>

One of the more interesting debates on the federalization of criminal law comes from the Federalist Society's 1997 National Lawyers Convention.<sup>20</sup> 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.<sup>21</sup> 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.<sup>22</sup> But the comments of former attorney general Edwin Meese III hold up the best over time.<sup>23</sup> 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.<sup>24</sup>

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.<sup>25</sup>

## 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