GUILT BY PRESUMPTION
Defending the DWI Suspect
FEATURES:

2 LETTERS/BOOKS

4 GUILT BY PREVISION: DEFENDING THE DWI SUSPECT
   By Jonathan D. Cowan

8 MAKE CONGRESS PLAY BY THE RULES—GUIDELINES FOR THE TREATMENT
   OF WITNESSES
   By Justin D. Simon

12 GETTING FREE: VICTIM PARTICIPATION IN PAROLE BOARD DECISIONS
   By Maureen McLeod

16 THE CONSEQUENCES OF FEDERALIZING CRIMINAL LAW
   By Roger J. Miner

20 PROVE YOU NEED THE MONEY USING CASELOAD DATA
   By James Kura

DEPARTMENTS:

24 Defense Services
   For the Poor
   By John B. Arango

26 Juvenile Justice
   By Robert E. Shepherd, Jr.

31 Section News
   By Cheryl M. Bradley

33 Legal Ethics
   By John M. Burkoff

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The Consequences of Federalizing Criminal Law

Overloaded courts and a dissatisfied public

BY ROGER J. MINER
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 counterfeitng of credit cards and theft of livestock having a value in excess of $10,000. Yes, cattle rustling is now a federal crime!

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 interstate 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.

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.

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 confines 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

I am afraid of the discretion of federal prosecutors

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)
sponsible for a fraction of their
driving performance, it is important to
look for other approaches to im-
prove traffic safety. R. Lehman, A.
Wolfe, & R. Kay, A Computer Ar-
chive of ASAP Roadside Breath-
Testing Surveys, 1970–1974, High-
way Safety Research Institute, Ann
Arbor, 1975, NHTSA DOT HS-801
502.

Direct measurement of driving
impairment

It would be most consistent with
our goals of promoting public saf-
ety and developing fair and consist-
ent statutes to directly measure
population-compared driving im-
pairment, and to penalize it when
appropriate. Until recently, there
was no easy way to measure an in-
dividual’s driving ability shortly af-
ter a traffic stop. Microcomputer
technology, which has produced
computer games resembling driv-
ing simulators, such as Atari’s Pole
Position, is currently available. This
type of testing would be an excel-
ent starting point for developing
appropriate measures of driving
impairment. J. Cowan, “The Com-
plex Relationship Between Blood
Alcohol Concentration and Impair-
ment,” in R. Erwin, ed.: Defense of
Drunk Driving Cases: Criminal and
Civil, 14–36 (1985). The technolo-
gy for developing a reasonably
priced, realistic driving simulator for
detecting driving impairment is now
available. J. Cowan and A. Stein,
“Development of a Driving Simu-
lator for Routine Impairment Mea-
surement,” Presentation to the
National Safety Council Commit-
tee 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 Al-
cohol and Other Drugs.

A testing device for use in a po-
lice station could then be devel-
oped. This would permit an initial
screening of the driving ability of
every suspect, including his reac-
tion to simulated emergencies.
Failing this screening would consti-
tute 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 impair-
ment, along with evidence of ob-
servations 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 be-
tween any drug blood level and im-
paired performance. See National
Institute on Drug Abuse, “Drug
Concentrations and Driving Im-
pairment,” 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 impair-
ment could then be investigated and
modified. Drivers who were
impaired because of medical prob-
lems, prescription medication, or
old age could also be screened out
and nonpunitive remedial actions
taken. This approach may be par-
ticularly appropriate for commer-
cial drivers of trucks, buses, and
taxi’s, who log hundreds of thou-
sands 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 relative-
ly modest funding.

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

Federalization

(Continued from page 19)

Obviously, it is not. To illustrate:
Everybody knows that most nar-
cotic transactions are punishable
under federal law. The ordinary cit-
izen has every right to expect that
violations will be prosecuted vig-
ishly. Yet nobody makes it clear
that only an infinitesimal number of
the 55,000 narcotics arrests made
in New York City in one year can
be prosecuted federally. The fed-
eral 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
offenses committed in the nation
eyear. Great expectations lead
to great disappointments, an unfor-
tunate consequence of too much
criminal federal law.

It seems almost unnecessary to
observe that two laws on the same
subject lead to duplication—dupli-
cation in investigation, duplication in
prosecution and duplication in pun-
ishment. 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 di-
vide the work. It is true, of course,
that conflicts between state and fed-
eral agencies have diminished great-
ly as the result of the Justice
Department’s promotion of Law En-
forcement Coordinating Commit-
tees. 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.

For many years, I have told the story of the jury foreman who announces a verdict in these words: "Your Honor, we have decided not to get involved." Involvement, of course, is the key to the success of our form of government. Yet participation is most lacking at the level where it should be the most widespread—the local government level.

The citizenry increasingly has been conditioned to turn to federal law enforcement and to the federal courts as the first line of defense against antisocial conduct. What we are witnessing is an abdication of responsibility for self-government. In the face of municipal corruption, it is easy to send for the "feds." If narcotics are sold on the street corners of a major city, it is a simple matter to invoke high-profile federal criminal prosecution. When loan sharks and racketeers infest a municipality, local law enforcement efforts can be relaxed if federal help is on the way. But, to invite federal authorities to define and prosecute crime involving activities primarily of state and local interest is to concede that state and local government cannot be moved to serve the will of the people, and that the people are willing to forego their form of government. I do not believe that Americans are prepared to make that concession.

Caseweighting

(Continued from page 23)

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 caseworking 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 excessive 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 caseworking 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