Testimony of
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Chairman Thompson and distinguished members of the committee, thank you for inviting me to testify today on the federalization of crime. My name is John Baker and I teach law at Louisiana State University, where I have been on the faculty for twenty-four years. Before teaching I clerked for a federal judge and served as an assistant district attorney in New Orleans. Later, during the Reagan Administration, I was a consultant to the Justice Department, the Separation-of-Powers Subcommittee of the U.S. Senate Judiciary Committee, and to the White House Office of Planning. I have taught and written in the areas of criminal and constitutional law; have argued regularly in the federal courts, including the United States Supreme Court; and have had the privilege of serving on the ABA Task Force which recently issued a report entitled The Federalization of Criminal Law.

The federalization of crime distorts the Constitution's structure of powers in at least three respects. I) The federalization of crime represents a usurping by the Congress of police powers, which the Constitution leaves in the states and withholds from the federal government. II) In the course of federalizing crimes, Congress has unnecessarily created so many uncertainties as to what is and is not criminal that federal courts are effectively defining crimes and thereby exercising Congress' exclusive legislative power. III) The Judiciary's interpretation of federal criminal statutes, which tends to be expansive, allows and even requires Executive branch agencies to prosecute individuals and corporations whose actions often are not clearly criminal and who would be prosecuted, if at all, before state court juries. These areas of constitutional concern are further discussed in the following three sections.

I. HOW THE FEDERAL GOVERNMENT HAS USURPED STATE POLICE POWERS

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ABA Task Force Report at 5.[ii]

A. THE ACCLERATION IN CREATING FEDERAL CRIMES

The ABA Report reveals that "***More than 40% of the federal criminal provisions enacted since the Civil War have been enacted since 1970***."[iii] (Emphasis added, italics in the original). Moreover, the pace has only accelerated during the 1980s and 90s.[iv] "All signs indicate that the federalization trend is growing, not slowing, in fact as well as perception."[v] No one actually knows exactly how many federal crimes exist because it is impossible to get an accurate count. Previous estimates of approximately 3,000 federal crimes have become dated due to the surge in federal criminalization during the last sixteen years.[vi] Depending on how one treats federal regulations, that number can skyrocket. Nearly 10,000 regulations carry some sort

of criminal or civil penalty.[vii] As the ABA Task Force Report puts it, "[w]hatever the exact number of crimes that comprise today's 'federal criminal law,' **it is clear that the amount of individual citizen behavior now potentially subject to federal criminal control has increased in astonishing proportions in the last few decades**."[viii] (Emphasis added).

If, despite the growth of federal criminal law, the states still prosecute all but a small fraction of criminal cases, it might seem that the federalization of crime has practically little effect, and is therefore of little concern. The point, though, is only partly that the claimed benefits of federalization are illusory. If federalization were simply ineffectual, it would only involve a waste of time and resources no worse than many other programs of the federal government. On the contrary, the overall ineffectiveness of federal criminal law vis-a-vis local crime only magnifies its dangerous potential. Although federal law enforcement has had very little impact on local crime, federal law enforcement agencies can "crush" particular persons and corporations on which they set their sights. As long as those being prosecuted are in fact guilty, the general public probably does not care much about the "technicalities" under the Constitution. As discussed in sections II and III, however, the uncertainties of federal criminal statutes, combined with broad interpretation, leaves everyone -- investigators, prosecutors, judges, juries, and potential defendants -- uncertain about what is and is not criminal. Such uncertainties endanger the innocent because they give federal law enforcement very great latitude in choosing its targets for investigation and possible prosecution.

Federal agencies have always been, and should be, more selective than state law enforcement in taking cases. As federal criminal law has expanded to the point of virtually duplicating state criminal law, however, that selectivity has become even more pronounced. With many more crimes to choose from than state law enforcement and many fewer federal courts than state courts, federal investigative agencies can concentrate tremendous resources on any chosen target. Fewer cases and more resources for their investigations mean that federal law enforcement can overwhelm all but the most financially powerful defendants.

The high degree of selectivity in federal investigations and prosecutions cannot be overcome simply by increasing the number of federal

criminal trials. Already, federal courts are overburdened with criminal cases. Moreover, the nature and function of the federal judiciary within the constitutional system is such that the number of federal courts and judges cannot be much enlarged. When Congress votes more funds for criminal law enforcement, the increases in federal spending can produce more and more intense federal investigations, but not a proportionate increase in the number of prosecutions. Without increasing the percentage of criminal convictions that come in federal courts,[ix] Congress has nevertheless greatly increased the presence and power of federal law enforcement by creating new federal crimes and increasing spending on federal law enforcement.

Every time Congress passes a new criminal statute or a federal court expands an existing one, the jurisdiction of federal law enforcement increases. Each increase means that some federal agency somewhere then has more power to investigate some conduct, or some aspect of that conduct, it could not have investigated otherwise. That investigative power will be used to determine for purposes of arrest or indictment whether there is probable cause to believe a crime has been committed. As a result of the surge in federal criminalization over the past two to three decades, the traditional notion that federal law enforcement agencies have only limited powers has ceased to reflect the reality. Instead, the working assumption has become that collectively the agencies of the Justice Department, Treasury, and the Postal Service can investigate anything and anyone they decide to.[x] Almost every kind of crime is potentially a federal crime.

B. THE CLAIMED CONSTITUTIONAL BASIS FOR FEDERALIZATION

Congress has generally used its power under the Commerce Clause as the basis for expanding federal criminal law. Congress does have plenary power under the Commerce Clause "to regulate commerce among the states." Unfortunately, Congress has confused its legitimate powers under the Commerce Clause with a general police power.

1. THE COMMERCE CLAUSE AND POLICE POWERS

Congress' power to control commerce that concerns more than one state is complete and not subject to control by the states.[xi] Congress is the proper forum in which to exercise a superintending power over commerce. In our federal system, the states cannot regulate cross-border activities because they have lost control over their borders. They cannot establish border checkpoints to admit or exclude persons and goods the way an independent, sovereign nation has the right to do. Under the Constitution, Congress can legislate, and often has done so, in ways that benefit (at least many of) the states when they themselves cannot do so because the Constitution elsewhere limits the powers of the states. For example, states with high labor costs want to retain their industries, but can neither directly prevent them from leaving nor impose import duties on products from other states as a way of protecting in-state companies. Through the Commerce Clause, Congress has regulated wages in ways that favor high-labor-cost states by eliminating the labor cost advantage that other states would otherwise be able to use to entice businesses to relocate to the low-labor-cost states.[xii] Regardless of whether this makes for good economic policy, Congress can, within limits, use its power to regulate commerce in ways that benefit some states to the disadvantage of others. The power of states and the federal government over the liberty of persons, even fleeing felons, however, is much more limited than that the federal government's power to regulate 'commerce among the states.'[xiii]

Distinguishing between Congress' power under the Commerce Clause [xiv] and the states' police power has been a recurring problem for the Supreme Court. Chief Justice Marshall, who is said to have first used the term, described the police powers as the residual sovereign powers of the state, and was clearly referring to *local* police powers.[xv] The later rise of a *national* police power was a different matter. Police powers have always been identified as inherent powers of sovereignty. The federal government was not considered to have a general police power because the federal government would thereby have ceased to be a government of limited powers as intended by even the most nationalistic of the Founders. The later development of a national police power concept was related to 1) using the Commerce Clause to turn the violation of regulations into crimes; and 2) ignoring the normal criteria for true crimes.

2. CONFUSING REGULATION OF COMMERCE AND PUNISHING CRIME

The federalization of crime through the Commerce Clause has been made possible in large part by failing to distinguish between *regulating commerce* and *punishing crime*. During the second half of the19th century, Congress and the individual states began to apply criminal sanctions to economic regulations.[xvi] Notable examples included the Interstate Commerce Act[xvii] and the Sherman Anti-Trust Act.[xviii] These "regulatory" offenses differed from "true" crimes, as has since been recognized, in that they did not involve moral stigma, but were designed to force compliance with the regulations.[xix] The Supreme Court, however, did not make such distinctions when addressing the Commerce Clause in the 1890s and later.[xx]

Indeed, in the first significant Commerce Clause case related to crime, *Champion v. Ames*,[xxi] the Court confused regulating commerce and exercising the police power. Congress had enacted legislation to protect states where gambling was prohibited (which was all but one) by prohibiting the shipment of lottery tickets across state lines. Congress did not outlaw gambling or the sale or lottery tickets; it merely prevented the movement of lottery tickets from the one state where they could be legally purchased into other states. The Supreme Court upheld the act as a constitutional regulation of commerce in lottery tickets by restricting their sale within the borders of the one state. Unfortunately, the Supreme Court went further and posited a general police power in Congress to criminalize certain conduct.[xxii] As I have explained in greater detail elsewhere,[xxiii] the Supreme Court's decision initiated confusion between Congress' undeniable power to regulate commerce among the states and the police power of defining, prosecuting and punishing crime.

By 1909-10 the body of federal criminal law had incorporated the notion of a national police power to protect the general welfare.[xxiv] In practice, however, national police powers did not greatly expand because the Supreme Court maintained a restrictive interpretation of the Commerce Clause. The one major assertion of federal police power occurred with Prohibition, and required an amendment to the Constitution.[xxv] That

disastrous experience probably cooled, for a number of years, the enthusiasm that otherwise might have existed for increasing federal criminal powers.

During the Roosevelt administration in the 1930s, Congress heavily regulated the economy under the Commerce Clause. After some cases voiding key components of the New Deal, the Supreme Court eventually validated most of this regulation, laying the groundwork for the later expansion of national police powers.[xxvi] Still, congressional inertia and concerns for federalism inhibited rapid expansion of federal criminal law and jurisdiction. That changed about 1970, when Congress and the Executive branch began to show greater willingness to extend the federal police power into areas of traditionally local concern due to mounting public pressure for the government -- state or federal -- to "do something" about crime, with little thought about federalism.[xxvii]

When Congress began to federalize more crimes, it relied on the fact that since the famous 1937 case of *NLRB v. Jones & Laughlin Steel*,[xxviii] the Supreme Court had -- until *U.S. v. Lopez* in 1995[xxix] -- upheld virtually every congressional act under the Commerce Clause. The vast majority of cases at least involved commerce, not crime. Nevertheless, prior to *Lopez*, the Court had not invalidated any federal criminal statutes under the Commerce Clause, even though it tended to give narrow constructions to federal criminal statutes, prior to 1970.[xxx] With *Perez v. United States* in 1971,[xxxi] the Court seemed to allow Congress as much deference defining and federalizing crime as it had been on regulations of commerce. In *Perez* the Court upheld application of a federal "loan-shark" statute to local acts without any showing of any relation to interstate commerce. The Court considered it sufficient that the activity was part of a class of activities that Congress had targeted as having affected commerce through organized crime.

Perez opened the way for Congress to expand federal criminal law into the domain of the states. If *Perez* was simply the logical extension of prior cases, then the principle had been extended beyond the limits of the logic. *Perez*'s significance was reflected by the comments of an old New Dealer, Robert Stern, who years before had worked to have the Supreme Court expand its interpretation of the Commerce Clause.

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C. THE NEW FACE OF FEDERAL LAW ENFORCEMENT: DRUG, COMMERCIAL, AND VIOLENT CRIMES

With apparent approval from the Supreme Court, federal law enforcement has focused increasingly on local crime since 1970. Of current federal prosecutions, the greatest number of cases involve drugs; the second highest are cases involving commercial fraud; and for the first time federal law enforcement has targeted run-of-the mill street crime by using federal

gun-control statutes. All three areas properly belong to the states and threaten to undermine not only state authority, but also to swamp the federal courts system.

1. DRUGS: DISTRIBUTION VERSUS POSSESSION

Drug crimes are a good example of how regulating commerce and punishing crime have become commingled. The federal government certainly should, and does, have a major role regarding drugs, a matter of great concern to the American people. That does not necessarily mean its criminal powers extend to the mere user of drugs who already falls within the jurisdiction of state criminal law. The federal government has the constitutional power to regulate drug trafficking, at least insofar as it relates to the flow of drugs crossing state and national borders. The states clearly have power to criminalize and prosecute drug distribution and use within their own borders. Given that most drug distribution originates outside the country, it is difficult to draw theoretical distinctions separating local from interstate and international drug trafficking. It is all part of a chain of distribution. As a result, state and federal law enforcement have coordinated their drug enforcement efforts.

The federal government has primary authority over the classification and regulation of drugs.[xxxiii] In terms of *regulation,* the federal government has ultimate control over drug policy as a matter of "regulat[ing] commerce among the states."[xxxiv] Nevertheless, while the federal government regulates and should interdict the *transportation* of controlled drugs, the states retain the *police power* over crime and they can, and should, prosecute most drug offenders.[xxxv]

The main reason for federal involvement in the prosecution of drug offenses is that both state and federal prosecutors want to maximize the sentences and force guilty pleas by using federal law, which provides for longer sentences than many states do.[xxxvi] It is not everywhere true and not necessarily the case that federal law has longer sentences for drug convictions. Some years ago federal drug penalties were lower than those of many states and, even today, are lower than some states.[xxxvii] Nothing prevents the states individually from raising their own penalties for drug

violations. If state penalties were higher than federal law provides, or if federal law did not provide criminal punishment for mere possession of drugs, then state courts would prosecute those cases. Indeed, even though federal drug prosecutions have greatly increased,[xxxviii] state courts still handle most of the drug cases, just as they do most criminal cases.[xxxix] Those relatively few drug defendants prosecuted in federal court do receive stiffer sentences generally than those tried in state court,[xl] but as noted below, it is much more costly to prosecute cases in federal court. Using federal prosecutions in this manner distorts the proper balance between state and federal governments and dispenses unequal justice in similar drug cases within a given locale.

2. CORPORATIONS AS CRIMINALS

Corporate executives and others who think such constitutional issues do not concern them should consider the dramatic demise of E.F. Hutton. The president of the former prestigious brokerage house later admitted that his decision agreeing to have Hutton plead guilty to federal fraud charges resulted in the firm's destruction. Too late, he regretted not fighting the indictment.[xli] The company should in fact have gone to trial; the charges were very questionable given the law as it then stood. Nevertheless, on the advice of counsel the firm pled guilty. Apparently, the firm's management thought it would be less difficult and less expensive to plead, rather than to fight. Hutton apparently followed the conventional wisdom that it is preferable to suffer a few days of bad publicity from a plea, rather than weeks of bad publicity from a trial. The conventional wisdom, however, failed E.F. Hutton. After the plea, members of the media and Congress questioned why only the firm, and no individual, had pled guilty. The Justice Department defended the plea agreement by admitting it could not actually prove any individual had committed a crime. As a matter of common sense, although not necessarily of legal logic, it seemed to many that a corporation, as an abstract entity, could not be guilty of anything unless at least one of its agents committed a criminal act. Before its indictment, E.F. Hutton had been known for its advertisements built around the line: "When E.F. Hutton speaks, ... everyone listens." Since its indictment and conviction, Hutton has been silenced.

3. VIOLENT CRIME

The federal government's chief drug enforcement officials have recently admitted that attempts to control drug trafficking have thus far failed.[xlii] If the only thing federal law enforcement succeeds at is putting corporate executives in jail, eventually the public may realize that federal criminal law enforcement is not accomplishing much. Not surprisingly, therefore, the Clinton administration has been emphasizing what the federal government claims it can do to stop violent crime.[xliii] Such efforts are an unprecedented intrusion into state responsibilities that actually threaten to prevent federal courts from performing their primary functions under the Constitution.

The Justice Department is touting its crime-with-a gun program in the city of Richmond, Virginia,[xliv] as a model for other cities and a justification for more federal authority over local crime. News reports cite an impressive drop in violent crime[xlv] in an apparent attempt to justify the use of federal law enforcement in what is clearly local crime. Those reports, however, often fail to note that the national figures for violent crime have dropped dramatically as well,[xlvi] and that criminal justice experts give different explanations for the decline.[xlvii] Even the NRA, supposedly a conservative organization concerned about protecting liberty against federal intrusiveness, has endorsed and promoted the approach.[xlviii] Nothing, however, about this joint federal-state program is beyond the ability of local law enforcement to accomplish on its own -- if it has sufficient funds either from the state and/or from the federal government and, of course, if a state is willing to increase its own criminal penalties. Again, this is a matter properly left to be decided by the citizens of the states through their legislatures.

If states made the necessary changes in their sentencing provisions, local prosecutors would not need federal law enforcement to achieve results similar to the Richmond program. Indeed, as one city adopts such a program, nearby cities will almost have to follow suit simply as a matter of self-defense against the criminals who leave one city in search of a city with less strict law enforcement. As criminals move to nearby areas, those cities are likely to experience an increase in crime, which puts pressure on officials in those other cities to adopt similarly strict responses to increases in crime. If

enough cities within a state adopt a similar tough enforcement policy, they will effect changes that are statewide. While a state may prefer to abdicate its responsibility for law enforcement to the Justice Department, as apparently some in Virginia wish to do,[xlix] that course of action is simply not feasible for the entire nation. To do so would require a national police force comparable to that in each state, but multiplied by fifty, something which unfortunately Congress may be willing to do.[l]

There are those who advocate a substantial increase in the role of federal criminal law.[li] While federal police power has been and could continue to be increased, the federal government cannot produce much increase in the number of criminal convictions without collapsing the federal judicial system. In the last 30 years the number of federal prosecutors assigned to the U.S. district courts has grown from about 3000 to about 8000.[lii] The number of prosecutors has risen far more quickly in that same period than the number of federal judges.[liii] There are now about four federal prosecutors to every federal judge.[liv] The number of federal criminal prosecutions has not, and should not, keep pace with the growth in prosecution.

The nature of the federal judiciary requires that the number of federal courts and be limited. Federal courts are relatively few for a number of reasons, constitutional and practical. Federal courts have limited jurisdiction under the Constitution; their role is to preserve and enforce federal law. Until recently, the federal courts dealt primarily with non-criminal cases, which had a constitutionally-related basis for being in a federal court. Now, federal criminal cases are delaying or crowding out important civil cases, which rightly belong in federal court. To make any dent on crime, the number of federal courts would have to multiply many fold, which is simply unacceptable for constitutional and practical reasons.[lv] As a federal district judge from Richmond complained in a letter to Chief Justice Rehnquist: "Our court has been transformed into a minor-grade police court."[lvi] Transforming federal courts in this fashion would make each federal court and judge less significant, but all of them collectively would become much more powerful and bureaucratic.

The federal court system simply cannot handle the number of criminal cases it would have to in order to have any impact on local crime. [lvii] Even if the federal courts could handle a great increase, it is financially foolish to prosecute ordinary street crime in federal courts because, as the federal court in Richmond noted, the **cost to prosecute a federal case is at least three times** the cost of prosecuting a state case.[lviii] If more judges are needed, the constitutionally proper and financially sensible solution is for states to create more judgeships. States, however, may not want to spend the money.[lix] If so, that is a matter for local officials and voters to decide. Whether the federal government should, instead of enforcing local crimes, pay for state personnel to enforce local criminal law involves other questions of federalism under the spending power,[lx] which are not addressed here. But it would certainly be preferable, as well as less expensive, to have the federal government provide more funds to the states than to have the federal government continue to usurp state police powers.

II. LAW ENFORCEMENT WITHIN A FEDERAL SYSTEM

Despite the federalization of criminal law, the states retain their police powers and they remain primarily responsible for investigating and prosecuting most crimes. The United States government has primary or exclusive responsibility for only a limited category of offenses.[lxi] Given that "[t]he Constitution . . . withhold[s] from Congress a plenary police power," United *States v. Lopez*,[lxii] the United States has not had a national police force as such. The Constitution's failure to provide a general federal police power is neither accidental nor irrational; it corresponds to traditional American concerns about protecting the liberty of individuals. Contrary to some misconceptions, and despite its problems, state law enforcement not only remains quite capable of responding to local crime problems, but can do so much more effectively than federal law enforcement. In what follows, this statement A) describes the organization and functioning of state and local law enforcement, B) which accounts for 95% of all convictions C) within a federal system of inter-governmental cooperation.

A. THE ORGANIZATION OF STATE AND LOCAL LAW ENFORCEMENT

The strengths and weaknesses of state and local law enforcement result from its organization on a local basis. Efficiency experts may find much to fault in the criminal justice system, precisely because it is not systematized on any uniform basis. That critique, however, can be made against virtually any aspect of federalism, including the very existence of separate states. Experts in mergers and acquisitions can presumably make a case for why all state governments should be eliminated or centralized under the national government. In the opinion of the Founders, however, self-government is necessarily inefficient in that ordinary citizens, rather than only experts, participate in the business of government. The Framers built certain inefficiencies into the Constitution as protections for liberty. Even if efficiency were more important that liberty, nothing about the local crime problem suggests that centralization of power in federal law enforcement can produce greater efficiencies than the local organization of law enforcement. Certainly, from the perspective of citizens who are the victims of crime, local law enforcement needs to be the most efficient in protecting them.

Most crime is local in nature, even in a very mobile society. The basic crimes are fundamentally the same as they have been for hundreds of years: murder, rape, robbery, burglary and theft. These crimes, often called common law crimes, are crimes in every state. From these have come many variants, but even modern high-tech crimes are only modifications of the basic crime of theft. These basic crimes are as unchanging as human nature and have been around for all of human history. As long as human beings live together in society, the evil of crime will be with us. That is not to say that crime cannot be reduced, but only that it will not be entirely eliminated.

Crime is first a family and then a community problem. Much of the crime begins with juvenile perpetrators and continues as they grow into adulthood. This fact reflects failures within the family, where children either are or are not taught to respect other persons and their property. While not all crimes are attributable to breakdowns in family discipline, a general decline in family discipline certainly contributes to crime in society.[lxiii] As the recent return to community policing demonstrates,[lxiv] the prevention and the detection of crime occurs neighborhood by neighborhood, that is, among groups of families.[lxv] Traditionally, police stations have been located

throughout a city. Before automobiles and for a long time thereafter, police generally patrolled on foot. Later, most officers came to patrol in squad cars. Today, centralized police departments of large cities are rediscovering the wisdom of returning police to walking the streets.[lxvi] The most effective police departments now allocate officers on the streets based on their understanding of the neighborhoods on a precinct basis.[lxvii]

Victims naturally desire and expect quick response to reports of crime, especially when one is still in progress. That kind of response requires police to be located nearby. Even so, local police rarely arrive until after completion of the crime either because the suspect flees or, more frequently, the victim discovers the crime only after the crime has been completed. The chances of apprehending the criminal diminish as time passes.

Crime control, of course, requires more than patrolling police officers; those officers require various forms of support. When a suspect is not immediately apprehended, and even when one is, clearing the crime often occurs only after additional investigation (e.g., photo or line-up identification, fingerprinting, DNA and other scientific testing). Police departments of any size consequently have detective bureaus and other specialized units to concentrate on particular crimes such as homicide, armed robbery, or drug offenses.

The organization of police departments varies not only from state to state, but from city to city within the same state, depending on the size and characteristics of each city or county. In large cities, law enforcement gives high priority to violent crimes. Other crimes, such as non-violent theft, may receive less attention than they would in a smaller community. The variations in local needs means that police agencies should not be organized along a uniform model, even within a single state.

Once the police (or sheriffs' department) does arrest a person or make a case before an arrest, the matter moves to the district or state's attorney and the courts. Again, the states have different approaches in organizing this aspect of law enforcement. Due to the close connection between the prosecuting function and the courts, prosecutors normally operate at the county court level. Generally, county district attorneys have primary control

over the prosecution of cases, although a state's Attorney General usually has at least some authority to initiate or intervene in prosecutions.[lxviii] However organized, prosecutors' offices and the courts are centralized in one (or two) places within a city or county.

When cases go to court, the victims, witnesses, and jurors probably travel further than they would in order to reach their local police station. This centralization within a county promotes efficiency, but at a cost in terms of convenience to victims and witnesses. Locating courts in each county, however, involves decentralization vis-a-vis the state and less inconvenience for all involved than they would experience if victims, witnesses, police, attorneys and others had to travel to a single state-court location.

Each state thus determines for itself the organization and distribution of police, prosecutors, and courts according to local conditions and the preferences of its citizens. As federal funding of local law enforcement has grown, however, Congress and the Justice Department have increasingly dictated priorities to the states.[lxix] While federal authorities do so in the name of "protecting the public," in actuality no single "public" exists when it comes to matters of crime. As the Founders viewed the matter, and as most Americans probably still do, the focal point for protection is each particular local community. As elaborated in section III, the organization of courts on a county basis reflects the traditional understanding of the jury as an instrument of local community justice.[lxx]

B. STATE AND LOCAL PROSECUTIONS ACCOUNT FOR 95% OF ALL CONVICTIONS

Very few crimes actually result in a conviction and most convictions adjudge the defendant guilty of something less than the original charge(s). In part this results from the fact that many crimes go unreported.[lxxi] Routinely, victims do not bother to report minor crimes such as vandalism and petty theft. Victims of certain crimes, notably rape and employee theft, frequently fail to report for fear of publicity. Of all the crimes actually reported, only twenty-one percent (21%) result in an arrest.[lxxii] Of those arrested for felonies, thirty to fifty percent (30-50%) are refused or "screened out."[lxxiii] Of those charged, fewer than fifty percent **(50%)** will result in conviction for

any crime, whether by plea or trial.[lxxiv] In other words, only about two to three percent of reported crimes result ultimately in any conviction. Nevertheless, although the number of convictions relative to the number of crimes is low, **state and local prosecutions account for 95% of all convictions.**[lxxv]

The low conviction rate relative to the number of crimes committed does not mean that most criminals get away completely. Most crimes are committed by a small number of criminals,[lxxvi] sometimes referred to as "career criminals."[lxxvii] By the time such a person is arrested, he may have committed countless crimes. Most of the crimes he committed will not actually be charged, for various good reasons. Local police officers often have had considerable contact with persons they later arrest. Police may have evidence of some crimes committed by the arrestee, but may not know of all of his crimes. They may suspect him of being responsible for crimes for which they have insufficient evidence. An investigating officer who has evidence of one crime may not consider it productive to devote additional time and resources to trying to gather more evidence of these other crimes, as long as the arrestee gets convicted for something. When the police attribute other crimes to an arrestee (with or without adequate evidence), they "clear" those cases, i.e., consider them solved, even though not prosecuted. Even if they do have sufficient evidence of other crimes, the police may not charge them pending the outcome of the crime(s) charged.

A prosecutor reviews and decides whether or not to accept some or all of the charges. The process of accepting some and refusing others involves various degrees of "screening."[lxxviii] The extent of screening varies from jurisdiction to jurisdiction. In some jurisdictions, the prosecutor's office accepts most charges for prosecution with little investigation beyond what the police provide. In others, the prosecutor's office does its own review of the evidence, including interviews with the victims and witnesses. As a result of screening, the prosecutor may refuse some or all charges against an arrestee.

Of the reasons for screening out charges, an insufficiency of evidence is certainly the most legitimate. The police frequently "overcharge," -- although not necessarily intentionally -- by filing more or more serious

charges than are justified by the evidence. A prosecutor's view of the strength of the evidence often differs from the assessment of the arresting officer. Making decisions about prosecution is not a science; it varies somewhat from lawyer to lawyer, depending on one's experience and judgment. Even when the evidence is strong against a person, other factors such as the arrestee's young age, lack of previous record, or cooperation with police, legitimately affect a prosecutor's decision to dismiss or divert, rather than to prosecute. [lxxix]

In those jurisdictions where prosecutors "screen out" a very high percentage of cases, they do so largely because they think most of those cases are not be "winnable" at trial.[lxxx] Although the evidence presented by the police may amount to "probable cause," which is sufficient to charge, the prosecutor may nevertheless conclude that the evidence is insufficient to prove the case at trial where the standard is proof "beyond a reasonable doubt."[lxxxi] Many police officers do not appreciate the difference and sometimes attribute the refusal of charges to illegitimate motives on the part of the prosecutor. Victims and witnesses may have a similar reaction. For elected local prosecutors, this means they need to set and communicate their policies in ways that maintain the confidence of the public, if they expect to be re-elected.

Local prosecutors have to contend with the fact that many, if not most, law-abiding citizens have the unrealistic notion that prosecutors should prosecute all cases presented by the police. Where prosecutors do so, they must do a great deal of plea-bargaining or risk losing many of those weak cases at trial. Where the screening of cases is inadequate, trial prosecutors have to cope with more and weaker cases than they should have. Somehow, they must dispose of all the indictments, either by trial, plea, or dismissal. They cannot try all the cases. Prosecutors naturally prefer to plea-bargain weak cases, rather than dismiss them or risk an acquittal. Of course, if the evidence raises real questions about the defendant's guilt, the case should be dismissed. Assuming the evidence, although not as strong as the prosecutor would like, does indicate the defendant's guilt, the prosecutor justifies the plea bargain as at least some conviction of a guilty defendant.

Few people appreciate the relationship between screening and plea-bargaining. The public does not like either. The term "plea bargaining" gives the impression that the guilty are getting a "deal." And in many cases, defendants are getting a deal simply because the prosecution cannot try all the defendants who have been indicted. Where more screening is practiced, the pressure to plea-bargain should be less than it would be otherwise. The pressure of too many cases, some of them too weak to try, means that prosecutors do "deal" cases against guilty defendants that might have been won at trial. It is impossible to say what percentage of the guilty pleas are in fact real "deals" for the defendants. Overall, however, about ninety percent (90%) of all convictions result from a plea rather than a trial,[lxxxii] with that rate varying from jurisdiction to jurisdiction, depending on -- among other things -- screening.[lxxxiii]

Screening and plea-bargaining involve significant policy choices left to the discretion of the prosecutor. Local prosecutors must screen and plea bargain to varying degrees because they do not get to choose their cases. They must respond in some way to all criminal cases brought to them, which means virtually all arrests made within their jurisdictions. Although local prosecutors within the same state will follow different policies on screening and plea-bargaining, each must answer to the local electorate. Thus voters are able to influence those policies on screening and plea-bargaining in ways voters cannot influence appointed federal prosecutors.

C. LAW ENFORCEMENT COOPERATION WITHIN A FEDERAL SYSTEM

Just as the Constitution provides for unelected federal judges to adjudicate cases free from local political pressure, it is appropriate that federal prosecutors not be directly influenced by local political sentiment, with an important caveat. The constitutional rationale for federal powers also explains the nature of the limits on federal powers. Any power the Constitution gives to the federal government can be limited in practice only by Congress, not by the states. For our federal system to remain one of limited powers, the federal government is obligated both to use its

enumerated powers, as necessary and proper, to protect federal interests and to override state powers only when they conflict with the exercise of a valid federal power. The very detachment of federal agencies from local popular sentiment is necessary for them to perform their role; that same detachment, when applied to matters left to popular control, undermines the balance struck by the Constitution's system of self-government.

The Federal government certainly has an important role in protecting the public. That role falls within its enumerated powers under the Constitution. Its most important duty, one that only it can execute, is the defense of the country against foreign aggression. Principally, such aggression and our response to it has been military. Foreign aggression, in and outside of war, also takes the form of espionage. When espionage occurs within the United States, such aggression becomes a law enforcement problem. As a nation, however, we have traditionally drawn the distinction, which some nations do not, between the military and law enforcement and between external and internal threats to peace. Unlike some nations, the U.S. does not use military force to maintain the peace at home.[lxxxiv] Only in the case of domestic violence (as opposed to insurrection against the United States or invasion of a state or the United States) does the Constitution provide for the use of federal power to maintain order within the states -- and then only at the request of a state's legislature (or, if the legislature cannot be convened, of the state's governor).[lxxxv]

The legitimate law enforcement powers of the federal government are not limited to cases of espionage and insurrection, however. From the beginning of the nation, it has been clear that the federal government can use "necessary and proper" means, including law enforcement, to protect the federal government itself, namely its property, its personnel, its functions, and the areas of land -- i.e., national parks, territories, and the District of Columbia -- over which it has exclusive jurisdiction. Any attack on a federal building or federal officers, such as occurred in the Oklahoma City bombing in 1995, properly falls within the jurisdiction of the federal government, even though the crime also falls within the jurisdiction of a state.

The nature of the federal system is such that some legitimate overlap will necessarily exist between federal and state law on criminal law matters.

Confusion naturally arises as to how to differentiate between what is properly federal and what is properly left to the states. There can be no doubt, however, that in the current state of affairs, federal criminal law has gone well beyond any legitimate overlap; it now almost completely duplicates state criminal law.[lxxxvi] This duplication has developed due to the failure of Congress to distinguish a) the federal power to **define** crime from the power to **investigate and prosecute** crime, and to further distinguish b) the **investigation and prosecution of crime** from the **regulation of commerce**.

In matters that are exclusively federal, ranging from offenses against the Postal Service to those against the President, the federal government both defines the crime, which the Congress does; and investigates the crime, which the Executive branch does. Theft from the Postal Service would simply be theft under state law and assassination of a president would be murder under state law. That the federal government has exclusive control over the definition and investigation/prosecution of these matters (although it may request, but not require, the aid of state law enforcement)[lxxxvii] in no way infringes on state powers. For most crimes, however, the Constitution leaves the power of definition and investigation to the states. Just as the federal government may ask for state assistance in investigation, so too the states may request the investigative assistance of the federal government under certain circumstances. As already noted, the Constitution does provide that a state can request the assistance of the federal government to protect it against domestic violence, but such instances have been rare.[lxxxviii] Federal assistance has been more common in criminal matters which cross-state lines. In these matters, however, there has often been a failure to distinguish between **investigation** and **prosecution of crime** and between **prosecution of crime** and the **regulation of commerce**.

While criminal investigation is principally the responsibility of the state in which the crime occurred, the nature of the federal system presupposes certain kinds of cooperation among the states and between the states and the federal government. The Constitution's extradition clause[lxxxix] requires the states to assist one another in investigation by returning fugitives who have fled from one state to another. Otherwise, fleeing criminals could escape prosecution, since only the state where the

crime occurred can prosecute for crimes occurring within its borders. When a criminal flees to another state and is apprehended there, the apprehending state cannot try the criminal for the offense that occurred outside its borders. A crime is an offense only against the state where the act occurred and which prohibited that act; therefore, only that state has jurisdiction to try the criminal for that crime.

Beyond extraditing persons charged with crimes, the Constitution neither requires nor prohibits other kinds of cooperation between state governments or between the states and the federal government.[xc] Law enforcement agencies in different states routinely assist one another in investigations. Voluntary cooperation is consistent with each state retaining responsibility for exercising its own police powers. Congress can also provide for federal agencies to assist state law enforcement in ways that do not pre-empt the sovereign functions of state legislatures[xci] nor co-opt state law enforcement.[xcii] Thus, under the Fleeing Felons Act,[xciii] passed in 1934, federal law assists local enforcement by imposing federal penalties on "roving criminals" who would be subject to extradition. The purpose was neither to deny nor interfere with state extradition, but merely to assist in the apprehension of fugitives. When the federal government assists in a state's **investigation** by searching for and returning a fleeing felon, it does so for **prosecution** by the state where the crime occurred. In these instances, the federal government assists states in a manner not unlike what the states do for each other through required extradition and sometimes through voluntary assistance. Providing such investigative assistance differs from assuming the responsibility for prosecution. Like the power to **define crime**, the power to **prosecute crime** is an essential and exclusive attribute of a government's sovereignty.

III. FEDERAL CRIMINAL LAW AS A THREAT TO THE INNOCENT

As the framework of the federal system has been forgotten, the federalization of crime itself has occurred, as previously described, under the Commerce Clause. In that process of transferring police power from the states to the federal government, Congress has also transferred or delegated much of its own legislative power to the federal Judiciary. Congress drafts so many criminal statutes with such uncertainty that federal courts effectively

exercise Congress' legislative power of defining crimes. This failure adequately to define federal crimes greatly increases the potential for arbitrary law enforcement in ways that the federal courts would find violative of due process if done by state law.[xciv] Transfer of the power to define crimes from the states to Congress, from Congress to the federal judiciary, and from the federal judiciary to the Justice Department, means that some arbitrarily-selected defendants will be tried in federal court under the uncertain definitions of federal criminal law when they should be tried, if at all, under the clearer standards of state law, in state or local courts, by local juries.

A. CONGRESS TURNS REGULATIONS INTO CRIMES

The development of national police powers through the Commerce Clause has come about in part due to the failure to distinguish true crimes from regulatory offenses. True crimes carry a "moral stigma" because they indicate that the defendant knowingly did something wrong in that he consciously broke the law. Regulatory offenses, on the other hand, require or prohibit some act regardless of whether the defendant did so knowingly. Regulatory offenses, therefore, have not generally carried the same kind of moral stigma or public shame. The states and the federal government create regulatory offenses typically as part of economic regulation; they provide for the possibility of criminal sanctions in order to spur compliance.

The core element of federal regulatory offenses generally involves Congress' power under the Commerce Clause to regulate commerce. If a statute prohibits transporting certain goods across state lines, for example, the criminal sanction attaches to the interstate shipment, which is both the essential and the jurisdictional element of the statute. This was the situation in the previously discussed Lottery Case, *Champion v. Ames*.[xcv] In that case, regulations criminalized only the *transportation* of certain goods across state lines, not the manufacturing or use of those goods. More commonly today, though, Congress does create true crimes which are simply and often implausibly "hooked" to the Commerce Clause. Thus it was that Congress made it criminal (as states had already done) to possess a gun near a school based on the notion -- rejected by the Supreme Court in *U.S. v. Lopez*[xcvi] -- that guns near schools had a substantial effect on interstate commerce. In

doing so, Congress has combined, in a constitutionally questionable way, its separate powers to create crimes against federal interests with its power to regulate commerce affecting more than one state.

The essential difference between an exercise of Congress' power to enforce a regulation by use of criminal sanction and a supposed power to punish crimes involves moral condem-nation.[xcvii] While violation of a regulation of commerce, such as the Fair Labor Standards Act,[xcviii] may carry a criminal penalty, such a violation is not generally thought of as a "crime." The "offense" lacks the moral turpitude of crimes such as murder, rape, theft, or even simple misdemeanors. It has been difficult to draw this distinction in practice between regulatory offenses which carry a possible penalty and true crimes, due to the interplay between constitutional and criminal law issues. The inclusion of commerce-based jurisdictional elements in federal statutes has confused both the jurisdictional and substantive issues, especially under the federal mail and wire fraud statutes. Is the essential core of the federal crime of mail fraud the use of the mails, or fraud, or both? If it is truly a crime, the essence is the fraud. If it is primarily a regulation, which was its original constitutional justification, namely a prohibition in the postal acts regulating the mails, then it is not truly a crime. Nevertheless, federal prosecutors and judges certainly treat these offenses as true crimes, as evidenced by their frequent use and substantial sentences.

Congress routinely confuses regulatory and criminal concepts in the process of justifying federal criminal laws. This explains much of the growth in federal criminal law directed at corporations. The most notable example may be the Racketeering Statute known as RICO, which stands for Racketeer Influenced Corrupt Organizations. While the title of the act makes it seem that the act prohibits certain practices of organized crime, RICO also targets corporations as well as any other group which is said to be an "enterprise" involved in certain listed crimes, including fraud. Under RICO, almost any crime that is at all organized qualifies. RICO's "enterprise liability" lumps corporations and other lawful entities together with traditional organized criminal gangs.[xcix]

B. CONGRESS LEAVES DEFINITION OF KEY TERMS IN CRIMES TO FEDERAL COURTS

Careful definition of crimes is tedious work. As with much of its legislation, Congress prefers to leave the difficult issues that arise in the course of drafting to the courts. While this may be acceptable in non-criminal matters, this practice in criminal statutes means that potential defendants do not always know what the law prohibits and that federal courts effectively exercise a power that the Constitution restricts to the Congress.

1. STRICT OR LIBERAL CONSTRUCTION OF CRIMINAL STATUTES?

All language has its ambiguities. As a result, courts will have to do a certain amount of interpretation. In matters of criminal law, Anglo-American tradition has specified the rule of "strict construction" to avoid unfairness to persons who cannot clearly understand that their conduct is prohibited. The interpretation of federal crimes has been complicated by the inclusion of references to the Commerce Clause, which has already been discussed, and also a) the failure of federal courts to adhere to the traditional rule of strict construction and b) the fact that federal crimes are a breed apart from most state crimes.

a. CONSTRUCTION OF FEDERAL CRIMES

United States v. Kozminski[c] demonstrates both the manner in which federal courts should construe federal criminal statutes and also the willingness of the Justice Department to stretch the coverage of federal criminal statutes when the defendant has done something "bad" which nevertheless is not actually covered by the language of the statute. In *Kozminski* the Supreme Court interpreted the term "involuntary servitude" in a federal, criminal civil rights statute enacted after the Civil War making slavery a criminal offense. Congress certainly was authorized to enact this statute in order to implement the Thirteenth Amendment's prohibition of slavery. The Justice Department, however, had stretched the statute to apply to general psychological coercion. The defendants in the case had used tactics (denial of pay, substandard living conditions, and isolation) that were certainly wrongful, but not necessarily criminal under federal law, to convince two mentally-impaired adults to believe they had no alternative but to work on the defendants' farm. The defendants' acts would have been

prosecutable under state law and possibly under other federal laws. Nevertheless, the Justice Department tried unsuccessfully to persuade the Supreme Court to give a very broad reading to the term "involuntary servitude." In rejecting that attempt, the Court illustrated what a dangerous interpretation the federal prosecutors were seeking by noting such an interpretation would make criminal all kinds of non-criminal conduct:

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The Court rejected the Government's interpretation because it "would delegate to prosecutors and juries the inherently legislative task of determining what type of coercive activities are so morally reprehensible that they should be punished as crimes. It would also subject individuals to the risk of arbitrary or discriminatory prosecution and conviction."[cii] While the Court reversed the case, that did not erase the fact the defendants had been prosecuted under a law that did not apply to them.

b. LIBERAL CONSTRUCTION

Although the term "involuntary servitude" construed in *Kozminski* is not a common law term, it has a history connected with the abolition of the effects of slavery which provides some common sense constraints on attempts to expand the statute. Many federal criminal statutes, however, notably those referred to as "white collar" or "organized crime" statutes, use terminology which lacks historical or common sense meanings. Such terminology requires greater precision in definition and narrow construction in order to ensure fair notice of what is prohibited. Unfortunately, that has not been the practice.

The sponsors of RICO recognized the impossibility of defining the term "organized crime" as well as the fact that any attempt to do so might impermissibly create a "status offense" (an offense for which no criminal act is required).[ciii] The Supreme Court has said that legislatures are barred by the Constitution from making it a crime to "be" a member of a group or organization.[civ] RICO therefore did not use the term "organized crime"; rather, it defined "racketeering activity" and "enterprise,"[cv] a term drawn from sociology.

In RICO, the potential for manipulation of language has been combined with an anti-corporate bias. At least some sociological terminology

of RICO rests on theoretical concep-tions drawn from leftist ideology. The creator of the critical term "enterprise" and the concept of "enterprise liability" in RICO has equated ordinary business executives with members of the Mafia.[cvi] While federal prosecutors and federal courts are oblivious to the origins of the concepts underpinning RICO, they have since about 1970 accepted the notion that pursuit of "white collar" and organized crime and corruption justifies liberal construction of criminal statutes.[cvii] RICO actually provides for liberal construction.[cviii] But even in statutes that do not provide liberal construction, federal courts have been more willing to loosely construe statutes, which target business practices. This willingness to construe liberally statutes aimed at "white collar" and organized crime seems related to the anti-corruption ethic described by Professor John Noonan.[cix]

The potential for abuse is probably most serious when a RICO charge is based on mail fraud. The mail fraud statute itself is broadly defined and uncertain in application. Federal courts have construed it expansively.[cx] Any act of fraud may constitute a federal offense if done in connection with the mails or telephone or telegraphy.[cxi] The term "fraud," moreover, is undefined in the federal statute and the jurisprudence basically disagrees as to what is required to establish criminal fraud.[cxii] With respect to fraud in a RICO charge, a court may liberally construe a federal statute of uncertain definition, and incorporate a state misdemeanor as the criminal act of fraud. An indictment for racketeering under RICO based on two acts of fraud communicated by mail or telephone may be far removed from organized crime activity; it also may lack the basic requirement of culpability due to uncertainty about the presence of a *mens rea*.

2. LIBERAL CONSTRUCTION VIOLATES SEPARATION OF POWERS

Liberal construction violates the constitutional principle of separation of powers. As long ago explained by Chief Justice Marshall, the Constitution’s principle of separation of powers requires the rule of strict construction in all federal crimes.

> The rule that penal laws are to be construed strictly is perhaps not much less old than construction itself. It is founded on the tenderness

of the law for the rights of individuals; and on the plain principle that *the power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the court, which is to define a crime, and ordain its punishment.*[cxiii]

When courts liberally construe criminal statutes without such direction, they are assuming the legislative function without any basis for doing so. Admittedly, a distinction between construing and defining crimes may be difficult to draw. As applied to federal "racketeering" and public corrup-tion statutes, however, federal courts have clearly crossed the uncertain line between "construction" and "definition," as Professor Noonan has discussed.

For almost two centuries it had been black letter law

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this judicial freedom was exercised in regard to bribery.[cxiv]

C. MAKING NON-CRIMINAL ACTS INTO CRIMES RETROACTIVELY

However well intentioned, federal courts have violated long-standing limitations on their authority by expanding federal criminal statutes. Those limits stem from the early constitutional arguments against any federal common law of crimes; they expressed a distrust of the common law judicial power to create crimes in addition to the concern that federal criminal jurisdiction not encroach upon the states.[cxv] Then and ever since there has

been a strong popular desire to constrain judges by preventing an expansive common-law process of interpretation.[cxvi]

1. THE FEDERAL COURTS ALLOW RETROACTIVITY

The arguments about judicially-defined crimes have long raised the charge of *ex post facto* application of the law.[cxvii] Although Congress has not completely delegated to federal courts the power of defining crime, to the extent that Congress leaves a statute loosely worded, especially if it calls for broad construction, it effectively commits to the courts much of their law--defining powers. At least crimes defined by reference to common law terms limit the Court's interpretive discretion due to the body of jurisprudence which has fairly well fixed the meaning of the terms.[cxviii] Thus, the federal murder statute adopts the traditional common law formulation tied to "malice aforethought."[cxix] While the federal courts are able to exercise the common law function of further interpreting the crime prohibited, but not defined by Congress, that power -- if respected -- is restrained. By using words which have well-settled meanings according to the substantive principles of the common law, the body of common law discourse serves as a restriction in the process of interpretation.

Judicial definition of criminal legislation raises the same kind of objection addressed by the Constitution's *ex post facto* prohibition, namely that newly "defined" crimes cannot be applied retroactively.[cxx] The federal courts, however, have not viewed definition of statutes through judicial construction as a violation of the *ex post facto* clause of the Constitution.[cxxi] Nevertheless, the Supreme Court has recognized that judicial definition of crime can violate due process if a new construction of a statute is in effect a retroactive application of a federal crime.[cxxii] In some sense, this objection is applicable to the interpretation of almost every criminal statute.[cxxiii] The problem, however, is more pronounced in the interpretation of statutory offenses, both *malum prohibitum* crimes and mere regulatory offenses, which lack the fairly well-settled meaning of common law crimes.[cxxiv] Given the preponderance of such statutes among federal criminal laws and the looseness of federal construction, the retroactive application of crimes necessarily results. To recognize the validity of constitutional challenges

based on retroactivity would and should place substantial restrictions on federal criminal law.[cxxv]

Challenges to loosely worded federal statutes on the grounds that they create retroactive or *ex post facto* violations or that they are vague or over broad have not succeeded because courts seem confident in their ability to do justice by interpreting the statute. The objection is not that Congress' passage of the law is *ex post facto,* but that its delegation of the definitional power to the courts produces that effect. Whatever authority Congress has to delegate its powers,[cxxvi] the power to define crimes is different due to the problem of retroactive effect. A separation-of-powers analysis dictates that criminal statutes be distinguished from economic legislation. Neverthe-less, the Court has been commingling interpretation of criminal statutes with other statutes enacted pursuant to the Commerce Clause.[cxxvii] Economic legislation, including regulatory offenses or provisions for administrative crimes, may also raise certain separation of powers problems between Congress and administrative agencies.[cxxviii] The separation of powers concerns here addressed are those between Congress and the Courts.

2. THE JUSTIFICATION: THE NEED TO ROOT OUT CORRUPTION

Behind the federalism and the separation of powers issues, one looks for reasons why the federal courts and prosecutors would press the federalization of crimes. Professor Noonan's summary of the developments under RICO and other federal crimes explains how federal prosecutors and courts have taken it upon themselves to decide what does and does not amount to public corruption. In discussing ABSCAM[cxxix] and related "sting operations," he describes how public corruption cases have restructured political power:

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The critical step in the prosecution of public corruption did not begin with Watergate, but rather, with efforts in the late 1960s started under the Nixon administration and continued under succeeding administrations.[cxxxi] President Nixon presented himself as a "believer in decentralization" but, "under his administration, a combination of old laws, prosecutorial ingenuity, judicial imperialism, and new legislation . . . began an effective federalization of the law of bribery."[cxxxii] An important step in this process was the expanded interpretation of the Hobbs Act[cxxxiii] to include bribery as well as

extortion.[cxxxiv] In addition to the reinterpretation of this Act, federal prosecutors also relied on a variety of federal laws, including the Travel Act, criminal laws on tax evasion, the mail fraud and wire fraud acts, conspiracy law "and, above all," RICO.[cxxxv] With the aid of sympathetic interpretations of these statutes by federal judges, federal prosecutors established themselves as the protectors of public morality.

The argument that elected state officials cannot be trusted to prosecute local corruption certainly has some truth to it. It does not follow, however, that the situation requires the "independence" of federal prosecutors. According to the anti-corruption argument, if the federal prosecutors are not vigorous in their investigations of local officials, the people will be deprived of good government.[cxxxvi] This argument for federal police powers assumes not only that federal law enforcement is better able to prosecute corruption, but also that criminal prosecution is preferable to other forms of attack on corruption, namely the democratic process.

The anti-corruption argument for the federalization of crime is similar to the argument made for the Independent Counsel Statute. It has been argued that the Executive Branch of the federal government cannot be trusted to prosecute the corruption of its own. Again, that may be true. In both the state and federal situations, however, the solutions are not only constitutionally questionable, but may be worse than the original problem. In both cases, the proper solution is to be found in the democratic process, a vigilant free press, and the structure of the Constitution's limitation on powers.

Conceding the existence of public corruption does not require acceptance of the proposition that the federal government has a direct role in protecting public morality, which is precisely what criminal law -- as opposed to the regulation of commerce -- does. The federalization of crime involves a shift of power from a multitude of locally elected officials, to an independent, centralized censor of public morality, staffed by career civil servants. While most of these federal civil servants are persons of integrity, dedication, and good intentions, it is naive to suppose that they are above politics, even if they are not involved in elected, partisan politics. To criticize the police power of federal officials does not mean to imply that state officials never abuse their own police powers. To hold both federal and state powers within

their respective bounds is to reaffirm the federalism principle that freedom flourishes when power is diffused.

IV. THE CONCLUSION: WHERE TO PLACE YOUR TRUST?

The federalization of crime presents great danger because it is a centralized power, the abuse of which has nationwide -- indeed, worldwide[cxxxvii] B consequences. State officials can and have abused their own police powers, but those abuses are subject to constitutional and practical checks. While similar protections should operate against the abuses of federal law enforcement, they do not operate in practice because Congress and the courts are joined in the abuse of federal criminal law.

State law enforcement operates under a number of restraints on its powers: 1) state law enforcement, unlike the federal, has all it can do to discharge its front-line responsibilities to investigate and prosecute all crimes within its jurisdiction; 2) state prosecutors are generally elected and therefore politically accountable in ways that federally-appointed United States' attorneys are not; 3) individual state law enforcement agents and agencies are constrained by much more limited resources than federal law enforcement; 4) a state's power and therefore its potential abuses are confined within its own boundaries; 5) even within those borders, state police and prosecutorial practices are subject to more aggressive federal court review than are the practices of federal law enforcement, due to the greater availability and frequent use of federal civil rights actions.

The checks on federal law enforcement, on the other hand, are those of structural restraints on power through federalism and separation of powers. Within the Congress and between the Congress and the Executive branch, the normal institutional checks, which block or slow the passage of ill-conceived legislation, are not working as they should to prevent the federalization of criminal law. No member of Congress wants to be accused of favoring criminals. Thus, any legislation labeled "anti-criminal" stampedes the Congress, often at the initiation of the Executive branch, with little likelihood of being checked by the federal judiciary. This distortion of the Constitution’s process enjoys popular support because the public naively assumes that it somehow has an effect in reducing crime. Instead of fighting crime, as this

statement has tried to explain, much of federal criminal law places the innocent at risk and does so lawlessly under the Constitution.

ENDNOTES

[i]. I gratefully acknowledge the research assistance of Jennifer N. Rath.

[ii]. ABA TASK FORCE, REPORT ON THE FEDERAL IZATION OF CRIMINAL LAW 10 (J. Strazella, Reporter) (1998) [hereinafter ABA TASK FORCE REPORT].

[iii]. *Id* at 7 (italics in the original).

[iv]. *Id* at 8.

[v]. *Id* at 11.

[vi]. *Id* at 10, note 11.

[vii]. This author does not agree that statutes with civil penalties are crimes.

[viii]. ABA TASK FORCE REPORT, *supra* note 2, at 10.

[ix]. Sara Sun Beale, *Too Many and Yet Too Few: New Principles to Define the Proper Limits for Federal Criminal Jurisdiction*, 46 HASTINGS L.J. 979, 993 (1995) [hereinafter Beale, *Too Many/Too Few*]. Even with the expansion of federal jurisdiction, federal courts are still handling less than five percent of criminal prosecutions.

[x]. ABA TASK FORCE REPORT, *supra* note 2, at 13. ("Congress' decision to create a federal crime confers jurisdiction upon other federal entities and results in the involvement of others in different federal government branches . . .. Federal executive departments . . . assume broad supervisory responsibility and power over newly created crimes. This activates powerful federal investigatory agencies (such as the FBI, Treasury Department agencies, or Postal Inspectors) to investigate citizen activity for possible federal criminal violations. The scope of federal prosecutors' interest widens, resulting in power to act in a broader range of citizen conduct and intervene in more local conduct").

[xi]. Gibbons V. Ogden, 22 U.S. 1 (1824), noting that Congress' power to regulate commerce "is complete in itself, . . . and acknowledges no limitations."

[xii]. *See* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) and U.S. v. Darby, 312 U.S. 100 (1941).

[xiii]. *See, e.g.*, Edwards v. California, 314 U.S. 160, 169 (1941). (Justice Douglas in a concurring opinion noted "[T]he right of persons to move freely from State to State occupies a

more protected position in our constitutional system than does the movement of cattle, fruit, steel and coal across state lines").

[xiv]. Although cases routinely refer to Congress' power over interstate commerce, the text of the Constitution provides Congress with the power to "regulate Commerce . . . among the several States." *See* Gibbons v. Ogden, 22 U.S. 1 (1824).

[xv]. Gibbons v. Ogden, 22 U.S. 1 (1824).

[xvi]. *See* L. Hall, *The Substantive Law of Crimes* -- 1887-1936, 50 HARV. L. REV. 616, 622-31(1937)(discussing anti-trust statutes, banking and security regulations).

[xvii]. Interstate Commerce Act, ch. 104, 24 Stat. 379 (1887) (codified as amended at 49 U.S.C. ' 301 *et seq*. (1998)).

[xviii]. Sherman Antitrust Act, ch. 647, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. §§ 1-7 (1998)), *see generally* Letwin, *Congress and the Sherman Antitrust Law, 1887-1890,* 23 U. CHI. L. REV. 221 (1956); Limbaugh, *Historic Origins of Anti-Trust Legislation,* 18 MO. L. REV. 215 (1953).

[xix]. Distinguishing between "true" crimes and other non-criminal or regulatory offenses is problematic. *See generally* J. Hall, *Prolegomena to a Science of Criminal Law,* 89 U. PA. L. REV. 549, 563-75 (1941). The *malum in se -- malum prohibitum* distinction (crimes by nature -- crimes by convention) has proven analytically ambiguous. *Id*. at 566. The distinction has also been made between "public welfare offenses" and "real crimes," Sayre, *Public Welfare Offenses,* 33 COLUM. L. REV. 55 (1933), for the purpose of designating a category of offenses which need not carry a *mens rea*. *See* Morissette v. United States, 342 U.S. 246 (1952). The distinction between regulatory offenses and "true" crimes reflects the distinction made by Professor Henry Hart in *The Aims of the Criminal Law,* 23 LAW & CONTEMP. PROBS. 401 (1958).

[xx]. *See In Re* Rapier, 143 U.S. 110, 134 (1892).

[xxi]. 188 U.S. 321 (1903).

[xxii]. *But see* Hammer v. Dagenhart, 247 U.S. 251 (1918), which was an exception to this trend. Later reversed by U.S. v. Darby, 312 U.S. 100 (1941), Hammer found a congressional law excluding from interstate commerce the products of child labor unconstitutional in that it exerted power over a purely local matter.

[xxiii]. *See* Baker, *Nationalizing Criminal Law: Does Organized Crime Make It Necessary and Proper?* 16 RUTGERS L.J. 495, 520-26.

[xxiv]. *See* M. CONBOY, *Federal Criminal Law, reprinted* in 1 LAW: A CENTURY OF PROGRESS 1835-1935 318 (1937).

[xxv]. U.S. CONST. amend. XVIII, repealed by amend. XXI.

[xxvi]. See Perez v. United States, 402 U.S. 146 (1971).

[xxvii]. Stern, *The Commerce Clause Revisited -- The Federalism of Intrastate Crime*, 15 ARIZ. L.REV. 271, 276-285 (1973).

[xxviii]. 301 U.S. 1 (1937).

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

[xxx]. It did not declare federal criminal statutes unconstitutional, but instead tended to construe them narrowly in order to avoid constitutional problems.

[xxxi]. 402 U.S. 146 (1971).

[xxxii]. Stern, *The Commerce Clause Revisited -- The Federalism of Intrastate Crime,* 15 ARIZ. L. REV. 271, 284 (1973).

[xxxiii]. *See* Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. section 801 *et seq*.; 21 C.F.R. 1308.01 *et seq*.

[xxxiv]. *See* U.S. v. Tisor, 96 F3d 370 (1996).

35. While that is the ideal, federal court dockets are often bogged down with a disproportionate number of minor drug cases. In 1991, DC district judges complained that the U.S. Attorney was bringing minor drug cases (for example, cases involving $20 sales of crack cocaine or youthful first offenders arrested as couriers) in federal district court rather than superior court. Sara Sun Beale, *Federalizing Crime: Assessing the Impact on the Federal Courts*, 543 ANNALS AM. ACAD. POL. & SOC. SCI. 39, 47 (1996) [hereinafter Beale, *Federalizing Crime*].

There will of course be some legitimate overlap, as when a person smuggles drugs into the country. The federal government can certainly punish smuggling, a crime involving national borders. When detected, the smuggler will also have violated state law by possessing the drugs within that state.

[xxxvi]. BUREAU OF JUSTICE STATISTICS, U.S. DEPARTMENT OF JUSTICE, FELONY SENTENCES IN THE U.S. 1994, Bulletin NCJ-1651-49, at 6-9 [hereinafter BUREAU OF JUSTICE STATISTICS, FELONY SENTENCES]; Beale, *Too Many/Too Few*, *supra* note 41, at 998 (citations omitted):

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[xxxvii]. *See, e.g.*, LSA-R.S. 40:966, a Louisiana statute requiring life sentence at hard labor, without benefit of probation or supervision, for conviction of distributing or intending to distribute Schedule I drugs. The comparable federal provision, 21 U.S.C. 841, can result in a minimum ten-year sentence followed by five years of supervised release and payment of a fine. For specifics on what the federal sentence could be, *see* UNITED STATES SENTENCING COMMISSION, GUIDELINES MANUAL section 2D1.11 and accompanying Sentencing Table (Nov. 1998).

[xxxviii]. Beale, *Too Many/Too Few*, *supra* note 9, at 984. The number of drug cases filed in federal court quadrupled between 1980-92. *See also* BUREAU OF JUSTICE STATISTICS, COMPENDIUM OF FEDERAL JUSTICE STATISTICS (1995) at 11, 39 [hereinafter BUREAU OF JUSTICE STATISTICS, COMPENDIUM]. Drug suspects were more likely than any other offenders to be prosecuted in federal court, and the least likely to have their cases declined by federal prosecutors. Drug defendants comprised 42% of all felony defendants in U.S. district courts in 1995.

[xxxix]. Beale, *Too Many/Too Few, supra* note 9, at 993 ("Even after the dramatic expansion of the federal criminal caseload in the 1980s and 1990s, the states are still handling more than ninety-five percent of all violent crime prosecutions").

[xl]. *Id*, at 1000, 1001.

[xli]. *See* S. Swartz & B. Burrough, *The SEC's Case Against Drexel*, WALL STREET JOURNAL, September 9, 1988 (page number unavailable online), noting that former Hutton chairman Robert Fomon has called Hutton's guilty plea the biggest mistake of his career.

[xlii]. Gary Fields, *DEA Chief: Drug Fight Lacks Desire*, USA TODAY, Feb. 19, 1999 at 1A. ("The head of the Drug Enforcement Administration says the nation has neither the will nor the resources to win the drug war"); Gary Fields, *Drug policy Advisor: Time to "Get Serious,"* USA TODAY, March 19, 1999 at 3A. ("'[W]e haven't begun to get serious about the problem,' McCaffrey [national drug policy advisor] says").

[xliii]. *See* Nancy E. Marion, *Symbolic Policies in Clinton's Crime Control Agenda*, 1 BUFF. CRIM. L. REV. 67 (1997).

[xliv]. Designated "Project Exile" and co-sponsored by the City of Richmond and the United States Attorney for the Eastern District of Virginia, the program allows arrests involving illegal guns made by Richmond police to be prosecuted in federal rather than state court. The stated goal is to reduce violent crime by federally prosecuting firearm-related crimes whenever possible. Under Project Exile, local police review each firearm-related offense to determine whether the conduct alleged also constitutes a federal crime.

[xlv]. Area/State, *Richmond's Homicide Rate Drops, Year Ends with 96 Deaths - The Fewest Since 1987*, RICHMOND TIMES-DISPATCH, January 2, 1999, at A1. ("After a decade of triple-digit body counts, Richmond's legendary homicide rate has dropped to its lowest level in more than a decade . . .. Many local officials point to Project Exile as a major factor in the

turnaround"). *See also* News, *Truancy Trials*, USA TODAY, January 27, 1999, at 2A. ("[Project Exile] was credited by some with cutting the gun-related homicide rate by more than 30%").

[xlvi]. BUREAU OF JUSTICE STATISTICS, CRIMINAL VICTIMIZATION, 1996: CHANGES 1995-96 WITH TRENDS 1993-96 (1996) at 1 (as paginated in <http://www.opj.gov/bjs/abstract/cv96.htm, visited Feb. 14, 1999) [hereinafter BUREAU OF JUSTICE STATISTICS, CRIMINAL VICTIMIZATION, 1996]. Violent crime rates are the lowest recorded since 1973; violent crimes were 21% lower in 1997 than they had been in 1993. *See also* ABA ANNUAL REPORT: THE STATE OF CRIMINAL JUSTICE (1997) at iv-2 [hereinafter ABA ANNUAL REPORT]. Violent crime has decreased 12% between 1991 and 1996; reported serious crime, including violent crime, has been on a downward trend; in 1996, index crimes were at their lowest since 1986). The rate of decline has been uneven across the country. While it dropped nationally by four percent in 1997, in the Mountain West area it dropped by only about two and one-half percent. (Orrin Hatch and Bill McCollum, *Shortchanging Law Enforcement*, THE WASHINGTON TIMES, February 22, 1999 at A18).

[xlvii]. ABA ANNUAL REPORT, *id*, at i-iii, notes two opposing trends: crime, drug use and victimization have decreased while the criminal justice system's response to crime has increased, and suggests that while they may be directly correlated, there are many possible reasons for the decrease in crime. Cited as possible factors are the changing role of police (most notably in the area of community policing), tougher measures to deal with serious offenders (including mandatory minimum sentences and habitual offender laws), and non-traditional approaches to less serious crime (such as specialized adjudication courts for drug, domestic violence and other family-related cases, and community-based bootcamp programs).

[xlviii]. Area/State, *Bull's Eye or Wasted Shots?* RICHMOND TIMES-DISPATCH, January 22, 1999, notes the National Rifle Association donated $100,000 to the local foundation that purchases advertising to publicize the federal program.

[xlix]. *See* Editorial, RICHMOND TIMES-DISPATCH, Feb. 27, 1997, at A14. ("Local leaders -- Commonwealth's Attorney David Hicks, Police Chief Jerry Oliver, and City Manager Robert Bobb -- . . . consider fighting crime more important than preserving turf").

[l]. *See* David S. Cloud, *Prosecutor's Strategy Scrambles Gun-Control Alliances*, THE WALL STREET JOURNAL, Aug. 31, 1998, at A20, noting that Congress wants to implement Project Exile in other cities.

[li]. *See* T. Stacy & K. Dayton, *The Under-Federalization of Crime*, 6 CORNELL J.L. & PUB. POL'Y 247 (1997).

[lii]. Beale, *Federalizing Crime*, *supra* note 35, at 45 (citation omitted).

[liii]. *Id* at 50.

[liv]. *Id* at 50.

[lv]. Beale, *Too Many/Too Few*, *supra* note 9, at 981 ("This difficulty cannot be resolved by the addition of more federal judges because the expansion of the federal courts on the scale required would fundamentally alter their character and throw into question their ability to perform their

constitutional role"); J. Harvie Wilkinson III, *We Don't Need More Federal Judges*, WALL ST. J., February 9, 1998, at A19.

[lvi]. Tom Campbell, *Bull's Eye or Wasted Shots? Federal Judges Not Among Gun Program's Supporters*, RICHMOND TIMES-DISPATCH, January 22, 1999, at A1, quoting letter from Senior U.S. District Judge Richard L. Williams to Chief Justice William H. Rehnquist [hereinafter *Letter to the Chief Justice*].

[lvii]. Beale, *Too Many/Too Few*, *supra* note 9, at 993 ("Doubling, tripling, or even quadrupling the federal judiciary would still leave the vast bulk of criminal cases in the state courts. Enlarging the federal courts sufficiently to take on the bulk of these cases would indeed change their character beyond recognition and be incompatible with their other constitutional functions").

[lviii]. *Letter to the Chief Justice, supra* note 56 at A1. ("Not only does [prosecuting armed street-level criminals in federal court] do violence to concepts of federalism, the cost to national taxpayers is at least three times more than if the [state] handled these cases"). *See also* U.S. v. Jones, 1999 WL 42038 (E.D. Va.). (Trying street crimes in federal rather than state court "force[s] federal taxpayers to support local law enforcement . . . at a significantly greater expense than would a comparable state prosecution. The rates [for court-appointed counsel are] more than ten times the amount the Commonwealth provides").

[lix]. Regarding increasing expenditures, *see* ABA TASK FORCE REPORT, *supra* note 2, at 14. Overall federal justice system expenditures have increased dramatically. Between 1982 and 1993, federal expenditures increased at twice the rate of comparable state and local expenditures, increasing 317% as compared to 163%. The number of federal justice system personnel increased by 96% from 1982 to 1993.

[lx]. U.S. CONST. art. I, section 8, cl. 1.

[lxi]. *See* Baker, *Nationalizing Criminal Law: Does Organized Crime Make It Necessary or Proper?* 16 RUTGERS LAW JOURNAL 495, 504-13 (1985).

[lxii]. 514 U.S. 549, 566 (1995).

[lxiii]. *See* Hal Burbach, Violence and the Public Schools at 3, <http://curry.edschool.virginia.edu/~rkb3b/Hal/School Violence.html (visited Feb. 14, 1999). Discusses surveyed judges who ranked "Family Breakdown" higher than "Drugs," "No Jobs," "Poor Housing," "Poor Education", or "Don't Know" as a reason for juvenile crime. *See also* OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, FACT SHEET #8: FAMILY STRENGTHENING FOR HIGH-RISK YOUTH (March 1994) at 1 (as paginated in <http://www.ncjrs.org/txtfiles/fs-9408.txt, visited February 14, 1999); *id*, FACT SHEET #21: VIOLENT FAMILIES AND YOUTH VIOLENCE (December 1994) at 2 (as paginated in <http://www.ncjrs.org/txtfiles/fs-9421.txt, visited February14, 1999).

[lxiv]. ABA ANNUAL REPORT, *supra* note 46, at 12. Reports that increasing numbers of police are being deployed in community policing programs. By 1993, 40% of the nation's larger police departments had established community-policing programs. The Violent Crime Control and Law Enforcement Act of 1994 authorized funding up to $8.8 billion to assist states and

localities in hiring officers for community-based policing. By 1997, 57,000 new officers had been hired and an additional 17,000 were included in the 1998 budget request.

[lxv]. FEDERAL BUREAU OF INVESTIGATION (R. TROJANOWICZ ET AL), COMMUNITY POLICING: A SURVEY OF POLICE DEPARTMENTS IN THE UNITED STATES (1994) at 2-3 (as paginated in <http://www.concentric.net/~dwoods/study.htm, visited February 13, 1999). Community policing is believed to have decreased the incidence of such "neighborhood" or local crimes as street-level drug dealing and general "social disorder." Forty-eight percent of police chiefs reported "serious" crime had decreased in their precincts since implementing community-policing programs. Fifty-nine percent reported that "less serious" crime had decreased; between 77-82% reported street level drug dealing, "social disorder" and "physical disorder" had decreased as well.

[lxvi]. *Id* at 2. Of the police chiefs who implemented community-policing programs, 74% reported using "park and walk" programs and 14% used foot patrols, as distinct from "park and walks."

[lxvii]. *Id* at 2. Of the police chiefs who implemented community policing programs, 77% had assigned community officers to defined beats and 65% had decentralized offices in beat areas.

[lxviii]. *See* W. LAFAVE & J. ISRAEL, CRIMINAL PROCEDURE 508, 631 (2d ed. 1992 [hereinafter LAFAVE & ISRAEL, CRIMINAL PROCEDURE].

[lxix]. N. Morton, *Symbolic Policies in Clinton's Crime Control Agenda*, 1BUFF. CRIM. L.REV. 67 (1997); *Cities with High Crime, Poverty get Federal Money for More Police*, THE BOSTON GLOBE, May 30, 1998, at A7. *See also* Violent Crime Control and Law Enforcement Act of 1994, 18 U.S.C. sections 921(a), 922.

[lxx]. U.S. CONST art. III, section 2; Duncan v. Louisiana, 391 U.S. 145, 156 (1968) (A jury of peers is "an inestimable safeguard against the corrupt or overzealous prosecutor...").

71. *See* BUREAU OF JUSTICE STATISTICS, CRIMINAL VICTIMIZATION, *supra* note 46, at 1, reporting that only 40% of violent crimes and 30% of property crimes were reported to police in 1996.

[lxxii]. ABA ANNUAL REPORT, *supra* note 46 at 10; LAFAVE & ISRAEL, CRIMINAL PROCEDURE, *supra* note 68, at 20. ("[F]or those crimes on which the F.B.I collects data, there is approximately one arrest for every five offenses reported to the police").

[lxxiii]. LAFAVE & ISRAEL, CRIMINAL PROCEDURE, *supra* note 68, at 21.

[lxxiv]. BUREAU OF JUSTICE STATISTICS, COMPENDIUM, *supra* note 38, at 7, Figure S. 2. Shows that of all federal criminal defendants prosecuted in 1995, forty-six percent were convicted. *See also* LAFAVE & ISRAEL, CRIMINAL PROCEDURE, *supra* note 68, at 27. About two-thirds of state criminal defendants arrested for felonies are convicted.

[lxxv]. BUREAU OF JUSTICE STATISTICS, FELONY SENTENCES, *supra* note 36, at 2; Beale, *Too Many/Too Few*, *supra* note 9.

[lxxvi]. BUREAU OF JUSTICE STATISTICS SPECIAL REPORT, RECIDIVISM OF PRISONERS RELEASED IN 1983, at 1, 2. Of all prisoners released from prisons in 1983,

62.5% were rearrested for a felony or serious misdemeanor within three years; of prisoners age 18 to 24 with 11 or more prior arrests, 94.1% were rearrested within three years; prior to their release from prison, that year's cohort had been arrested and charged with an average of more than 12 offenses each. *See also* MARVIN WOLFGANG ET AL., DELINQUENCY IN A BIRTH COHORT (1972), finding that 6% of a cohort of boys born in Philadelphia in 1945 accounted for over 50% of offenses. *But see* William Raspberry, *Crime and the 6 Percent Solution*, THE WASHINGTON POST, March 14, 1994 at A19, noting that the six percent figure is often misinterpreted to mean that six percent of criminals (not six percent of the total population) commit over half of all crimes.

[lxxvii]. 1 CRIMINAL CAREERS AND "CAREER CRIMINALS" (Alfred Blumstein et al, eds., 1996).

[lxxviii]. LAFAVE & ISRAEL, CRIMINAL PROCEDURE, *supr*a note 68, at 21.

[lxxix]. *See* BUREAU OF JUSTICE STATISTICS, COMPENDIUM, *supra* note 38, at 17, Table 1.3; LAFAVE & ISRAEL, CRIMINAL PROCEDURE, *supra* note 68, at 623, 624.

[lxxx]. LAFAVE & ISRAEL, CRIMINAL PROCEDURE, *supra* note 68, at 21.

[lxxxi]. The minimum evidentiary requirement to bring a prosecution in good faith is probable cause that the defendant has committed a crime. The broader the criminal statute, the easier it is to establish probable cause. Even if broad criminal statutes ease the burden of proof, they impose another undue burden on the prosecutor. The prosecutor need not and should not decline to prosecute simply because he may not be convinced prior to trial of the defendant's guilt beyond a reasonable doubt. He knows that there may be certain things not known to him, but possibly to the defendant, which may or may not come out at trial. While exercising ethical restraint, the prosecutor's professional responsibility does not include building the defendant's case.

[lxxxii]. BUREAU OF JUSTICE STATISTICS, COMPENDIUM, *supra* note 38, at 39 ("92% of those convicted [federal criminal defendants in 1995] pleaded guilty, while only 8% were convicted at trial"); LAFAVE & ISRAEL, CRIMINAL PROCEDURE, *supra* note 68, at 26, noting that guilty pleas account for 75-90% of dispositions.

[lxxxiii]. In some jurisdictions, the prosecution may not in practice be able to do adequate screening for various reasons. In a jurisdiction that requires the prosecutor to accept or reject charges in a relatively short period of time, e.g., 48 hours, the prosecutor will have insufficient time to give adequate review to the charges. Under those circumstances, prudence dictates that the prosecutor accept all cases that might well be triable. All things being the same, the plea bargain rate would likely be higher in such a jurisdiction.

[lxxxiv]. *But see* Kurt A. Schlichter, *Locked and Loaded: Taking Aim at the Growing Use of the American Military in Civilian Law Enforcement Operations*, 26 LOYOLA OF LOS ANGELES L.R. 1291 (1993).

[lxxxv]. U.S. CONST. art.IV, section 4. *See* Jay S. Bybee, *Insuring Domestic Tranquility: Lopez, Federalization of Crime, and the Forgotten Role of the Domestic Violence Clause*, 66 GEO. WASH. L. REV. 1, 75-76 (1997) [hereinafter Bybee, *Insuring Domestic Tranquility*].

[lxxxvi]. Beale, *Too Many/Too Few*, *supra* note 9, at 997 ("Dual federal-state criminal jurisdiction is now the rule rather than the exception. Federal law reaches at least some instances of each of the following state offenses: theft, fraud, extortion, bribery, assault, domestic violence, robbery, murder, weapons offenses, and drug offenses. In many instances, federal law overlaps almost completely with state law...") (citations omitted).

[lxxxvii]. *See* Printz v. U.S., 521 U.S. 98 (1997).

[lxxxviii]. *See* Bybee, *Insuring Domestic Tranquility*, *supra* note 85, at 49-52.

[lxxxix]. U.S. CONST. art. IV, section 2, cl. 2.

[xc]. California v. Superior Court of California, 482 U.S. 400, 406 (1987). ("The Extradition Clause, however, does not specifically establish a procedure by which interstate extradition is to take place, and, accordingly, has never been considered to be self-executing"). In 1793, Congress enacted the Extradition Act (Act of Feb. 12, 1793, ch. 7, section 1, 1 Stat. 302) to regulate the process.

[xci]. *See* New York v. U.S., 505 U.S. 144 (1992).

[xcii]. *See* Printz v. U.S., 521 U.S. 98 (1997).

[xciii]. 18 U.S.C. section 1073.

[xciv]. *See, e.g.*, Papachristou v. City of Jacksonville, 405 U.S. 156 (1972).

[xcv]. 188 U.S. 321 (1903).

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

[xcvii]. *See supra* note 19 and accompanying text.

[xcviii]. 29 U.S.C. section 216 (1996).

[xcix]. U.S. v. Turkette, 452 U.S. 576 (1981).

[c]. 487 U.S. 931 (1988).

[ci]. *Id* at 949.

[cii]. *Id* at 949.

[ciii]. BLACK'S LAW DICTIONARY 446 (4th ed. 1968) (Statutory crimes are those created by statute, as distinguished from those such as are known to the common law).

[civ]. Robinson v. California, 370 U.S. 660 (1962).

[cv]. 18 U.S.C. §1961 (1982).

[cvi]. According to the sociologist who invented the term "enterprise liability" used in RICO, the only apparent distinction between "organized criminals" and business people are that the former are economically and psychologically underdeveloped persons in the process of evolving into white-collar criminals. *See* E. SUTHERLAND & D. CRESSEY, CRIMINOLOGY 270-71 (10th ed. 1978).

[cvii]. The Court has held that strict construction is inapplicable when congressional intent, as evinced by legislative history, is that the statute be construed liberally. United States v. Turkette, 452 U.S. 576, 588-93 (1981). It has been argued that the rule of liberal construction comports with the trend of the states. The argument equates liberal construction with the construction of words according to their "fair import." In fact, liberal construction and construction according to "fair import" derive from opposing attitudes about the proper role of the judiciary. Where liberal construction endorses judicial lawmaking, "fair import" construction is rooted in a reaction to the common law powers of judges. Moreover, the fact that some states may adopt liberal standards of construction does not necessarily justify a liberal standard for federal legislation. States have primarily been concerned with the common law offenses or what are considered "ordinary" crimes. Even though states have generally departed from the common law of crimes in favor of codification and have modified the elements of particular crimes, the codification of crimes follows in large part the content of the common law of crimes. Such crimes present few constitutional problems in terms of notice because the core meanings of crimes such as murder, rape, and robbery are well understood. On the other hand, newly created crimes, whether state or federal, which proscribe conduct in language that is unclear, are more likely to present notice problems.

[cviii]. Pub.L. 91-452, Title IX, section 904(a), Oct. 15, 1970, 84 Stat. 941 provides that "The provisions of this title [RICO] shall be liberally construed to effectuate its remedial purposes."

[cix]. *See generally* J. NOONAN, BRIBES (1984).

[cx]. *See* John C. Coffee, Jr., *From Tort to Crime: Some Reflections on the Criminalization of Fiduciary Breaches and the Problematic Line Between Law and Ethics,* 19 AM. CRIM. L. REV. 117 (1981) [hereinafter Coffee, *From Tort to Crime*] and the cases cited therein.

[cxi]. 18 U.S.C. §§ 1341, 1343 (1994).

[cxii]. Coffee, *From Tort to Crime, supra* note 110 at 126-27. ("[C]ourts have refused to define 'scheme to defraud' in terms of any objectively verifiable set of facts or circumstances. Indeed, judicial definition of the term has been almost exclusively negative").

[cxiii]. United States v. Wiltberger, 18 U.S. 76 (1820) (emphasis added). The Court relied on *Wiltberger* in narrowly construing the National Stolen Property Act, 18 U.S.C. 2314 (1994), as applied to a copyright violation. *See* Dowling v. United States, 473 U.S. 207, 213-14 (1985).

[cxiv]. J. NOONAN, BRIBES 585-86 (1984).

[cxv]. On the Federalist-Republican conflict over the proper role of the judiciary in the new republic, *see generally* R. ELLIS, THE JEFFERSONIAN CRISIS: COURTS AND POLITICS IN THE YOUNG REPUBLIC (1971).

[cxvi]. *See* C. COOK, THE AMERICAN CODIFICATION MOVEMENT: A STUDY OF ANTEBEL-LUM LEGAL REFORM 86, 91-92, 160-61 (1981).

[cxvii]. "This mode of proceeding manifestly partakes of the odious nature of an ex post facto law." 2 Z. SWIFT, A SYSTEM OF THE LAWS OF THE STATE OF CONNECTICUT 365-66 (1796), *quoted in* M. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW: 1780-1860 14 (1977).

[cxviii]. 1 W. STORY, LIFE AND LETTERS OF JOSEPH STORY 298 (1851):

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[cxix]. 18 U.S.C. § 1111 (1994).

[cxx]. SWIFT, as quoted in HOROWITZ, *supra* note 117 at 365-66. By construction, a court could render criminal an act which, under prior constructions, was not prohibited.

[cxxi]. Frank v. Mangam, 237 U.S. 309, 344 (1915) (*ex post facto* clause of Constitution applies only to statutes).

[cxxii]. Marks v. U.S., 430 U.S. 188, 191-92 (1977) (retroactive application of standards announced in case decided subsequent to defendant's actions violates due process).

[cxxiii]. J. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 61 (2d ed. 1960).

[cxxiv]. *Supra*, note 19.

[cxxv]. *See* J. NOONAN, BRIBES 586 (1984).

[cxxvi]. *See* Schecter Poultry Corp. v. United States, 295 U.S. 495 (1935) and Panama Refining Co. v. Ryan, 293 U.S. 388 (1935).

[cxxvii]. *See* Perez v. United States, 402 U.S. 146 (1971) and the cases cited therein.

[cxxviii]. *See* Abrahams & Snowden, *Separation of Powers and Administrative Crimes: A Study of Irreconcilables,* 1976 S. ILL. U.L.J. 1, 34-38, 43, 45-46, 102-05, 117-20.

[cxxix]. J. NOONAN, BRIBES 604-20 (1984).

[cxxx]. *Id*. at 620 (emphasis added).

[cxxxi]. *Id*. at 584.

[cxxxii]. *Id*.

[cxxxiii]. 18 U.S.C. §1951 (1994).

[cxxxiv]. *See* U.S. v. Kenny, 462 F.2d 1205 (1972), *cert. denied* 409 U.S. 914 (1972), *discussed in* J. NOONAN, BRIBES 584-89 (1984).

[cxxxv]. J. NOONAN, BRIBES 587 (1984).

[cxxxvi]. The Court in McNally v. U.S., 483 U.S. 350, 360 (1987) declined to extend the scope of the mail fraud statute from protection of property rights to protection of a citizen's intangible right to honest and impartial government: "Rather than construe the statute in a manner that leaves its outer boundaries ambiguous and involves the Federal Government in setting standards of disclosure and good government for local and state officials, we read [section] 1341 as limited in scope to the protection of property rights. If Congress desires to go further, it must speak more clearly than it has." McNally v. U.S. was legislatively overruled in November, 1988, when Congress amended the statute to make intangible rights actionable.

[cxxxvii]. *See* Linda Duetsch, *Man Pleads Guilty to Money Laundering*, ASSOCIATED PRESS ONLINE, March 9, 1999. U.S. Customs agents arrested top Mexican bankers and executives in a money-laundering sting, raising tensions between the U.S. and Mexico. Mexico accused the United States of intruding on Mexican sovereignty. *See also Chinese National, Companies Indicted on Arms Export Control Violation*, ASSOCIATED PRESS NEWSWIRES, March 9, 1999. A U.S. federal grand jury indicted a Chinese immigrant to Canada, a Chinese national, and two foreign companies for gun running and money laundering.