



Testimony of
WILLIAM N. SHEPHERD
on behalf of the
AMERICAN BAR ASSOCIATION
for the hearing on
DEFINING THE PROBLEM OF OVER-
CRIMINALIZATION AND OVER-FEDERALIZATION
before the
Committee on the Judiciary
Task Force on Over-Criminalization
of the
UNITED STATES HOUSE OF REPRESENTATIVES
June 14, 2013



Co- Chairman Sensenbrenner, Co-Chairman Scott, and Members of the Task Force:

I am William Shepherd, Chair of the American Bar Association (ABA) Criminal Justice Section. I am pleased and honored to appear today on behalf of the ABA at the first hearing held by the Task Force on “Defining the Problem of Over-Criminalization and Over-Federalization.”

The ABA, with nearly 400,000 members, commends the Task Force for holding this hearing. We also applaud the leadership of the Judiciary Committee, its Chairman Bob Goodlatte and Ranking Member John Conyers, Jr. as well as the Task Force Co-Chairs, for fostering the creation of this Task Force and for doing so on a bipartisan basis. I also want to acknowledge the leadership of our colleague organizations. The NACDL, the Heritage Foundation and the Federalist Society have worked tirelessly and increasingly together with us in recent years to bring about a broader focus on issues that the Task Force will examine over the next few months.

The need for comprehensive review of the state of federal criminal law by the Task Force is clear. At every stage of the criminal justice process today – from the events preceding arrest to the challenges facing those re-entering the community after incarceration – serious problems undermine basic tenets of fairness and equity, as well as the public’s expectations for safety. The result is an overburdened, expensive, and often ineffective criminal justice system.

Both over-criminalization and over-federalization lessen the value of existing important legislation by flooding the landscape with duplicative and overlapping statutes, making it impossible for the lay person to understand what is criminal and what is not. Punishment, the centerpiece of American criminal law, can lose its deterrent, educative, rehabilitative, and even retributive qualities, under the barrage of overly broad, superfluous statutes.

Over-federalization

While only a small fraction of our nation’s prosecutions are handled in federal court, the overwhelming number of regulations and statutes that carry criminal penalties are found on the federal side of the ledger. Many of these criminal violations were never passed by Congress and are not found in Title 18, but instead are created through the regulatory framework housed in federal agencies.

The ABA has long called for more careful scrutiny and steps to reform the unchecked growth of federal criminal law and the attendant expansion of the federal criminal justice system. We share this concern for over-federalization with a wide range of organizations.

In 1998, the American Bar Association (ABA) Task Force on the Federalization of Criminal Law, chaired by former Attorney General Edwin Meese, issued a report entitled “The Federalization of Criminal Law.” It noted that for much of our national history, the deeply rooted principle that the general police power resides in the states – and that federal law enforcement should be narrowly limited – was recognized in practice as well as in principle. At least until recently, the constitutional vision that the federal government should play a narrowly circumscribed role in defining and investigating criminal conduct was reflected in cautious limitation on the types of behavior that federal lawmakers addressed through criminal law. The ABA Task Force reached the clear conclusion that there had been significant growth (much of it

recent) and that a sizeable portion of new federal crime legislation dealt with localized matters earlier left to the states. A complex layer is being added to the overall criminal justice scheme, dramatically superimposing federal crimes on essentially localized conduct already criminalized by the states.

The Task Force's research revealed a startling fact about the explosive growth of federal criminal law: More than 40% of the federal provisions enacted since the Civil War have been enacted since 1970. It concluded that the federalization trend presents a troubling picture with far-reaching consequences. It reflects a phenomenon capable of altering and undermining the careful decentralization of criminal law authority that has worked well for all of our constitutional history. It also raises questions about what kind of American criminal justice system will evolve if this trend continues.

The 1998 Report noted that as the federal courts were increasingly burdened with cases traditionally handled in state courts the federal criminal justice system had grown in unprecedented scale, size and cost to fulfill new its duties. Greatly increased federal criminal jurisdiction led to a greatly larger federal criminal justice infrastructure in all respects. A direct consequence of much concern today in a period of intense fiscal scrutiny of federal spending is that the greatly increased numbers of federal convictions resulting from an unprecedented expansion of federal criminal law has led inevitably to commensurate increases in the federal prison population, burdening the federal system with all the attendant consequences of such expansion. There is a growing consensus that the costs for maintaining the projected growth of the federal Bureau of Prisons budget cannot be sustained and that reform of federal criminal laws, particularly those governing sentencing and release from terms of imprisonment must be reexamined.

Inappropriately federalized crimes cause serious problems in the administration of justice in this country. Even when prosecuted only occasionally, inappropriately federalized crimes threaten fundamental allocation of responsibility between state and federal authorities. While a single unsuitable proposal, intended as a well-meaning antidote for criminal ills, may be thought to do little damage, it is important to keep in mind the detrimental long-term effects of unwarranted federal intrusion.

- It general undermines the stat-federal fabric and disrupts the important constitutional balance of federal and state systems.
- It can have a detrimental impact on the state courts, state prosecutors, attorneys, and state investigating agents who bear the overwhelming share of responsibility for criminal law enforcement.
- It has the potential to relegate the less glamorous prosecutions to the state system, undermine citizen perception, dissipate citizen power, and diminish citizen confidence in both state and local law enforcement mechanisms.
- It creates an unhealthy concentration of policing power at the federal level.
- It can cause an adverse impact on the federal judicial system.
- It creates inappropriately disparate results for similarly situated defendants, depending on whether their essentially similar conduct is selected for federal or state prosecution.
- It increases unreviewable federal prosecutorial discretion.

- It contributes, to some degree, to costly and unneeded consequences for the federal prison system.
- It accumulates a large body of law that requires continually increasing and unprofitable Congressional attention in monitoring federal crimes and agencies.
- It diverts Congressional attention from a needed focus on that criminal activity which, in practice, only federal prosecutions can address.
- Overall, it represents an unwise allocation of scarce resources needed to meet the genuine issues of crime.

Because inappropriate federalization produces insubstantial gains at the expense of important values, it is important to legislate, investigate and prosecute federal crimes only in circumstances where limited legislative time and law enforcement efforts can most realistically deal with the most serious problems and do so without intruding on long-standing values. Congress should not bring into play the federal government's investigative power, prosecutorial discretion, judicial authority, and sentencing sanctions unless there is a strong reason for making wrongful conduct a federal crime – unless there is a distinct federal interest involved.

Other observers have reported that since the 1998 report the pace of new federal criminal law has continued unabated. After decades of expansive federal action, experts estimate that there are now more than 4,500 separate federal criminal statutes that are scattered throughout the federal code without any coherent organization. There is also widespread recognition that the result of decades of expansion of federal crime has resulted in the criminalization of behavior that often lacks criminal intent (*mens rea*) and would better be managed by civil fines or other non-criminal sanctions.

At the ABA Criminal Justice Section 2012 Fall Conference, former Attorney General Edwin Meese noted that the immense number of laws are traps to the unwary, and threaten people who would never consider breaking the law. The sheer size of the federal criminal law is so great that no one has even been able to find and provide a definitive count of the thousands of statutory criminal offenses. In addition to the issue of size, the statutes are scattered across the United States Code and are near impossible to find.

Over-criminalization

Criminal penalties represent the ultimate intrusion on individual liberty and constitute “community condemnation” which justifies their imposition. This infuses a criminal penalty with a significance not attached to a civil penalty. The seriousness of its use with regard to any individual has traditionally demanded that it be utilized only when certain mental states and behaviors are proven.

The effect of a *mens rea* requirement or guilty mind element provides an offense with its normative appeal: the degree of liability and punishment will be proportionate to culpability and limited by it. It is a fundamental principle of criminal law that, before criminal punishment can be imposed, the government must prove both a guilty act (*actus reus*) and a guilty mind (*mens rea*).

Increasingly and in too many instances, federal and state criminal statutes do not properly define the *mens rea* or guilty mind elements of the crime. Too often, the use of a criminal sanction or

sanctions is applied to behavior that was formerly addressed by the civil law, through regulation. There are manifold examples of federal regulatory crimes that impose a criminal penalty, including jail or imprisonment, without a requirement of a finding of criminal intent.

Individuals who make honest mistakes or engage in conduct that that under traditional standards is not sufficiently wrongful to give them notice of possible criminal responsibility are increasingly not protected from criminal prosecution by a prerequisite legal requirement of meaningful *mens rea*.

The ABA Criminal Justice Section recently developed draft policy that urges governments to re-examine strict liability offenses to determine whether the absence of a *mens rea* element results in imposition of unwarranted punishment on defendants who lacked any culpable state of mind in performing acts that were not *malum in se*, to prescribe specific *mens rea* elements for all crimes other than strict liability offenses, and to assure that no strict liability crimes permit a convicted individual to be incarcerated. This draft policy will be voted on by the House of Delegates during the 2013 ABA Annual Meeting in August.

More broadly, the problem of over-criminalization adds to the human and societal costs of an overburdened criminal justice and corrections system. Over-reliance on incarceration and long sentences is expensive, unsafe for inmates and corrections employees alike, and unlikely to achieve the goal of rehabilitation. Numerous social and economic disadvantages characterize the vast majority of individuals who are released from prison, including poor educational attainment and employment histories, poor physical and mental health, and alcohol and other drug misuse. There are inadequate community resources for the drug addicted and those suffering from mental illness. Despite unprecedented numbers of people incarcerated, there are also unprecedented numbers of ex-offenders who are released without job skills or without treatment for substance abuse, who face collateral consequences of conviction that have been greatly expanded in a similar fashion to the federal criminal laws. It is not surprising that recidivism rates are so high.

At year end 2011 there were 6.98 million offenders under supervision in the United States' adult correctional system; 4.9 million of these individuals are on probation and parole and 2.2 million are incarcerated in prisons or jail. Nearly half of the prisoners in the United States have been incarcerated for nonviolent offenses. While these numbers reflect a 1.4% decline in the correctional population and a 0.9% decline in the state and federal prison population, California's decline of 15,493 prisoners through the Public Safety Realignment plan accounted for more than half of the 0.9% prison population decrease. Moreover, the United States continues to maintain the highest rate of incarceration in the world with extreme and entrenched racial disparity. If current trends continue, one of every three African American males born today can expect to go to prison in his lifetime, as can one of every six Latino males, compared to one in seventeen white males.

Mass incarceration has come at great cost to taxpayers. State prisons hold the vast majority of prisoners, about 86.5% of United States prisoners. The average cost of incarcerating an individual in state prison for one year is \$31,116. On average, states spend roughly two and a half times more per prisoner than per public school pupil. In fiscal year 2012, total state spending on corrections, including prisons as well as probation and parole, is estimated to total

\$53.3 billion. At the federal level, DOJ's Bureau of Prisons had a fiscal year 2012 operating budget of about \$6.6 billion—the second largest budget within DOJ. Aside from the substantial financial burdens, there is also the damage done to the lives of those incarcerated and their families. Incarceration has been proven to have a negative impact on future income, employment prospect, and family involvement. Reducing over-criminalization saves taxpayer money and improves the lives of all citizens.

I appreciate the opportunity to share the views of the American Bar Association on these pressing issues. We look forward to working with the Task Force as it moves forward to combat the issues of over-criminalization and over-federalization.

For additional information on these issues, please contact Thomas Susman (202-626-3920; Thomas.Susman@americanbar.org), Director of the ABA's Governmental Affairs Office (GAO), or Bruce Nicholson (202-662-1769; Bruce.Nicholson@americanbar.org), Senior Counsel, ABA GAO.
