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by
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Professor Beale's Article, *Too Many and Yet Too Few: New Principles to Define the Proper Limits for Federal Criminal Jurisdiction*, is a well-documented plea for the conservation of federal judicial resources in the face of a burgeoning criminal caseload, caused at least in part by the creation of new federal crimes. The "too many" in the title of Professor Beale's Article refers to the current plethora of federal criminal cases that threaten (in the view of many) a docket crisis in the federal courts. The "too few" refers to the ability of federal prosecutors to pursue only a small fraction of the cases that could be prosecuted under federal law. Moreover, these "too few" cases are generally identical to cases that are prosecuted in state courts, thus raising the question of the utility of federal prosecutions.

Professor Beale develops a strong argument that the current system of concurrent federal/state criminal jurisdiction is "deeply problematic." First, given that federal sentences are generally harsher than state sentences for identical criminal conduct, the offenders who are prosecuted in federal court can receive grossly disparate sentences. Professor Beale rightly calls this an unfair "structural defect" that directly contradicts the policy behind the federal guideline sentencing scheme, which calls for like sentences for similarly situated individuals who commit comparable offenses.[1]

Second, the current system imposes a burden on the relatively small federal judicial system. As Professor Beale (and some federal

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1. Professor Beale seems to assume (as do I) that the unfairness stems from the phenomenon of giving the few (federal) offenders very harsh sentences in comparison to those received by the many (state) offenders for similar crimes. I believe that the current system is unfair because I think that federal sentences are, in general, excessive with respect to any of the usual purposes of sentencing—punishment, deterrence, rehabilitation, or incapacitation. On the other hand, I must admit that there are people who have different views, and some of them are in Congress. We who criticize the current dual system must make it clear that we are prepared to argue that it is the federal punishment system that is out of line and that state prisoners are not getting undeserved breaks.

judges) perceives the problem,[2] the workload of federal judges threatens to impair the quality of justice delivered in criminal cases and to decrease the ability of the federal courts to perform their "constitutional" functions in civil cases.

Third, Professor Beale believes that there is a tension between the current system and decentralization, which she believes to be a desirable attribute of federalism. Professor Beale links decentralization with federalist values of efficiency and experimentation. She also notes that decentralization permits criminal justice policy to be tailored to local conditions and varying policy preferences.

Professor Beale suggests that Congress uncouple two components of federal criminal jurisdiction—the need for federal jurisdiction and the need to employ federal judicial resources. Professor Beale believes that any theory that bases jurisdiction on the need for federal resources will inevitably produce more cases than can "fit comfortably within the small federal judicial system." Hence, Congress might better devote resources to fighting crime by: (1) supplementing state and local law enforcement resources; (2) authorizing federal prosecutors and investigators to help prepare state cases; or (3) creating federal crimes, with federal penalties, to be tried in state courts. None of these choices would impinge upon federal *judicial* resources and would, thus, free federal judges to concentrate on matters of "clear national import and interest that properly fall within the scope of federal concern."[3]

Even if Congress adopted the approaches described above, Professor Beale believes that some structuring of prosecutorial discretion would still be necessary to prevent overburdening of federal judicial resources and to avoid unfairness to defendants. She proposes that prosecutorial discretion be exercised on a class basis rather than the current ad hoc method and that some entity, either Congress or the Department of Justice, promulgate prosecutorial standards that are public and enforceable. She would require the standards to be "sufficiently definite and quantifiable to ensure that the current ad hoc decision making would not appear in a new guise."

2. *See generally* COMMITTEE ON LONG RANGE PLANNING, JUDICIAL CONFERENCE OF THE UNITED STATES, PROPOSED LONG RANGE PLAN FOR THE FEDERAL COURTS (1994); REPORT OF THE FEDERAL COURTS STUDY COMMITTEE (1990) [hereinafter FEDERAL COURTS STUDY]; Hon. Roger J. Miner, *The Consequences of Federalizing Criminal Law: Overloaded Courts and a Dissatisfied Public*, CRIM. JUST., Spring 1989, at 16; Hon. William H. Rehnquist, *1993 Year-End Report on the State of the Judiciary, reprinted in* THE THIRD BRANCH (Administrative Office of the U.S. Courts), Jan. 1993, at 1 ("[W]e can no longer afford the luxury of state and federal courts that work at cross purposes or irrationally duplicate one another.").

3. Professor Beale quotes here from the COMMITTEE ON LONG RANGE PLANNING, JUDICIAL CONFERENCE OF THE UNITED STATES, PROPOSED LONG RANGE PLAN FOR THE FEDERAL COURTS 13, 16 (Draft for Public Comment, Nov. 1994).

Let me begin my commentary by agreeing with and appreciating Professor Beale's effort to "disaggregate" the concept of federalization: we should discuss the opportunities and effects of federalization in the context of the three different branches of the federal government. I also agree that, for example, Congress could provide federal resources, indeed a federal cause of action, without necessarily involving either federal prosecutors or the federal courts.

Further, Professor Beale fairly points out that, under the current form of federalization, a disproportionate part of the burden of implementation of the congressional vision falls upon the federal courts. The number of criminal statutes has increased, and the number of prosecutors has increased. Resources committed to the Federal Bureau of Investigation, the Drug Enforcement Agency, the Bureau of Alcohol, Tobacco and Firearms, and other enforcement agencies have increased. Yet the number of federal judges available to hear and handle cases has not risen to keep pace with the increase in federal resources devoted to investigation and prosecution of crime.

While the pressure on judicial resources has received the attention, I must add that other resources *within* the federal system are equally—or more—stressed. The allocation of resources to federal public defenders has not kept pace,[4] and those private lawyers who are appointed as criminal defense lawyers have described the burdens imposed upon them by the delay in receiving payments.[5]

In short, Professor Beale has rightly pointed to court congestion, duplication of resources, and unfairness to defendants as serious problems that are intrinsic to the current criminal justice "nonsystem." I do, however, part company with her in two important respects: in her analysis of *why* federalization is a problem and in at least one of her proposed solutions—prosecution of federal crimes in state courts. I think that Professor Beale's focus on the federal judiciary addresses only a part of the conversation that is necessary when considering the role that Congress should play in creating federal crimes. Hence, let me set forth the analytic premises from whence I begin.

I take the history that state courts predated the federal courts as a given. I also accept the fact that Article III authorizes Congress to give federal courts jurisdiction as a structural premise—Congress has the constitutional power to provide federal courts with jurisdiction,

4. For the period 1979-1990, the percentage change in direct expenditures for federal public defense purposes was 68.9%, while that for prosecution and legal services was 470.4%. For the period covering 1985-1990, the respective percentages are 18.2% and 88.9%. U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1993, at 3 (Kathleen Maguire & Ann L. Pastore, eds., 1994).

5. *See, e.g., Report of the Committee to Review the Criminal Justice Act*, CRIM. L. REP. (BNA) No. 52, at 2265 (Mar. 10, 1993).

bounded only by the limits of Article III. Given those two background assumptions—the states were here first, and Congress has constitutional power to give federal courts jurisdiction—the question is when and how Congress should act. In facing that question, I also assume that the states have already proscribed most of the behavior that is now also prohibited by federal criminal law. Given the undoubted power of Congress, the discussion is rarely couched in constitutional terms.[6] Most of the time, the question concerns when Congress *should* legislate criminally. One argument is that permission for Congress to make something criminal under federal law should come from history: if Congress has acted before, it may do so again.

But as a limiting principle, that approach is not very useful. The catalog of federal crimes is huge, over three thousand offenses are on the books. The other papers from this Symposium demonstrate that Congress has acted time and again to criminalize actions that are already forbidden by state law. The only reason today we conceptualize "crime x" as federal and "crime y" as state is because of a pattern of congressional action. For example, why should robbing a bank be seen as a "federal" concern? Answer: Congress said so a long time ago.[7] History tells us, as a descriptive matter, what Congress has done, but it cannot tell us what Congress *should* do. The bottom line: Congress's readiness to pass laws making various crimes federal offenses is almost unlimited.[8]

Given that *a priori* little is "intrinsically" state or federal but that historically state courts have had broader jurisdiction than the federal courts, we then move from the question of *when* Congress may act to the question of *why* Congress might pass legislation making certain behavior a federal crime. Again, the permissible bases seem to be almost unlimited.

First, of course, there are "federal" crimes—*e.g.*, crimes against the United States itself, such as treason or income tax violations.[9]

6. Though in a recent and possibly far-reaching decision, the United States Supreme Court held that Congress did not have the power under the Commerce Clause to prohibit guns within 1,000 feet of a school. *See* United States v. Lopez, No. 93-1260, 1995 U.S. LEXIS 3039 (U.S., Apr. 26, 1995).

7. *See* Rory K. Little, *Myths and Principles of Federalization*, *in* this Symposium Issue; Charles Warren, *Federal Criminal Laws and the State Courts*, 38 HARV. L. REV. 545, 548-55 (1925).

8. The United States Supreme Court's readiness to countenance such decisions is no longer clear. *See* United States v. Lopez, No. 93-1260, 1995 U.S. LEXIS 3039 (U.S., Apr. 26, 1995).

9. *See* 18 U.S.C. § 2381 (1988)(treason); 26 U.S.C. § 7201 (1988)(income tax violations). My favorite federal crimes include: 18 U.S.C. § 46 (1988) (transporting water hyacinths); 18 U.S.C. § 709 (1988 & Supp. V 1993) (misuse of the "Smoky Bear" character or name); and 18 U.S.C. § 707 (1988) (fraudulent use of a 4-H club emblem).

Second, Congress could take a behavior heretofore legal and make it criminal. Examples include prohibition of the sale of alcohol, which was once legal, then criminally prohibited, now again legal.

Third, Congress could make a federal crime if it wants to draw national attention to a problem. I take it that the recently enacted Violence Against Women Act is an example of this rationale. Making something a proverbial "federal case" is one way to help us all see that so-called "domestic" violence is not a normal family scene, but a nationally prevalent behavior that concerns everyone.

Fourth, Congress could make something a federal crime if it wanted a uniform enforcement policy; here with more ifs—if one could compel U.S. Attorney's offices around the country to follow uniform rules; if Congress devoted enough resources to enable U.S. Attorneys to bring all or most cases; and, if one assumes that the states will not do interstate cooperative national work.

Fifth, Congress could make something a federal crime if it thought that it could put certain kinds of resources to work at responding, and if it believed in either economies of scale (given the size of the country) or in targeted work against crimes that are serious but committed relatively infrequently. For example, federal efforts to combat violence against abortion clinics could be prosecuted by a relatively small task force, but might involve almost simultaneous indictments in Buffalo, San Diego, Wichita, and Brookline. Congress could also use federal jurisdiction to prosecute crimes that states would not prosecute—for example, perhaps Congress might believe that states were lax in dealing with political corruption and, therefore, devote resources to that effort.

Sixth, Congress could decide to make something a federal crime if it thought that a national agency, such as the FBI, was the right entity to do investigation, and that the FBI should have exclusive investigative responsibilities without sharing information or cooperating with state authorities. Again, political corruption could be a target of this sort of legislation.

Seventh, Congress could make criminal activity subject to specific penalties: imagine that Congress wanted to change sentencing policy to make it more harsh or more lenient. Congress could decide to prosecute, for example, *all* cocaine cases and impose federal guideline sentences upon all offenders. Alternatively, as Professor Beale suggests, one piece of national legislation could change state penalty structures to conform to federal sentencing laws. I am somewhat dubious about Congress's power to accomplish the latter aim;[10] nevertheless, it remains a possibility.

10. *See* New York v. United States, 112 S. Ct. 2408 (1992).

Finally, Congress could make something a crime simply because it was popular to do so: imagine a hue and cry against guns, with Congress stepping in to make it criminal to own a gun.

I take all of the above rationales—not an exhaustive list, and not all presumptively wise—to be permissible bases for federal criminal jurisdiction, both constitutionally and more than plausibly. I think that Professor Beale would agree. Where I part company with her is in her narrow focus on judicial workload as the primary limiting factor in determining which and how many cases should be handled by the federal courts. The problem with workload as a limiting principle is that it does not deal with the complex questions that are presented when Congress adopts one of the rationales listed above.

A good deal of Professor Beale's assumptions proceed from the proposition that making too many federal crimes is bad for federal judges, who will have too much work to do. But assume that Congress decides that one of the above rationales is so important that it is prepared to devote the resources necessary to deal with the problem, including increasing the number of federal judges to deal with the increased caseload. I am sympathetic with concerns about workloads, but much less sympathetic with the claim that a federal judiciary of 1,300 people (including magistrate judges, very relevant in the criminal context) is sufficient to the needs of a country of more than 200,000 million people.

First, I believe that the arguments based on the "character" of the federal judiciary are misplaced. Professor Beale adopts the view (embodied in the *1990 Federal Courts Study Committee Report*) that increasing the number of federal judges would cause a "significant dilution of the prestige and responsibility that have historically served as the chief incentives permitting the recruitment of persons of real distinction." Every lawyer who practices in federal court knows that for every sitting federal judge there are at least ten (and probably many more) equally qualified lawyers available in every judicial district. Second, federal judges are not "carefully selected from a pool of competent and eager applicants," but gain appointment through a complicated political process that screens *out* many who would be "competent and eager applicants" if they had a chance to be nominated.

Most importantly, someone appointed to be a federal judge—and to wield truly awesome power—would do her or his level best to use that power responsibly, whether as a member of a cadre of 1,000 or 2,000 judges. Whether a person behaves responsibly or feels like a "tiny cog in a vast wheel"[11] and, thus, neglects his or her duties is, in my view, a function of character and life experience, not a variable

11. FEDERAL COURTS STUDY, *supra* note 2, at 9.

dependent upon the relative prestige of the office. It is hard for me to believe that any judge would not "feel a personal stake in the consequences of [his or her] actions."[12] Judges, above all, deal with people and make decisions crucial to peoples' lives. Perhaps some forms of assembly line justice can deaden a judge's personal feelings about the consequences of his or her actions, but such conditions surely would not obtain in even a greatly enlarged federal court system.

In light of her conception of the problem—the burden on federal judges—Professor Beale has offered one kind of disaggregation: think about federal prosecutions separate from federal judges. Of equal import is another form of disaggregation: what is the rationale behind congressional criminal law making? Unless you pick your goal—any of the ones listed above—you cannot figure out who should be responsible for implementation and *why*. Moreover, the goal should not be to protect federal judges. In summary, I can agree with Professor Beale that the current system is bad (for several reasons, such as the ad hoc nature of federal prosecutorial decisions, the ineffective impact of federal prosecutions generally, the coercive and unfair effects of dual jurisdiction on defendants who end up in the federal system) and yet disagree that the elite character of the federal courts will only be preserved if we retain the current, or a slightly increased, number of judges.[13]

Let me turn then to Professor Beale's proposed solutions—specifically the transfer of some of the criminal caseload from federal courts to state courts. Let us remember, first, that both federal and state judges are currently beleaguered by large criminal dockets and that state judges, by and large, operate with many fewer resources than do federal judges. Any solution to dual jurisdiction must take into account very limited state resources. Professor Beale offers two mechanisms to accomplish the transfer of cases to relieve the federal criminal docket. The first is for Congress simply to provide resources to the states to enforce those criminal laws that Congress believes deserve specific federal interest and national attention. Congress could provide resources to states for prosecution of drug or firearms offenses, for example, and cease federal prosecution of those offenses.

Such a plan could take some of the pressure off of federal courts and, given the random nature of the federal prosecutorial decisionmaking process in these cases—especially in drug cases—such a plan could be reasonable. But it is not clear that, having transferred all drug cases to the states, the federal criminal docket would necessarily be reduced. For example, Congress could reasonably decide to in-

12. *Id.*

13. *See* Hon. Stephen J. Reinhardt, *Too Few Judges, Too Many Cases*, A.B.A. J., Jan. 1993, at 52.

crease enforcement of other crimes—for example, mail fraud cases involving significant sums of money—leaving the federal caseload at the same level. More practically, United States Attorneys might very well simply shift their attention to increased levels of enforcement of other crimes across the board. Of course, if the shift in funding from federal to state was accompanied by a corresponding reduction in federal prosecutorial resources, real reductions in the federal criminal caseload could result.

There are other hard decisions associated with turning over complete jurisdiction over certain crimes to the states. Take drug prosecutions: federal prosecutions amount to about ten percent of the total of these prosecutions nationwide—a significant number. Should Congress give the states enough money to make up for the lost ten percent? More? Less? Should Congress pay for relieving the additional overcrowding of state prisons already bursting at the seams? Or, since states already have criminalized the behavior, should Congress declare victory in the drug war and give the states nothing? One congressional purpose underlying the provision of federal resources to the states might be to encourage the states to adopt harsher penalties or uniform penalties—of whatever kind, harsh or lenient. If Congress's money comes with strings attached—minimum sentences, for example—how have the values of federalism that Professor Beale appreciates, such as decentralized experimentation, been enhanced?

Professor Beale's other proposal is for Congress to give jurisdiction over federal crimes to state courts. She points to possible constitutional problems in the implementation of this proposal but argues that there are no insuperable barriers to state court prosecution of federal crimes. But, assuming for the moment its constitutionality, is such a delegation really necessary? Most federal crimes could be prosecuted as state crimes in state courts anyway. Why have dual jurisdictional bases for prosecution of the same behavior within a single state?

Once again, this sort of delegation could be a de facto mechanism by which Congress could not only give jurisdiction, but also impose federal sentencing policy—again, making the national decision (presumably to be harsher) without doing much by way of putting national assistance (funds for prisons, if nothing else) behind the policy. Further, if Professor Beale's first proposal (direct aid to states for enforcement of state law) were implemented, there is probably no need to do more. If the overriding purpose of shifting cases is seen only as a device to reduce the caseload of overburdened federal judges, that palliative only transfers cases to courts with fewer resources and even greater caseloads, probably makes for harsher criminal penalties, and swells already overcrowded state prisons. There is another less attractive possibility. One could see Congress responding by passing

"tough" legislation—proving itself "hard" on crime by both adding prohibitions and upping penalties—but then handing all the problems of enforcement over to the state courts, which are tremendously burdened already.

On the other hand, Professor Beale's third proposal—a call for administrative regulations governing the decision to prosecute, promulgated either by Congress or by the Department of Justice—sounds a welcome note and, if implemented, might change significantly the caseload mix in the federal courts. I must point out two problems: (1) although the mix might change, the burden on federal judges could very well remain the same because realigning prosecutorial discretion might not reduce the caseload or the workload of federal judges; and, more important, (2) I believe Professor Beale's suggestion will be very difficult to implement given the discretionary decisions made not only by prosecutors but by investigators and many low visibility actors along the chain that makes prosecutorial decisions.

Assuming that the task of promulgating administrative regulations would fall upon the Attorney General, there are at least two serious questions to ask about the ability of the Attorney General to constrain charging decisions by individual U.S. Attorneys. First, United States Attorneys have a long history of at least some independence from Washington. Moreover, some U.S. Attorneys are powerful political players in their own right, jealous of their independence and confident of their own prosecutorial agenda. Second, courts have in the past been exceedingly reluctant to circumscribe the discretion of federal prosecutors either in charging or in plea bargaining.[14] The weight of historical practice, then, would make change difficult. Apart from the questions of political feasibility, there is some doubt whether any charging regulations can be effectively enforced by defendants, which in my opinion is the only way in which such regulations could be both effective and fair. It is one thing to draft regulations, quite another to give a defendant indicted in federal court the right to have the indictment quashed by a federal judge on the ground that the Department's charging regulations have not been followed.[15]

14. *See, e.g.*, Wayte v. United States, 470 U.S. 598, 607 (1985). The creation of the United States Sentencing Guidelines has actually served to increase prosecutorial discretion while decreasing discretion on the part of the judiciary. *See* Dennis E. Curtis, Mistretta *and Metaphor*, 66 S. CAL. L. REV. 607 (1992); Jeffrey Standen, *Plea Bargaining in the Shadow of the Guidelines*, 81 CAL. L. REV. 1471, 1505-18 (1993).

15. The Justice Department's internal policies (such as the Petite Policy that governs when the federal government will prosecute a defendant who has already been prosecuted in state court) have been held not to create any substantive rights for defendants. *See* United States v. Paternostro, 966 F.2d 907, 912 (5th Cir. 1992); United States v. Pungitore, 910 F.2d 1084, 1120 (3d Cir. 1990); Katherine Lowe, *Prosecutorial Discretion, Twenty-Sec-*

Yet, despite my misgivings, I believe that there are some signs that comprehensive Department of Justice charging regulations are necessary and could be effective. First, Professor Beale and others are clearly correct in pointing out the serious problems with federal law enforcement case selection under the current system. Federal drug laws, for example, have not resulted in the prosecution of only "kingpins" or large-scale drug dealers. Far from it. There is a very large overlap of the categories of drug offenders prosecuted in state and federal courts. Recognition of this reality should provide an impetus toward structuring federal prosecutorial discretion, with a focus on those cases where federal help is really needed.

Professor Beale is surely right that Congress's current policy (or non-policy, to be more accurate) promotes the worst of alternatives: random enforcement or non-enforcement of federal criminal laws, minimal impact of federal prosecutions over a broad range of criminal conduct, and disparate and harsher punishment in the relatively few instances when federal prosecutions are brought. But the answer is not to elevate federal judicial caseload as the main problem to be addressed. The discussion should be focused on when and how Congress is best advised to spend federal resources (judges, prosecutors, defense attorneys, prisons, investigators) and when Congress should be advised to conserve such resources. Further, we should be clear about what goals and values we are espousing: fairness to defendants? fair and appropriate sentencing? increased crime control? federalism? protecting federal judges? Naming the problem tends to drive the solutions.

ond Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeal, 1991-92, 81 GEO. L.J. 1029, 1040 (1993).