Note

The Proposed Federal Criminal Code: An Unwarranted Expansion in Federal Criminal Jurisdiction

INTRODUCTION

Since 1966 Congress has been considering the idea of major federal criminal law reform.[1] The most recent proposal for reform and revision of Title 18 of the United States Code is the Proposed Federal Criminal Code,[2] which has been described as "the most important attempt in 200 years to reorganize and streamline the administration of federal criminal justice."[3] As part of its overhaul of the federal criminal laws, the Proposed Code contains new and startling expansions of federal jurisdiction—the power of the federal government to define and punish criminal activity—over what has previously been considered "intrastate" crime. Noticeable conceptual and structural changes in federal criminal jurisdiction highlight the increase in jurisdiction in the Proposed Code. Although there is some doubt whether the Proposed Code will be enacted into law,[4] because of the considerable controversy engendered by this proposal and its status as, at least, a tentative statement of federal policy, it is fruitful to analyze the jurisdictional framework of the Proposed Code.

This Note will examine the need for, the wisdom, and the effectiveness of the jurisdictional approach and policy of the Proposed

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1. *See* Act of Nov. 8, 1966, Pub. L. No. 89-801, 80 Stat. 1516, *as amended by* Act of July 8, 1969, Pub. L. No. 91-39, 83 Stat. 44. This Act provided for the establishment of the National Commission on Reform of Federal Criminal Laws and required the Commission to submit a final report within four years. This Final Report has served as a work basis for legislative proposals on reform, revision, and codification of federal criminal law. *See* FINAL REPORT OF THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS (1971) [hereinafter cited as FINAL REPORT].

2. S. 1437, 95th Cong., 2d Sess. (1978) [hereinafter cited as Proposed Code].

3. 123 CONG. REC. S6838 (daily ed. May 2, 1977) (remarks of Sen. Kennedy). The Proposed Code, *supra* note 2, is the most recent attempt to establish a new, comprehensive federal criminal code and has its genesis in the work of the National Commission. Earlier attempts at reform included S. 1, 93d Cong., 1st Sess. (1973), and S. 1400, 93d Cong., 1st Sess. (1973). The Senate Committee on the Judiciary in the 94th Congress did not act on these previous proposals because of controversy surrounding a number of issues in them. The current Proposed Code, S. 1437, "is the result of efforts to identify and resolve in a spirit of give and take the conflicting views that surfaced in the previous Congress." SENATE COMM. ON THE JUDICIARY, CRIMINAL CODE REFORM ACT OF 1977, S. REP. NO. 95-605, 95th Cong., 1st Sess. 13 (1977) [hereinafter cited as SENATE REPORT].

4. The Proposed Code has passed the full Senate but has run into stiff opposition in the House. At the time this article goes to press the Subcommittee on Criminal Justice of the House Committee on the Judiciary has indicated it will not act favorably on the Senate Bill, but will propose piecemeal reform as an alternative. N.Y. Times, May 13, 1978, at 10, col. 3-4 (city ed.).

Federal Criminal Code. In order to place the Proposed Code's jurisdictional framework in its proper historical perspective, the historical development of federal criminal jurisdiction will be emphasized. Part I will briefly sketch the early development of federal criminal jurisdiction in the context of the principles of American federalism. Part II will discuss modern developments in federal criminal jurisdiction and, in particular, the expansion of federal criminal jurisdiction under the commerce clause of the United States Constitution. Finally, Part III will describe and evaluate the treatment of jurisdiction in the Proposed Code.

I. THE EARLY DEVELOPMENT OF FEDERAL CRIMINAL JURISDICTION

A. *The Formative Years: Protecting Exclusively Federal Governmental Interests*[5]

The federal government is one of enumerated powers,[6] and accordingly, it has no general power to punish crime.[7] Under the Constitution, "[t]he power to define crimes belongs to Congress only as an appropriate means of carrying into execution its limited grant of legislative powers."[8] In accordance with the basic federalist precept that "[t]he powers delegated by the . . . Constitution to the federal government are few and defined,"[9] the first federal criminal laws were limited in jurisdictional scope. The only constitutional provisions that specifically authorize federal jurisdiction over criminal activities empower Congress:

(1) To provide for the punishment of counterfeiting the securities and current coin of the United States;[10]

(2) To define and punish piracies and felonies committed on the high seas, and offenses against the law of nations;[11]

(3) To exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular states, and the acceptance of Congress, become the seat of government of the United States, and to exercise like authority

5. *See generally* Boudin, *The Place of the Anti-Racketeering Act in Our Constitutional-Legal System*, 28 CORNELL L.Q. 261, 264-68 (1943); McClellan, *Codification, Reform and Revision: The Challenge of a Modern Federal Criminal Code*, 1971 DUKE L.J. 663, 672-85; Schwartz, *Federal Criminal Jurisdiction and Prosecutors' Discretion*, 13 LAW & CONTEMP. PROB. 64, 64-66 (1948).

6. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).

7. Boudin, *supra* note 5, at 262. *See* THE FEDERALIST No. 45 (J. Madison) (B. Wright ed. 1961).

8. Rochin v. California, 342 U.S. 165, 168 (1952).

9. THE FEDERALIST No. 45, at 328 (J. Madison) (B. Wright ed. 1961).

10. U.S. CONST. art. I, § 8, cl. 6.

11. *Id.* art. I, § 8, cl. 10.

over all places purchased by the consent of the legislature of the states in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings;[12] [and]

(4) To declare the punishment of treason, but no attainder of treason shall work corruption of blood, or forfeiture except during the life of the person attained.[13]

The Federalist Papers suggested that the power to protect the general welfare through the exercise of police powers was to remain with the states. Madison explained that in the federal system the "powers reserved to the several states will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people; and the internal order, improvement, and prosperity of the State."[14] Similarly, Hamilton pointed out that "the State governments would clearly retain all the rights of sovereignty which they before had, and which were not, by that act [of union] *exclusively* delegated to the United States."[15] These principles of American federalism, therefore, conceived of a limited federal presence in American society. The powers of the federal government were to be those that a nation-state would normally exercise—the power to make treaties, declare war, collect revenue, and regulate trade. The general power to define and punish criminal activity, however, was to remain the province of the states.

In accordance with the principles of federalism the early federal criminal laws prohibited only conduct directed against the federal government or affecting exclusively federal governmental functions. The first federal criminal statute was enacted in 1789 to punish customs fraud and bribing or "conniving" federal customs officers.[16] In 1790 Congress passed "An Act for the Punishment of Certain Crimes against the United States."[17] This statute dealt with offenses against the federal government (*e.g.*, treason and misprision of treason), piracies and felonies committed on the high seas, direct interferences with the federal court system (*e.g.*, perjury in federal court), counterfeiting, and murder or manslaughter within a federal enclave such as

12. *Id.* art. I, § 8, cl. 17.

13. *Id.* art. III, § 3, cl. 2. In addition, the Constitution defines treason: "Treason against the United States, shall consist only in levying war against them, or, in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses of the same overt act, or on confession in open court." U.S. CONST. art. III, § 3 cl. 1.

14. THE FEDERALIST No. 45, at 328 (J. Madison) (B. Wright ed. 1961).

15. THE FEDERALIST No. 32, at 241 (A. Hamilton) (B. Wright ed. 1961) (emphasis in original). *See* U.S. CONST. amend X. ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.")

16. Act of July 31, 1789, ch. 5, §§ 34-35, 1 Stat. 29 (current version at 18 U.S.C. § 201 (1976).

17. Act of April 30, 1790, ch. 9, § 1, 1 Stat. 112 (codified in scattered sections of 18 U.S.C.).

a fort or arsenal belonging to the United States.[18] All of the crimes proscribed were within the exclusive jurisdiction of the United States, and each proscription was directly dependent upon a specific provision in the Constitution.[19]

The limited number of crimes specified in the 1790 Act gave rise to an inference that other crimes committed within the exclusive jurisdiction of the United States, such as arson or robbery within the compound of a federal fort, federal building or on the high seas, could not be punished.[20] This inference was buttressed in the 1812 case of *United States v. Hudson*,[21] in which the Supreme Court held that the circuit courts of the United States could not exercise a common law jurisdiction in criminal cases. Under *Hudson*, in order for the federal courts to have jurisdiction over an offense, "[t]he legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the court that shall have jurisdiction of the offense."[22] Four years later, in the case of *United States v. Coolidge*,[23] the principle of *Hudson* was further strengthened when the Attorney General declined to argue that same issue.[24] Under the rule of these two cases, an offense committed within the exclusive jurisdiction of the United States was punishable only under a federal statute proscribing the particular conduct.

In 1825 Congress increased the number of offenses that were punishable if committed within the exclusive jurisdiction of the United States.[25] In addition, the definition "high seas" was broadened to include offenses committed on an American ship "while lying in a port or place within the jurisdiction of any foreign state or sovereign."[26] The concluding section of the act provided, however, that "nothing in this act contained shall be construed to deprive the courts of the individual

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18. *Id.* §§ 1-7.

19. *See* text accompanying notes 10-13 *supra*. The inclusion of crimes affecting the federal court system was necessary and proper to the establishment of an effective federal court system. *See* U.S. CONST. art. 1, § 8, cl. 18.

20. *See* McClellan, *supra* note 5, at 674-75.

21. 11 U.S. (7 Cranch.) 32 (1812).

22. *Id.* at 33-34.

23. 14 U.S. (1 Wheat.) 415 (1816).

24. Justice Story, however, did not take the question whether federal courts had jurisdiction at common law of offenses against the United States to be settled by *Hudson*. United States v. Coolidge, 14 U.S. (1 Wheat.) 415, 416 (1816). *See generally* 1 C. WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 433-40 (1922).

25. *See* Act of March 3, 1825, ch. 65, §§ 1-26, 4 Stat. 115 (codified in scattered sections of 18 U.S.C.). The Act punished such crimes as arson in a federal enclave, or "other needful building belonging to the United States," arson or rape on the high seas, plunder of a vessel in distress, extortion by a federal officer, theft by an employee of the Bank of the United States, and forgery of treasury notes or coins. *Id.* §§ 1, 2, 4-9, 12, 16, 17, 20.

26. *Id.* § 5. *See* McClellan *supra* note 5, at 676.

states, of jurisdiction, under the laws of the several states, over offences made punishable by this act."[27]

B. *The First Stages of Growth: Mail Fraud, Lotteries, and the White Slave Traffic*

From 1825 until the Reconstruction period the scope of federal criminal jurisdiction was not increased.[28] Expansion occurred in 1872, when Congress criminalized the use of the mails as an instrumentality of fraud[29] and the sending of obscene literature through the mails.[30] Both statutes derived their constitutional authority from Congress' power to establish post offices and post roads and provide for their regulation.[31] In the 1877 case of *United States v. Fox*,[32] the Supreme Court defined the limits of federal jurisdiction over crime: Such jurisdiction could not exist unless the offense had "some relation to the execution of a power of Congress."[33] The postal provision was "practically construed" that same year in *Ex Parte Jackson*[34] to give Congress the power to regulate the entire postal system of the country and to articulate what could be carried in the mail and what could be excluded. The Court considered proper the congressional refusal of the use of "its facilities for the distribution of matter deemed injurious to the public morals";[35] therefore, Congress possessed the power to "forbid any such acts done in furtherance of a scheme that it regards as contrary to public policy, whether it can forbid the scheme or not."[36] In this manner the exclusive federal power to regulate the nation's postal system was used as a source of federal criminal jurisdiction over conduct believed to violate public policy and morality.

The most significant jurisdictional development, however, occurred at the turn of the century when the power of Congress to regulate interstate commerce was held to include the power to prohibit particular articles from entering the stream of commerce if Congress found such articles or commodities to be harmful to the na-

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27. Act of March 3, 1825, ch. 65, § 26, 4 Stat. 115.

28. *See* Boudin, *supra* note 5, at 266; McClellan, *supra* note 5, at 676-77; Schwartz, *supra* note 5, at 65.

29. Act of June 8, 1872, ch. 335, § 301, 17 Stat. 283 (codified at 18 U.S.C. § 1341 (1976)). *See* Boudin, *supra* note 5, at 266.

30. Act of June 8, 1872, ch. 335, § 148, 17 Stat. 283, *as amended by* Act of March 3, 1873, ch. 258, § 2, 17 Stat. 598 (codified at 18 U.S.C. § 1461 (1976)). Federal legislation barring the importation of indecent and obscene matter first appeared in 1842. *See* Tariff Act of 1842, ch. 270, § 28, 5 Stat. 548 (current version at 18 U.S.C. § 1462 (1976)).

31. *See* U.S. CONST. art. I, § 8, cl. 7.

32. 95 U.S. 670 (1877).

33. *Id.* at 672. *See also* United States v. Cruikshank, 92 U.S. 542 (1876).

34. 96 U.S. 727 (1877).

35. *Id.* at 736. *See* In re Rapier, 143 U.S. 110 (1891).

36. Badders v. United States, 240 U.S. 391, 393 (1916).

tional interest. In this way Congress was able to exercise criminal jurisdiction under the commerce clause. Such jurisdiction was to prove to be potentially as broad as the commerce power itself. This power to prohibit articles from entering the stream of commerce was established in 1903 in the *Lottery Case*,[37] in which the Court sustained Congress' power to prohibit the interstate transportation of lottery tickets by invoking criminal sanctions against anyone shipping lottery tickets interstate.[38] In 1913, in *Hoke v. United States*,[39] the principle established in the *Lottery Case* was applied to the White Slave Traffic Act,[40] which prohibited the transportation of women for immoral purposes across state lines.

The growth in federal jurisdiction over crime in these years, however, was not viewed as an expansion into traditionally local areas of law enforcement. Rather, both Congress and the Court conceived of the type of federal statute at issue in the *Lottery Case* and *Hoke* as police regulations in "a domain which the States cannot reach and over which Congress alone has power."[41] Both the Lottery Act and the White Slave Traffic Act were enacted in response to problems that were viewed as particularly national in character.[42] With the constitutionality firmly established of federal criminal legislation based on the power of Congress to prohibit the use of the mails and of the instrumentality of interstate commerce for unlawful purposes, the actual scope of Congress' plenary commerce power as it applied to criminal legislation remained to be determined.

C. *Early Expansion of Federal Jurisdiction Under the Commerce Clause*

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37. 188 U.S. 321 (1903).

38. The majority was careful to point out, however, that the federal statute was not interfering with the substantive law of the states in this area. The Court construed the federal anti-lottery statute as not interfering "with traffic or commerce in lottery tickets carried on exclusively within the limits of any state, but [having] in view only commerce of that kind among the several States." *Id.* at 357.

39. 227 U.S. 308 (1913).

40. White Slave Traffic (Mann) Act, ch. 395, §§ 2-7, 36 Stat. 825 (1910) (codified at 18 U.S.C. § 2421 (1976)).

41. Hoke v. United States, 227 U.S. 308, 321 (1913).

42. The legislative history of the Mann Act points out that it was not aimed at regulating conduct over which the states had control:

> The legislation is needed to put a stop to a villainous interstate and international traffic in women and girls. The legislation is not needed or intended as an aid to the states in the exercise of their police powers in the suppression or regulation of immorality in general. It does not attempt to regulate the practice of voluntary prostitution, but aims solely to prevent panderers and procurers from compelling thousands of women and girls against their will and desire to enter and continue in a life of prostitution.

H. R. REP. No. 47, 61st Cong., 2d Sess. 9-10 (1909). The statute's application, however, soon reached beyond commercialized vice, and federal prosecution of an accused for traveling with his mistress from California to Nevada was held to be within the scope of the Mann Act in Caminetti v. United States, 242 U.S. 470 (1917).

1. *The Meaning of Plenary Power*

As early as 1824, in *Gibbons v. Ogden*,[43] Chief Justice Marshall defined commerce: "Commerce, undoubtedly, is traffic, but it is something more—it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches. . . ."[44] The power of Congress over that commerce "is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution."[45] Thus, Marshall continued, the sole restraints on which the people must rely to secure them from the abuse of the commerce power are "[t]he wisdom and the discretion of congress, their identity with the people, and the influence which their constituents possess at elections."[46]

2. *The Larceny Act*

Following the Supreme Court's pronouncements on the scope of the commerce power in the *Lottery Case*, it was but a short step for Congress to federalize an offense if the criminal activity took place in interstate commerce or in direct connection with goods actually moving in interstate commerce. As a constitutional matter, the necessary and proper clause[47] enabled Congress to protect commercial intercourse among the states by enacting laws that would define and punish criminal interference with the interstate shipment of goods. The first enactment of this type of criminal statute was in 1913 in the Larceny Act,[48] which prohibited larceny from railroad cars containing interstate or foreign shipments.

Constitutional and practical problems arose, however, in that the Larceny Act made "an ordinary crime, which was previously cognizable only in a state court, a federal offense merely because the crime was committed in interstate commerce or in connection with an article moving in interstate commerce."[49] This was a "departure from the earlier principles of federal criminal legislation, and affected the basic distribution of powers between state and nation" because it "was a

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43. 22 U.S. (9 Wheat.) 1 (1824).

44. *Id.* at 189-90.

45. *Id.* at 196.

46. *Id.* at 197.

47. U.S. CONST. art. I, § 8, cl. 18.

48. Larceny Act, ch. 50, §1, 37 Stat. 670 (1913) (codified at 18 U.S.C. § 2117 (1976)). The Larceny Act provides in part:

> Whoever breaks the seal or lock of any railroad car, vessel . . . or other vehicle or of any pipeline system, containing interstate or foreign shipments of freight or express or other property, or enters any such vehicle or pipeline system with intent in either case to commit larceny therein, shall be fined not more than $5,000 or imprisoned not more than ten years, or both.

18 U.S.C. § 2117 (1976).

49. Boudin, *supra* note 5, at 267.

practical invasion of a sphere of competence long enjoyed exclusively by the states."[50] Previous federal laws prohibiting the criminal use of an instrumentality of interstate commerce did not prohibit activities that were already state law crimes.[51] Congress accordingly attempted to minimize the intrusion of the federal government into an area of substantive state law by providing in the Larceny Act that

> nothing in this Act shall be held to take away or impair the jurisdiction of the courts of the several States under the laws thereof; and a judgment of conviction or acquittal on the merits under the laws of any State shall be a bar to any prosecution hereunder for the same act or acts.[52]

The Larceny Act, therefore, was consistent with the view that the federal role would vindicate the federal interest of protecting interstate commerce, but at the same time would recognize the states' interest in protecting their citizens from crimes of larceny.[53] Moreover, it indicated a congressional determination that the federal interest was not so substantial that it warranted federal prosecution in all cases; if the state prosecuted the larceny of interstate shipments, federal prosecution was barred.

The language quoted above from the Larceny Act illustrates a significant point: under this piecemeal approach to federal criminal legislation Congress limited the federal prosecution of state law crimes to the extent deemed necessary on an offense-by-offense basis.[54] Federal interests would be protected by both state and federal law, but the principal responsibility for punishing the proscribed conduct remained with the states.

3. *Post-World War I*

Significant expansion in the coverage of federal criminal laws enacted under the commerce power occurred after World War I as Congress continued to respond on an offense-by-offense basis to the pressures for federal criminal legislation. The increase in federal jurisdiction over crime in these years has been explained in part as necessary because "state power proved increasingly inadequate to deal with crime extending beyond state borders."[55] The primary difficulties in state law enforcement in this era were related to the advent of the automobile and

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50. *Id.*

51. *See id.*

52. Larceny Act, ch. 50, § 2, 37 Stat. 670 (1913) (current version at 18 U.S.C. § 2117 (1976)).

53. *Cf.* Fox v. Ohio, 46 U.S. (5 How.) 410 (1847) (recognizing that the State of Ohio had an interest in protecting its citizens from the private wrong that occurs when one passes counterfeit coins to another, even though the federal government has the power under the Constitution to punish offenses related to counterfeiting).

54. SENATE REPORT, *supra* note 3, at 29.

55. NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, STUDY DRAFT OF A NEW FEDERAL CRIMINAL CODE xxviii (1970).

increasing mobility of American society, accompanied by a corresponding increase in the interstate operations of organized crime.[56]

For example, when theft rings were organized to transport stolen vehicles across state lines and arrange the resale of the vehicles, difficulties in coordinating investigatory and prosecutorial efforts among the states contributed to Congress' decision in 1919 to make it a federal crime to transport or receive stolen motor vehicles in interstate commerce.[57] In *Brooks v. United States*[58] the Court applied the principles of the *Lottery Case* and *Hoke* in sustaining the National Motor Vehicle Theft Act as a valid congressional exercise of the police power "within the field of interstate commerce."[59]

Similarly, as roads and railroads were expanded and improved in these years it became easier for fugitives to flee from justice. The Fugitive Felon Act of 1934 made it "unlawful for any person to move or travel in interstate . . . commerce . . . with intent . . . to avoid prosecution for murder, kidnaping, burglary, robbery, mayhem, rape, assault with a dangerous weapon, or extortion accompanied by threats of violence."[60] The public outcry over the kidnaping of the Lindbergh child provided the impetus for the so-called Lindbergh Law, which punished "whoever shall knowingly transport or cause to be transported . . . in interstate or foreign commerce, any person who shall have been unlawfully seized, confined, . . . kidnaped, abducted, or carried away by any means whatsoever and held for ransom or reward or otherwise. . . ."[61] As a result of this period of development of federal criminal jurisdiction, it was no longer open to question that the plenary power of Congress under the commerce clause enabled it to prohibit the use of interstate facilities in aid of criminal enterprise.

4. *Jurisdiction as an Element of the Federal Offense*

Throughout the early development of federal criminal legislation both Congress and the federal courts continually considered the jurisdictional violation—*i.e.*,that element of the criminal conduct that violated or impinged a federal interest—an essential element of the federal offense.[62] Federal statutes stated the basis for exercising federal criminal jurisdiction together with the definitions of criminal conduct as an

56. *See* Note, *The Scope of Federal Criminal Jurisdiction under the Commerce Clause*, 1972 U. ILL. L.F. 805, 806.

57. The resulting statute was the National Motor Vehicle Theft (Dyer) Act, ch. 89, §§ 1, 3-5, 41 Stat. 324, 325 (1919) (codified at 18 U.S.C. §§ 2312-13 (1976)).

58. 267 U.S. 432 (1925).

59. *Id.* at 436-37.

60. Fugitive Felon Act, ch. 302, 48 Stat. 782 (1934) (codified at 18 U.S.C. § 1073 (1976)).

61. Federal Kidnaping Act, ch. 271, §§ 1, 3, 47 Stat. 326 (1932) (current version at 18 U.S.C. 1201 (1976)).

62. *See, e.g.*, Dyer Act, 18 U.S.C. § 2312 (1976); Davidson v. United States, 61 F.2d 250, 254-55 (8th Cir. 1932).

element of the offense.[63] Most current federal criminal statutes still follow this approach[64] because of congressional

> recognition of the limited nature of the powers granted the federal government by the Constitution. The philosophical rationale for such a formulation of offenses is that the Federal government should take cognizance only of the harm to its integrity, imposing criminal sanctions only to the extent that misconduct obstructs a specific federal function and leaving punishment for the misconduct itself to State and local governments.[65]

II. MODERN DEVELOPMENT OF FEDERAL CRIMINAL JURISDICTION

A. *Continued Application of Traditional Principles*

1. *The Anti-Extortion Act*

In the wake of the Great Depression the new presence of the federal government was felt not only in socioeconomic legislation, but in a continued expansion of federal criminal legislation. These laws continued to build on the principles established in the *Lottery Case* and were drafted to include the jurisdictional violation as an element of the federal offense. In 1934, Congress used the commerce power to create two new jurisdictional bases that were to require judicial interpretation to delineate their actual jurisdictional reach.

The first new jurisdictional base was contained in the Anti-Extortion Act, which made it a crime to transmit in interstate commerce, by any means whatsoever, any threat to injure or kidnap any person with intent to extort any money or thing of value.[66] It was not clear whether the jurisdictional language of the Anti-Extortion Act—transmit in interstate commerce—required that the transmission move from one state to another state, or whether a purely intrastate communication nonetheless could be a threat transmitted in interstate commerce. In general, the response by the courts was that the threat must cross state lines.[67] Thus, the communication of a threat by means of telephone that did not cross state lines did not satisfy the jurisdictional element under the

63. For example, the Dyer Act punished whoever knowingly received a stolen motor vehicle "moving as, or which is a part of, or which constitutes interstate or foreign commerce." 18 U.S.C. § 2313 (1976).

64. SENATE REPORT, *supra* note 3, at 29.

65. *Id.* Nonetheless the punishment that is imposed for violation of a federal interest does in fact reflect the nature of the underlying criminal conduct. For example, one who violates the federal interest in regulating the avenues of interstate commerce by transporting a kidnap victim across state line faces more severe penalties under the law than one who violates the same federal interest by shipping lottery tickets interstate. *Compare* Federal Kidnaping Act, 18 U.S.C. § 1201 (1976) *with* Lottery Act, 18 U.S.C. §§ 1301-05 (1976).

66. Anti-Extortion Act, ch. 300, 48 Stat. 781 (1934) (codified at 18 U.S.C. § 875 (1976)).

67. *See* United States v. Oxendine, 531 F.2d 957 (9th Cir. 1976); United States v. Holder, 302 F. Supp. 296 (D. Mont. 1969), *aff'd*, 427 F.2d 715 (9th Cir. 1970). *See also* United States v. Cafero, 473 F.2d 489, 502 (3d Cir. 1973) (telephone call must be interstate to satisfy similar jurisdictional language of the Travel Act, 18 U.S.C. § 1952 (1976)).

statute merely because "the nation's vast network of telephone lines constitutes interstate commerce."[68]

2. *The Hobbs Act*

A second, more significant, jurisdictional base was created in 1934 with the passage of the first federal anti-racketeering statute,[69] amended by the Hobbs Act in 1946.[70] The Hobbs Act at present provides in part:

> Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.[71]

When this broad jurisdictional language first appeared in 1934 the suggestion was made that the statute should be construed to "limit its operation to crimes in which interstate or foreign commerce was used in the perpetration of the offense or in achieving its purpose."[72] This suggestion was not followed in *Stirone v. United States*,[73] in which the Supreme Court construed the Hobbs Act as "manifesting a purpose to use all the constitutional power Congress has to punish interference with interstate commerce by extortion, robbery or physical violence."[74] The Act was held not to be limited to conduct that directly and immediately obstructs a particular movement of goods in interstate commerce; criminal extortion or racketeering that produces only an indirect effect on interstate commerce could be sufficient to sustain federal jurisdiction over the offense.[75] Nonetheless, in *Stirone* the Court continued to emphasize that the existence of federal jurisdiction was a crucial element of a Hobbs Act offense:

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68. United States v. Holder, 302 F. Supp. 296, 298 (D. Mont. 1969), *aff'd*, 427 F.2d 715 (9th Cir. 1970).

69. Anti-Racketeering Act of June 18, 1934, ch. 569, §§ 1-6, 48 Stat. 979, *as amended by* 18 U.S.C. § 1951 (1976).

70. Hobbs Act, ch. 537, §§ 1-6, 60 Stat. 420 (1946) (codified at 18 U.S.C. § 1951 (1976)).

71. 18 U.S.C. § 1951(a) (1976).

72. Boudin, *supra* note 5, at 284-85.

73. 361 U.S. 212 (1960).

74. *Id.* at 215. In United States v. Culbert, 98 S. Ct. 1112 (1978), the Court reaffirmed *Stirone* when it resolved a split in the circuit courts by refusing to read a "racketeering" requirement into the statute. In *Culbert* the Court construed the legislative history of the Hobbs Act to indicate that "Congress apparently believed . . . that the States had not been effectively prosecuting robbery and extortion affecting interstate commerce and that the Federal Government had an obligation to do so." *Id.* at 1117. This construction of the statute enabled the Court to sustain Culbert's conviction in the District Court, which had been reversed by the Ninth Circuit, for attempting to obtain $100,000 from a federally-insured bank by means of threats of physical violence made to the bank's president.

75. 361 U.S. at 215. *See* United States v. Tropiano, 418 F.2d 1069 (2d Cir. 1969), *cert. denied*, 397 U.S. 1021 (1970).

> Here . . . there are two essential elements of a Hobbs Act crime: interference with commerce, and extortion. Both elements have to be charged. Neither is surplusage and neither can be treated as surplusage. The charge that interstate commerce is affected is critical since the Federal Government's jurisdiction of this crime rests only on that interference.[76]

3. *Recent Legislation*

The principle that Congress has the power to criminalize conduct that uses interstate or foreign commerce facilities for unlawful purposes was applied as the constitutional basis for the enactment in the 1960's of legislation that was directed against the operations of organized crime.[77] Much of the legislation was aimed at combatting large scale illegal gambling that operated across state lines.[78] The Travel Act in particular has proved of significant assistance in fulfilling this role.[79] Only the federal loan shark statute,[80] however, expanded the reach of federal criminal jurisdiction based on the commerce power to purely intrastate activity, and thus differed significantly from previous federal criminal statutes by not requiring any proof of an interstate nexus as a basis for federal jurisdiction.[81] This expansion was upheld in *Perez v. United States*,[82] in which the Supreme Court adopted the principle that the power to regulate interstate and foreign commerce extends to local criminal activity that affects interstate commerce. This is the most recent and perhaps far-reaching development in federal criminal jurisdiction,[83] and in order to better understand the Court's holding in *Perez*, a brief discussion of the modern scope of the commerce power concerning economic and noneconomic regulation follows.

B. *Federalization of Intrastate Crime: From* Wickard v. Filburn *to* Perez v. United States[84]

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76. 361 U.S. at 218. Concerning the jurisdictional element of the Hobbs Act offense of extortion under color of right, the circuit courts have endorsed a policy of expanding the interstate nexus to include within the reach of federal power criminal acts that potentially affect commerce. *See, e.g.*, United States v. Staszcuk, 517 F.2d 53 (7th Cir.), *cert. denied*, 423 U.S. 837 (1975). *See generally* Ruff, *Federal Prosecution of Local Corruption: A Case Study in the Making of Law Enforcement Policy*, 65 GEO. L.J. 1171 (1977).

77. *See* Travel Act, 18 U.S.C. § 1952 (1976); *see generally* Kennedy, *The Program of the Department of Justice on Organized Crime*, 38 NOTRE DAME LAW. 637 (1963); Pollner, *Attorney General Robert F. Kennedy's Legislative Program to Curb Organized Crime and Racketeering*, 28 BROOKLYN L. REV. 37 (1961); Note, *supra* note 56, at 812-14.

78. *See, e.g.*, 18 U.S.C. §§ 1952, 1955 (1976).

79. SENATE REPORT, *supra* note 3, at 839.

80. 18 U.S.C. §§ 891-96 (1976).

81. *See* text accompanying notes 99-104 *infra*.

82. 402 U.S. 146 (1971).

83. *See* Stern, *The Commerce Clause Revisited—The Federalization of Intrastate Crime*, 15 ARIZ. L. REV. 271 (1973).

84. *Id.* The analysis in this section draws extensively from the article by Mr. Stern.

1. *Plenary Power and Federal Regulation of Local Economic Activity*

It was not until the Supreme Court upheld New Deal legislation in the midst of the controversy over President Roosevelt's court-packing plan in 1937 that the full implications of Congress' plenary power under the commerce clause, as articulated in *Gibbons v. Ogden*,[85] could be realized.[86] After 1937 it was soon established that the power of Congress to regulate interstate commerce included the power to regulate local, intrastate economic activity that either directly or indirectly affects interstate commerce.[87] Perhaps the most startling application of this principle occurred in *Wickard v. Filburn*,[88] in which the Supreme Court sustained federal marketing quotas on wheat production as applied to an individual farmer who grew wheat in excess of the quotas even though the farmer consumed the excess on his farm. In *Wickard* the Court reasoned that the home-grown wheat supplied "a need of the man who grew it which would otherwise be reflected by purchases in the open market," and thus competed with wheat in commerce.[89] In determining that the farmer's activity affected commerce, the Court considered the total impact on commerce of the class of all home wheat growers: "That appellee's own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial."[90] This rationale echoed what the Court had decided one year earlier in *United States v. Darby*,[91] in which the Court also stated that in passing on the validity of legislation in which "Congress itself has said that a particular activity affects the commerce, . . . the only function of courts is to determine whether the particular activity regulated or prohibited is within the reach of the federal power."[92]

2. *Application of* Wickard *and* Darby *to Noneconomic Commerce Clause Legislation: The Public Accommodation Cases*

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85. 22 U.S. (9 Wheat.) 1 (1824). *See* text accompanying notes 43-46 *supra.*

86. *See* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937). *See generally* Stern, *The Commerce Clause and the National Economy*, 1933-1946, 59 HARV. L. REV. 645 (1946); for a discussion of the court-packing plan see P. BATOR, P. MISHKIN, D. SHAPIRO, & H. WECHSLER, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 41-45 (2d ed. 1973).

87. Wickard v. Filburn, 317 U.S. 111 (1942); United States v. Darby, 312 U.S. 100 (1941).

88. 317 U.S. 111 (1942).

89. *Id.* at 128.

90. *Id.* at 127-28.

91. 312 U.S. 100 (1941).

92. *Id.* at 120-21. *But see* National League of Cities v. Usery, 426 U.S. 833 (1976) (striking down commerce clause legislation that operated to impair the ability of the states as states to allocate limited resources and function effectively as employers).

The rationales of *Darby* and *Wickard* facilitated further congressional exercise of its plenary power under the commerce clause, and the principles of those cases have since been applied to commerce clause legislation involving noneconomic regulation. In *Heart of Atlanta Motel, Inc. v. United States*[93] and *Katzenbach v. McClung*[94] the Supreme Court followed the import of *Darby* and *Wickard* when it sustained the power of Congress under the commerce clause to enact civil rights legislation making it unlawful for places of public accommodation to refuse to serve travelers or patrons on the basis of race.

In these two cases the Court adopted a number of theories to sustain the constitutionality of Title II of the Civil Rights Act of 1964.[95] The prohibition of racial discrimination by a hotel that received interstate travelers was directed at a practice that inhibited interstate movement and thereby had a disruptive effect on commercial intercourse.[96] The prohibition of discrimination was extended to restaurants, for if restaurants sold fewer interstate goods as a result of the discrimination, interstate travel was obstructed, business in general suffered, and new businesses refrained from establishing in areas where discrimination was practiced.[97] In this way the Court reasoned that it was constitutional for Congress to consider the total effect on commerce of the discriminatory practices of a great many individual proprietors, each of whom may individually have had an insubstantial effect on interstate commerce. This reasoning reaffirmed the power of Congress to regulate under the "class of activities" test, that is, "the power . . . to regulate acts which in isolation have no significant effect on interstate commerce but which were part of a class which as a whole could be said to have such an effect."[98]

3. Perez v. United States *and its Aftermath*

A major development in the growth of federal criminal jurisdiction occurred when the Supreme Court, in *Perez v. United States*,[99] sustained the power of Congress to regulate intrastate crime under the commerce clause "class of activities" test that had been applied in the public accommodation cases. In *Perez* the Court had before it a challenge to the constitutionality of the federal loan shark statute,[100] which prohibited all extortionate credit transactions whether or not an inter-

93. 379 U.S. 241 (1964).
94. 379 U.S. 294 (1964).
95. 42 U.S.C. § 2000a (1970).
96. Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 257 (1964).
97. Katzenbach v. McClung, 379 U.S. 294, 300 (1964).
98. Stern, *supra* note 83, at 272-73.
99. 402 U.S. 146 (1971).
100. 18 U.S.C. §§ 891-96 (1976).

state connection was established for any particular transaction.[101] The loan shark statute did not require "any proof of interstate movement, of the use of the facilities of interstate commerce, or of facts showing that [an accused's] conduct affected commerce."[102] Nonetheless the Court held that Congress could exercise criminal jurisdiction over a purely intrastate extortionate credit transaction because Congress had found that the class of all extortionate credit transactions supplied a major source of revenue to organized crime and adversely affected interstate commerce. The Court accepted as "quite adequate" the congressional findings that there was a tie-in between local loan sharks and interstate crime;[103] it agreed with Congress that the economic, financial, and social setting of the problem of loan sharking indicated that federal regulation was necessary to arrest a problem of national dimensions.[104] Thus, Congress could appropriately consider the total impact of the practice of the class of loan sharks on commerce.

The *Perez* holding, though a major development, was not revolutionary, for the Court had indicated nearly two decades earlier that it would uphold congressional regulation of an entire class of criminal transactions within the interstate commerce context. In *United States v. Five Gambling Devices*,[105] what has been termed the "first partial step" in the federalization of intrastate crime occurred.[106] There six of the Justices subscribed to the view that interpreted reporting provisions of a federal statute prohibiting the interstate transportation of gambling machines to apply also to intrastate transactions as a means reasonably necessary to effectuate the prohibition of transporting gambling devices interstate.[107] This interpretation of the federal regulation, however, was limited to the particular evil sought to be eradicated in *Gambling Devices*: "[T]he situation here is unique: the commodity involved is peculiarly tied to organized interstate crime and is itself illegal in the great majority of the States, and the federal law

101. An extortionate credit transaction is the lending of money at exorbitant rates of interest followed by the use of violence or threats of violence as a means of collecting on the loans.

102. Perez v. United States, 402 U.S. 146, 157 (1971) (Stewart, J., dissenting).

103. 402 U.S. at 155. Moreover, it was uncontroverted that Perez was a member of the class of loan sharks who engage in extortionate credit transactions. *Id.* at 153.

104. "It appears . . . that loan sharking in its national setting is one way organized crime holds its guns to the heads of the poor and the rich alike and syphons funds from numerous localities to finance its national operations." 402 U.S. at 157.

105. 346 U.S. 441 (1953).

106. Stern, *supra* note 83, at 274-76.

107. United States v. Five Gambling Devices, 346 U.S. 441, 463 (1953) (Clark, J., dissenting). In a plurality opinion, however, the Court sustained the dismissal of indictments that charged two dealers with failure to comply with the reporting provisions regarding slot machines seized by federal agents from a local club. Three of the Justices construed the statute as not reaching purely intrastate transactions; the two concurring Justices agreed with the dissent that Congress had the power to require registration of all gambling machines and that the statute applied to all transactions, interstate or intrastate, but that the registration requirements were unconstitutionally vague.

in issue was actively sought by local and state law enforcement officials as a means to assist them."[108] The *Perez* opinion similarly emphasized the role of organized crime in loan sharking activities; indeed, Congress acted on the presumption that the loan shark statute would "get at" the operations of organized crime. As a result, the decision in *Perez* has been explained as a product of

> the difficulty in proving in each individual case that the loan shark had an interstate connection even when it existed. A sweeping prohibition may, therefore, have been the only, or at least the most effective, means of combatting an interstate evil—even though a particular episode may have no effect upon or relation to interstate commerce whatsoever.[109]

Because the *Perez* majority employed the commerce clause class of activities test, however, the implications of the case may be much broader than a reading that limits it to the activities of organized crime would indicate. Justice Stewart, the lone dissenter in *Perez*, pointed this out:

> It is not enough to say that loan sharking is a national problem, for all crime is a national problem. It is not enough to say that some loan sharking has interstate characteristics, for any crime may have an interstate setting. And the circumstance that loan sharking has an adverse impact on interstate business is not a distinguishing attribute, for interstate business suffers from almost all criminal activity, be it shoplifting or violence on the streets.[110]

Indeed, commentators have questioned how far the class of activities rationale of *Perez* can be extended in federal criminal statutes without making a major intrusion into the area of local law enforcement.[111] One commentator has suggested that "Congress is unlikely to interject the federal government into local transactions without good reason"[112] and that practical restraints would limit federal intervention in local law enforcement to areas in which both federal and state governments seek to effectuate the same policies.[113] Such restraints would mean that the Court may never "face an exercise of federal power over local crimes unless substantial local benefit from having the national government deal with the problem can be established."[114]

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108. 346 U.S. at 463.

109. Stern, *supra* note 83, at 278. *See also* 49 TEX. L. REV. 568, 573 (1971).

110. Perez v. United States, 402 U.S. 146, 157-58 (1971) (Stewart, J., dissenting).

111. *See* Stern, *supra* note 83, at 280-85; 49 TEX. L. REV. 1106, 1111 (1971). The impact of *Perez* is especially significant if it means that "Congress may by legislative fact-finding create the conditions of its own rightful exercise of authority." Schwartz, *Preface* to *Symposium—Pivotal Decisions of the Supreme Court*, 15 ARIZ. L. REV. 224, 226 (1973).

112. Stern, *supra* note 83, at 280.

113. *Id.* at 282. Other statutes that have been enacted on a jurisdictional foundation similar to the loan shark statute also purport to regulate problems of national dimensions. *See, e.g.*, 21 U.S.C. §§ 841-45 (1970) (prohibiting distribution of controlled substances).

114. Stern, *supra* note 83, at 283-84.

There has been some indication of the judiciary's reluctance to allow federal criminal jurisdiction to grow unchecked, for in three relatively recent decisions the Supreme Court has limited the application of federal criminal statutes enacted under the commerce power.[115] In these cases the Court has neither restricted *Perez* nor articulated any new constitutional standard; rather, it has limited the federal presence in the fight against local crime by construing federal statutes narrowly in accordance with the rule of strict construction[116] and by refusing to extend federal criminal jurisdiction into areas traditionally policed by the states unless Congress clearly conveyed its purpose to significantly change the "federal-state balance."[117]

C. *Modern Federal Criminal Jurisdiction: An Overview*

The present scope of federal jurisdiction over criminal activities is a far cry from what Madison and Hamilton had envisioned as the proper role of the federal government. Yet this growth is not without its logic and justification. The growth of federal criminal jurisdiction occurred in piecemeal fashion as federal criminal statutes were passed to meet the exigencies of contemporary national problems. Each new expansion of federal criminal jurisdiction sought to maintain the delicate state-federal balance that is viewed as a cornerstone of our federalist system. The federal government moved into an area only when the states—because of the nature of the activity or their own lack of resources—demonstrated an inability to deal effectively with a certain criminal activity. In this manner the federal criminal system served in an auxiliary capacity in those areas that were traditionally of state concern. The states were free to assert local interests and use the flexibility inherent in a locally-based system in the fight against crime. It was only when the proportions of the criminal activity became "national" in character that the federal government stepped in.

Given the piecemeal character of the development of federal criminal jurisdiction, it was perhaps inevitable that Congress would

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115. *See* United States v. Enmons, 410 U.S. 396 (1973); United States v. Bass, 404 U.S. 336 (1971); Rewis v. United States, 401 U.S. 808 (1971). *See also* Erlenbaugh v. United States, 409 U.S. 239, 247 (1972). Two very recent cases suggest that the Court may be moving the other way. *See* United States v. Culbert, 98 S. Ct. 1112 (1978); Scarborough v. United States, 431 U.S. 563 (1977).

116. "[A]mbiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." Rewis v. United States, 401 U.S. 808, 812 (1971). The principle of strict construction is founded on two policies that have long been associated with federal criminal law. The first is that "a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed." McBoyle v. United States, 283 U.S. 25, 27 (1931) (Holmes, J.). The second is that "because of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity." United States v. Bass, 404 U.S. 336, 348 (1971).

117. United States v. Bass, 404 U.S. 336, 349 (1971).

eventually attempt to revise and consolidate the federal criminal system. Those to whom the task would fall might reflect on the development of federal criminal jurisdiction and conclude that the role of the federal government was primary in areas of federal concern but auxiliary in areas in which the federal interest overlapped with local interests. In this manner the federal-state balance of federalism could be preserved and each sovereign could direct its limited resources to the areas in which it would be most effective. The drafters of the Proposed Federal Criminal Code, however, evidently had something else in mind.

III. TREATMENT OF JURISDICTION IN THE PROPOSED FEDERAL CRIMINAL CODE

A. *The Structure of the Proposed Federal Offense*

In the operation of the Proposed Code, federal offenses have been restructured to de-emphasize the importance of the jurisdictional factor to the federal offense. The de-emphasis in jurisdiction has been carried out by separating the jurisdictional violation from the underlying offense and, as a corollary, by providing a per se rule that the existence of federal jurisdiction is not an element of the federal offense,[118] and thus not an issue of fact for the jury.[119] This treatment of jurisdiction departs from the historical pattern and would open the way for the federal government to assume a primary enforcement role over activities of local concern.

The separation of the jurisdictional element from the underlying offense departs from current laws that in general have been drafted to include the jurisdictional factor as an element of the federal offense.[120] The rationale for inclusion of a jurisdictional element in the definition of the crime is the recognition of the limited powers over crime granted the federal government under the Constitution.[121] Only in rare instances, such as with the federal loan shark statute, did Congress define criminal activity without providing for a jurisdictional basis as an element of the federal offense.[122]

The drafters of the Proposed Code believe, however, that "[n]othing has so distorted Federal criminal law as the legislative practice of defining Federal crimes in such a way as to make jurisdictional requirements an element of the offense. This confuses the conduct

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118. Proposed Code, *supra* note 2, § 201(c).

119. *Id.* tit. II, § 111 (o)(b)(1) (proposed FED. R. CRIM. P. 25. 1). Under this provision the judge will determine the existence of jurisdiction beyond a reasonable doubt.

120, *See* text accompanying notes 62-65 *supra.*

121. SENATE REPORT, *supra* note 3, at 29.

122. *See* text accompanying notes 99-104 *supra.*

proscribed with the Federal power to prohibit the conduct."[123] Thus, the drafters have divorced the question of what constitutes criminal conduct from the question of what criminal behavior triggers federal jurisdiction.[124] The architects of the reform bill have defined federal offenses only in terms prohibiting the objectionable activity. They have separated the jurisdictional violation from the elements of the underlying offense, detailing separately, in the jurisdictional subsection of the offense, the circumstances that give rise to federal jurisdiction.[125] Thus, for example, the current robbery laws[126] have been restructured as follows:

§ 1721. Robbery

(a) OFFENSE.—A person is guilty of an offense if he takes property of another from the person or presence of another by force and violence, or by threatening or placing another person in fear that any person will imminently be subjected to bodily injury.

(b) GRADING.—An offense described in this section is a Class C felony.

(c) JURISDICTION.—There is federal jurisdiction over an offense described in this section if:

(1) the offense is committed within the special jurisdiction of the United States;

(2) the property is owned by, or is under the care, custody, or control of, the United States; is being produced, manufactured, constructed, or stored for the United States; or is subject to a security interest held by the United States;

(3) the property is owned by, or is under the care, custody, or control of, a national credit institution;

(4) the property is mail;

(5) the offense in any way or degree affects, delays, or obstructs interstate or foreign commerce or the movement of an article or commodity in interstate or foreign commerce;

(6) the property is moving in interstate or foreign commerce, constitutes or is a part of an interstate or foreign shipment, or is in a pipeline system that extends across a state or United States boundary or in a storage facility of such a system;

(7) movement of a person across a state or United States boundary occurs in the planning, promotion, management, execution, consummation, or concealment of the offense, or in the distribution of the proceeds of the offense;

(8) the offense is committed against:

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123. SENATE REPORT, *supra* note 3, at 5.

124. *Id.* at 7.

125. *Id.* at 30. This approach improves on the more controversial approach taken in earlier versions of the Proposed Code. Under the alternative suggested previously by the National Commission on Reform of Federal Criminal Laws, "the jurisdictional subsection [included] a cross reference to one or more of several generally stated jurisdictional concepts appearing elsewhere in the Code." *Id.* at 31. *See* FINAL REPORT, *supra* note 1; Proposed Code, *supra* note 2, § 201. For criticism of the National Commission's approach see Clark, *Prologue*, 68 NW. L. REV. 817, 817-25 (1973); Levine, *The Proposed New Federal Criminal Code: A Constitutional and Jurisdictional Analysis*, 39 BROOKLYN L. REV. 1 (1972); SENATE REPORT, *supra* note 3, at 31-33.

126. 18 U.S.C. §§ 1153, 1652, 1661, 1951, 2111-2114 (1976).

(A) a foreign dignitary, or a member of his immediate family, who is in the United States;

(B) a foreign official who is in the United States on official business, or a member of his immediate family who is in the United States in connection with the visit of such official;

(C) an official guest of the United States, or

(D) an internationally protected person; or

(9) the property is a controlled substance, consisting of a narcotic, amphetamine, or barbituate, that is listed in Schedules I through IV established by section 202 of the Controlled Substances Act (21 U.S.C. 812) and that has value in excess of $500; the offense consists of a robbery of a pharmacy; and the offense is part of a pattern of such robberies in the locality.[127]

The drafters attempt to rationalize this restructuring of current law by stating that "[j]urisdiction is not an element of an offense . . . because jurisdiction goes only to the power of a government to prosecute. Whether or not it is proper for the federal government to prosecute is a separate question from whether or not the defendant has done something criminal."[128] This explanation, however, fails to justify the proposed per se rule, for historically the question has been whether the defendant's criminal conduct violated a federal interest. The federal government's constitutional power to punish crime is as dependent as ever on the existence of a jurisdictional nexus between the proscribed conduct and an enumerated federal legislative power. In many instances, establishing the jurisdictional nexus will involve establishing facts at trial just as susceptible to offers of conflicting evidence as the underlying elements of an offense. By this restructuring, the drafters of the Proposed Code have taken the resolution of these disputed issues of fact from the jury's province of determining them beyond a reasonable doubt.[129] This is a most serious deviation from current federal criminal practice and could have major ramifications in the federal government's ability to successfully move against an expanded area of criminal activity. Such a change deserves more of a justification than "jurisdiction goes only to the power of the government to prosecute."

Moreover, despite the restructuring, only the jurisdictional factor

127. Proposed Code, *supra* note 2, § 1721.

128. FINAL REPORT, *supra* note 1, at 4, *quoted in* SENATE REPORT, *supra* note 3, at 40.

129. The existence of jurisdiction is an issue for the judge and must be proven beyond a reasonable doubt. Proposed Code, *supra* note 2, tit. II, § 111(o)(b)(1). This, however, could often involve resolution of issues of fact usually left to the jury in a criminal trial. For example, the proposed theft offense provides in part that there will be federal jurisdiction over theft if the property involved has a value of $5,000 or more, and is moved across a state or United States boundary in the commission of the offense. Proposed Code, *supra* note 2, § 1731(c)(9). Whether stolen property has a value of $5,000 could involve hotly disputed valuation and evidentiary problems. Furthermore, whether the property was moved across state lines during the commission of an offense is a question of fact that could turn on conflicting proof of when and if the property was moved.

continues to distinguish the federal offense from analogous state law provisions dealing with the same conduct. The greater ease that federal prosecutors will have in asserting federal jurisdiction will tend to blur this distinction between federal and state criminal legislation. Principles of federalism would seem to dictate that the drafters of federal criminal law reform give more consideration to the state interests and not concentrate solely on whether the federal government might have the power to prosecute. Because of these considerations, a federal defendant should not, as a per se rule, be denied a jury determination beyond a reasonable doubt of what may prove to be the crucial element in a federal prosecution.

B. *Expansion in the Jurisdictional Bases*

A more serious departure from the historical pattern of federal criminal legislation is that in the process of restructuring offenses the drafters of the Proposed Code have also expanded jurisdictional bases in many instances, thereby in effect creating new federal laws dealing with crime. The expansion in many instances is so great that it would place the federal government in a position to assume a primary enforcement role in matters of purely local concern. Unlike the circumstances surrounding the piecemeal development of federal criminal law in the past, there has been no current demonstration of the need for this expansion. I have designed the following hypothetical situations to illustrate some of the expansion in the jurisdictional bases under the Proposed Code.

1. *Use of a Facility of Interstate Commerce*

A. *X*, a prostitute, works during the evenings out of a local hotel-bar in Columbus, Ohio. Each morning she uses a pay phone to call *Y*, her pimp, in order to account for her night's business and arrange delivery of the proceeds to him. There would be federal jurisdiction over *Y*'s activity, and *Y* would be guilty of a federal offense.[130]

B. *A*, who operates a corner adult bookstore in Miami, Florida, is indicted by a federal grand jury for displaying and distributing for profit obscene material.[131] *A* obtains the material from *B*, who operates a warehouse in Miami. *B* is also indicted. Because *A* places his orders for books with *B* over the telephone, federal jurisdiction would exist over the offense of disseminating obscene material.[132]

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130. Under the Proposed Code, a person is guilty of conducting a prostitution business if "he owns, controls, manages, supervises, directs, finances, procures patrons for, or recruits participants in, a prostitution business." *Id.* § 1843(a). A "prostitution business" means "a business in which a person controls, manages, supervises, or directs the prostitution of another person." *Id.* § 1843(b)(2). *X*, the prostitute, may be criminally liable as an accomplice. *Id.* § 401.

131. For the definition of obscene material see *id.* § 1842(b)(5).

132. *Id.* § 1842(f)(2).

Neither of these activities constitutes federal offenses under current law, and it is doubtful that there is a need for federal intervention in these areas. The Proposed Code brings the federal system into play in the first situation, however, by providing for federal jurisdiction over conducting a prostitution business if "the United States mail or a facility of interstate or foreign commerce is used in the planning, promotion, management, execution, consummation, or concealment of the offense, or in the distribution of the proceeds of the offense."[133] Similarly, federal jurisdiction arises over the dissemination of obscene material if a facility of interstate commerce is used.[134] In both of these hypothetical situations, intrastate use of a facility of interstate commerce (the telephone) would constitute a violation of a federal interest under the current interpretation of this jurisdictional language.[135] Thus, this language, as applied in the Proposed Code, subjects to federal prosecution many offenses that have always been considered local in nature.

Such an insignificant demonstration of a federal interest (the mere use of a telephone) is in sharp contrast to generally prevailing federal criminal jurisdictional principles, such as the principles developed under the Anti-Extortion Act, in which courts have held that to be proscribed, a threat must cross state lines, and that the mere use of a telephone is not enough to bring the federal system into play.[136] The new provision, which is also present in the proposed extortion,[137] blackmail,[138] and gambling sections,[139] finds it genesis in the Travel Act,[140] but it is an expansion from the current interpretation, which prohibits traveling or using a facility *in* interstate or foreign commerce in furtherance of unlawful activities such as gambling or prostitution.[141] By expanding upon the current understanding of "facilities of interstate commerce," the drafters of the Proposed Code have asserted federal jurisdiction over areas that have traditionally been matters of local concern and in which there is no demonstrated need for federal substantive regulation.

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133. *Id.* § 1843(e)(2).

134. *Id.* § 1842(f)(2).

135. *See* Myzel v. Fields, 386 F.2d 718, 727-28 (8th Cir. 1967) (interpreting a jurisdictional provision of the Securities Exchange Act of 1934, 15 U.S.C. § 78(j) (1976)), *cert. denied*, 390 U.S. 951 (1968). The use of the jurisdictional language of the Securities Exchange Act of 1934 seems particularly misplaced when applied to such minor, local criminal offenses as prostitution and gambling, offenses that are readily prosecuted under local law and that do not involve interstate activity.

136. *See* United States v. Oxendine, 531 F.2d 957 (9th Cir. 1976); United States v. Feudale, 271 F. Supp. 115 (D.C. Conn. 1967).

137. Proposed Code, *supra* note 2, § 1722(d)(2).

138. *Id.* § 1723(d)(1).

139. *Id.* § 1841(f)(2)(A). It is a defense to the proposed "engaging in a gambling business" offense that the gambling activity was legal in all states and localities in which it was carried on. *Id.* § 1841(c)(1).

140. 18 U.S.C. § 1952 (1976).

141. *Id. See* Rewis v. United States, 401 U.S. 808 (1971); United States v. Altobella, 442 F.2d 310, 315 (7th Cir. 1971).

2. *Movement Across State Lines*

> *Y*, a resident of Chicago, Illinois, participates in a public rally protesting alleged racial discrimination in the hiring policies of the Chicago police department. The rally takes place near the steps of the police station. *Z*, a friend of *Y's* who is active in civil rights matters, comes from Detroit, Michigan to Chicago to participate in the rally. In the course of the demonstration, *Y* is directly responsible for the destruction of street lights outside the station and for the breakage of windows in the building itself. *Y* would be guilty of the federal offense of property destruction,[142] and possibly of aggravated property destruction.[143]

The expansion in federal jurisdiction to reach this hypothetical situation is based on the "movement of a person [*Z*] across a state or United States boundary . . . in the planning, promotion, management, execution, [or] consummation . . . of the offense."[144] The current law, however, is confined to the movement of the offender (*Y*) across state lines,[145] but the travel base in the Proposed Code includes the interstate movement of *any* person in connection with the offense.[146] Moreover, new federal crimes have been created in connection with this jurisdictional base, for the crimes of property destruction or aggravated property destruction in the hypothetical situation are not federal offenses under the current law.[147] Thus, in this particular hypothetical situation jurisdictional expansion has been accompanied by expansion in the coverage of the substantive federal criminal law dealing with offenses involving property. The increased mobility of American society together with the expansive reach of this jurisdictional base would subject many persons to possible federal prosecution for crimes against property lying solely within a state's boundaries, an area that has always been viewed as a matter of local concern. This proposed jurisdictional provision regarding movement of any person across state lines in connection with the offense has also been inserted in the proposed robbery,[148] extortion,[149] blackmail,[150] gambling,[151] and prostitution[152] offenses.

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142. Proposed Code, *supra* note 2, § 1703.

143. *Id.* § 1702.

144. *Id.* § 1701(c)(9).

145. *See* 18 U.S.C. § 1952 (1976).

146. SENATE REPORT, *supra* note 3, at 594 n.25.

147. The only property offense reached under the current Travel Act is arson. *See* 18 U.S.C. § 1952 (1976).

148. Proposed Code, *supra* note 2, § 1721(c)(7). The provision also reaches travel across a state or United States boundary in the concealment of the offense or in the distribution of the proceeds of the offense.

149. *Id.* § 1722(d)(1).

150. *Id.* § 1723(d)(1).

151. *Id.* § 1841(f)(2)(B).

152. *Id.* § 1843(e)(3).

3. *The Offense Affects Interstate Commerce*

Y holds up at gunpoint a department store in Rutland, Vermont. The store is one of a chain of national department stores and receives most of its merchandise from outside Vermont. There would be federal jurisdiction over this robbery, which would be deemed to have obstructed interstate commerce.[153]

Federal jurisdiction exists over robbery if "the offense in any way or degree affects, delays, or obstructs interstate or foreign commerce or the movement of an article or commodity in interstate or foreign commerce."[154] In light of the recent decision in *United States v. Culbert*,[155] this provision probably represents no change in the scope of federal power over local robbery. The provision, however, has been extended under the Proposed Code to reach blackmail.[156]

4. *Piggyback Jurisdiction*

A. In the course of the robbery of a department store a cashier is shot by the robber and dies from the resulting wounds. There would be federal jurisdiction over the robbery[157] and the federal felony murder offense[158] through the technique of piggyback jurisdiction.[159]

B. *Y* and *Z* plan to rob a truck that is transporting copper between Pittsburgh and Saint Louis. At a truck stop outside of Wheeling, West Virginia the robbery plan is executed, but in a shoot-out the truck driver is severely wounded and dies from his injuries. *Y* and *Z* are apprehended at the truck stop by West Virginia State Police. There would be federal jurisdiction over the attempted robbery,[160] the conspiracy to commit robbery,[161] and the felony murder of the truck driver.[162]

These hypothetical situations demonstrate the expanded use of ancillary or piggyback jurisdiction, which is a drafting technique providing for jurisdiction over state law crimes "committed in association with Federal offenses."[163] The piggyback offense, normally punishable solely under state law, becomes a separate federal offense that may be charged and punished by the federal government, as well as by the state, when it occurs during the commission of an offense over which

153. *Id.* § 1721(c)(5).

154. *Id.* In order to satisfy the language of the statute, the effect on interstate commerce need only be to a minimal degree. United States v. Shackelford, 494 F.2d 67, 75 (9th Cir.), *cert. denied*, 417 U.S. 934 (1974).

155. 98 S. Ct. 1112 (1978).

156. Proposed Code, *supra* note 2, § 1723(d)(1).

157. *Id.* § 1721(c)(5).

158. *Id.* § 1601(a)(3).

159. *Id.* § 1601(e)(4).

160. *Id.* § 1721(c)(6). ("the property is moving in interstate or foreign commerce [or] constitutes or is a part of an interstate or foreign shipment").

161. *Id.* § 1002(f)(2).

162. *Id.* § 1601(e)(4).

163. SENATE REPORT, *supra* note 3, at 29.

federal jurisdiction exists. There are approximately three hundred such combinations of piggyback offenses under the Proposed Code, and nearly all of these represent expansions in jurisdiction.[164] This expansion would indicate a federal intent to assume primary responsibility for prosecuting "the more important common-law offenses . . . that are most likely to be encountered in the commission of the particular Federal offenses involved."[165] In contrast with the historical growth of federal criminal jurisdiction, however, this proposed expansion of federal power does not have the justification of being directed at national problems unsolvable by the state enforcement authorities.

5. *Dual State and Federal Prosecutions*

> *X* is prosecuted for larceny under state law for allegedly appropriating property that is moving in interstate commerce, but the jury acquits *X* on the merits of the case. The federal government may nonetheless prosecute *X* for the very same act under the proposed federal theft statute.[166]

This situation demonstrates an overturning of part of the current Larceny Act,[167] which provides that "[a] judgment of conviction or acquittal on the merits under the laws of any State shall be a bar to any prosecution under this section for the same act or acts."[168] The Proposed Code in general intends to allow independent prosecutions of a defendant for the same conduct by different sovereignties (by a state and by the United States),[169] and double jeopardy problems are "left to existing law and prosecutive policies."[170]

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164. *Id.* at 35. The Proposed Code's treatment of piggyback jurisdiction is less expansive than the broad approach of the proposals of the National Commission. *See* FINAL REPORT, *supra* note 1, § 201(b). The National Commission's approach would have resulted in more than 7500 piggyback combinations. SENATE REPORT, *supra* note 3, at 35.

165. *Id.*

166. Proposed Code, *supra* note 2, § 1731(c)(8).

167. 18 U.S.C. § 2117 (1976).

168. *Id.* *See* text accompanying notes 48-54 *supra.*

169. SENATE REPORT, *supra* note 3, at 51. Under current law a federal prosecution does not bar a subsequent state prosecution of the same person for the same acts, and a state prosecution does not bar a federal one. Bartkus v. Illinois, 359 U.S. 121 (1959); Abbate v. United States, 359 U.S. 187 (1959); United States v. Lanza, 260 U.S. 377 (1922). *Cf.* United States v. Wheeler, 98 S. Ct. 1079 (1978) (double jeopardy clause of the fifth amendment does not bar the prosecution of an Indian in a federal district court under the Major Crimes Act, 18 U.S.C. § 1153 (1976), when he has previously been convicted in a tribal court of a lesser included offense arising out of the same incident). The basis for this doctrine is that each government is deemed to have the right to punish conduct offensive to its sovereignty. *See* Moore v. Illinois, 55 U.S. (14 How.) 13, 20 (1852), Fox v. Ohio, 46 U.S. (5 How.) 410 (1847). With increased federal jurisdiction, however, there are many more possible situations in which a defendant will be subject to both state and federal prosecutions. Such overlapping jurisdiction is perhaps not sensitive enough to the limited prosecutorial resources of each sovereignty.

170. SENATE REPORT, *supra* note 3, at 51 n.112. *See* Petite v. United States, 361 U.S. 529 (1960). Under the *Petite* policy, the Justice Department has taken a general position against duplicating federal-state prosecutions. *See, e.g.*, Rinaldi v. United States, 98 S. Ct. 81 (1977).

CONCLUSION

The drafters of the Proposed Code proceeded on the assumption that as a result of the historical development of federal criminal jurisdiction, "the scope of Federal law-making powers *vis-a-vis* those of the States is [now] well defined."[171] Historically, however, the scope of federal law-making power developed on an offense-by-offense basis. In nearly every instance the enactment of federal criminal legislation was in response to a perceived need for federal action in the fight against crime, and the legislation was generally aimed at problems of national dimensions. The Proposed Code departs from this historical pattern. It contains expansions of jurisdictional concepts that developed piecemeal over the years, but it does this in the absence of any perceived or articulated need for expansion. The drafters have not attempted to qualify jurisdictional language so that it could apply only to circumstances in which a substantial federal interest is at stake or in which state enforcement authorities are unable to enforce the law. Thus, new and broader jurisdictional bases for a number of crimes have been proposed. Finally, to facilitate federal jurisdictional expansion over crime the Proposed Code presents a conceptual restructuring of the federal jurisdictional element within the framework of the federal offense. Together, these changes suggest that the Proposed Code addresses itself to problems of local, not national, concern and thus would have an enormous impact on the future course of criminal law.

The recent reaction of the Subcommittee on Criminal Justice of the House Committee on the Judiciary[172] indicates that concepts of federalism retain strength in Congress. The idea of reform and consolidation of federal criminal law retains validity, but such reform must be based on the lessons derived from the history of the development of federal criminal jurisdiction. Thus, there should be federal prohibition of those criminal activities that directly impinge on a federal interest or that demand a national solution. On matters of local concern, however, the federal government should defer to the traditional power of the states.

Richard H. Brody

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171. SENATE REPORT, *supra* note 3, at 27.

172. *See* note 4 *supra*.