Time for a Twenty-First-Century Justice Department

SAMUEL W. BUELL*

Associate Professor, Washington University School of Law, St. Louis, Missouri

Among its many costs, September 11, 2001, stunted the development of federal government policy in ways that, hard as it is to believe, are still underappreciated. Consider the United States Department of Justice, specifically its criminal enforcement mission. We have been distracted from—or perhaps inexcusably have lacked interest in having—a critically important conversation about the future of this mission.

Having quite deliberately, and in many cases for good reason, created in the criminal jurisdiction of our federal courts the most powerful tools available to any domestic actor, we have failed to discuss explicitly how these tools ought to be used. And, most urgently, we have not thought carefully about how to design executive branch institutions to give law enforcement officials the proper incentives to use those tools for good rather than ill.

Many of the innovative devices of modern federal law enforcement—things like the Title III scheme for electronic surveillance, the RICO statutes, flexible procedural and evidentiary rules surrounding conspiracy liability, enhanced penalties for weapons offenses connected to narcotics and violent crimes, money laundering crimes, and so on—have been success stories to the extent they have assisted society in keeping pace with the most threatening and dangerous actors bent on imposing harm on others.

The problems these laws present are ones of overbreadth: how to manage legal space within which enforcers may use these laws to sanction individuals who do not deserve serious sanction or persons whose behaviors are not sufficiently harmful to justify costly deterrence efforts. The conversation we need to have about these laws, and about the institutions through which they are enforced, is not a conversation about repealing or expanding them so much as a conversation about how to use them. However good the policy justifications for creating these laws, we have made the contemporary federal prosecutor a kid in a candy store. Most do not act like children, of course. But we have not even tried to create incentives that would steer enforcement actors toward relatively fewer and more labor-intensive cases involving sophisticated and threatening criminal actors and away from high-volume cases involving low-level criminal actors for whom the powerful tools of federal law enforcement are unnecessary and often terribly costly overkill.

Between roughly 1970 and 2000, the institution of federal criminal justice passed through a sea change. Prior to 1970 (and perhaps leaving aside Prohibition's early-twentieth-century detour), the federal prosecutor's office was a small social institution that mostly affected specialized areas of government concern like the post office and occasionally, though with limited effects, a handful of high-profile problems like the Mafia. By 2000, it was a major regulatory bureaucracy that had produced the largest prison population in the United States and reached into nearly every area of pressing social concern, ranging from regulation of corporate managers in vast financial markets to the control of people and contraband, and associated harmful activities, flowing into the United States from abroad.

This transformation was no accident. Congress, the executive branch, and the courts all deliberately facilitated the change, primarily in four ways: rapid expansion, in both quantity and breadth, of substantive federal crimes; a massive, innovative project to impose determinate and equality-based sentencing, the United States Sentencing Guidelines; dramatic growth in the size and resources of the federal criminal bureaucracy, especially the numbers of federal agents, prosecutors, judges, courthouses, and prisons; and, with somewhat less impact, rejection in the period after the Warren Court of opportunities to limit police and prosecutorial powers through rules of criminal procedure, constitutional and otherwise. The political economy of crime in the United States generated demand for legal and institutional change in the federal government and this demand was answered, if not sated.

By the end of the 1990s, consumer's remorse began to creep into the system, at least among academics and some judges. Regret manifested itself in sharp criticism, and a slight retrenching move or two in the judiciary, in the areas of determinate sentencing and expanded liability rules. A growing chorus of critics blamed synergies between broad and redundant liability rules and ever more severe and less flexible sentencing guidelines for producing a regime that made it far too easy for prosecutors to use charging and plea bargaining practices to obtain guilty

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pleas in too high a proportion of cases to, on average, too high terms of imprisonment. Serious questions were arising about the overall size of the federal prison population and the relative dangerousness and culpability of many members of that population. Then came September 11.

The beginning of the George W. Bush administration would have been an opportune time for an assessment of the costs and benefits of the great explosion in federal criminal law of the end of the last century and for a discussion about the role of federal criminal justice in the new century. That discussion, although it had been gaining momentum in the academy and the courts, never reached the legislature or executive. Perhaps it never would have, from lack of political will. But September 11 ensured that it did not, by placing nearly the entire federal government in reactive and defensive modes of thinking from which it has not been dislodged. Not only did global affairs push domestic crime control, among many other matters, off the national policy agenda but much of the law enforcement bureaucracy was diverted to an ill-defined mission of preventing terrorist attacks for which it was poorly equipped and to which it struggled to adapt. Ironically, the consensus on September 12 that "everything is forever different" has been a major impediment to reformative thinking about crime control.

Should a new administration wish to cast fresh eyes on the role of federal criminal justice in twenty-first-century America, here are three questions it should ask itself. First, what if anything happened during those transformative three decades at the end of the last century that was an innovation of genuine social value? Though critics do not often acknowledge the gains, there was much to like in the performance of federal criminal justice in the period from 1970 to 2000. Coupling of enforcement resources with innovative legal tools like the RICO statutes produced historic gains that have crippled if not destroyed core organized crime as we knew it. Although international alien smuggling and drug trafficking networks are seemingly ineradicable, money laundering enforcement and conspiracy prosecutions, and extraterritorial reach of federal criminal law and its enforcement, have hampered their ability to operate with impunity across the globe. The law's deterrent arsenal against sophisticated, large-scale corporate fraud is now bolstered by a highly credible threat of effective prosecution and serious punishment that used to be practically nonexistent. Some of the reduction in homicide rates in major urban areas of the past fifteen years is undoubtedly attributable to the innovation of prosecuting the most violent gang leaders in federal court, using tools previously reserved for traditional organized crime.

These are a few among what can legitimately be claimed as victories. Crime conducted for profit, like any industry, evolves and grows more sophisticated. This is true whether such pursuits involve fraud, narcotics trafficking, robbery, gambling rackets, corruption in government, laundering of the criminal profits of others, or any number of other pursuits of the criminal entrepreneur. Federal court has been the primary venue in which the law—created, adapted, and given enforcement resources by members of Congress, federal prosecutors, and federal judges—has kept pace with these developments.

Second, what unwanted social costs did these innovations produce? The principal problem with the federal criminal justice system is that it has grown vastly overbroad. In an effort to maintain legal tools that are state-of-the-art, legislators, prosecutors, and judges have created a regime that has the capacity to massively oversanction. Steep sentencing multipliers for crack cocaine and certain kinds of gun cases might be useful in leveraging testimony that brings down leaders of violent street gangs, but they permit draconian sentences to be imposed on the low-level cocaine possessor or the petty criminal with a record who happens to possess a handgun, often with racially discriminatory impacts.

A broad money laundering statute can help the law reach the financier whose knowledge about the specifics of underlying criminal activity might be tough to prove, but it also risks allowing prosecution of relatively unwitting people who engage in downstream commercial transactions that happen to involve criminal proceeds. RICO's conspiracy provision might make it easier to reach mob bosses who keep themselves distant from criminal acts by delegating tasks to underlings, but it can also lead to serious federal prosecution of a government executive who did not do enough to prevent some graft in her administration. Overbreadth problems like this arise in virtually every area of substantive and procedural federal criminal law that is implicated in the pursuit of sophisticated and difficult-to-prosecute criminal activity.

Third, what could be done to salvage the benefits of a transformed federal law enforcement bureaucracy while working to eliminate its costly by-products? One approach would be to continue to rely on the informal compromises that have guided the system to this point. On the whole, federal prosecutors have exercised restraint in reserving the potent legal tools they possess for the kinds of serious cases for which such tools are genuinely necessary. On the whole, Congress has been willing to grant broad tools to the executive branch on the understanding that such powers will not be abused. On the whole, the federal judiciary has refrained from sharply curtailing executive branch powers in the belief that the Justice Department sees itself as a responsible public institution and not simply a litigant that should push every advantage to its logical limit.

But these compromises seem more unsteady as the federal criminal justice bureaucracy, especially its prison population, continues to mushroom and as the executive branch, in recent years, pursues legal positions that depart from preexisting norms. It is high time that federal policy makers asked themselves much more self-consciously what should be done to ensure that federal enforcement is channeled toward the acute problems for which its awesome powers are uniquely suited and away from wasteful

oversanctioning of relatively unthreatening actors and behaviors.

Bureaucracies, after all, can be expected to behave like bureaucracies the larger and more entrenched they grow. Lack of enforceable legal controls and the iron tendency of bureaucrats to stray from their public missions and behave in a lazy or self-interested manner are certain to produce greater problems in the future. It is deeply concerning that in the short span from 1989 to 2003 the number of assistant United States attorneys more than doubled and the number of federal prisoners more than tripled.[1] If the purpose of federal court, at least where its jurisdiction largely duplicates state criminal jurisdiction, is to deal with the toughest of problems, do we really need such a big institution? The Justice Department ought to look seriously at shrinking the size of the federal criminal justice bureaucracy, while evaluating its performance with qualitative measures that deny significance to the numbers of prosecutors, prosecutions, prisoners, or prisoner years that the system produces. Powerful legal tools need not be dismantled in order to ensure that they are not used in the wrong kinds of cases.

The United States Department of Justice is a uniquely valuable domestic institution. After a period of stunning ascendancy at the end of the last century, the institution has faltered—perhaps as much from strategic neglect as from deliberate diversion of its mission in service of political and foreign policy objectives that most Americans have concluded were misguided. A twenty-first-century executive branch should set as a priority thoughtful consideration of how to confine the powerful tools of federal criminal enforcement to the pressing social harms that justify their existence.

Notes

* E-mail: swbuell@wulaw.wustl.edu. From 1994 to 2004, the author served as a federal prosecutor in New York, New York; Boston, Massachusetts; Washington, D.C.; and Houston, Texas. He twice received the Attorney General's Award for Exceptional Service, which is the U.S. Department of Justice's highest honor.

1 *See* U.S. Dep't of Justice, Bureau of Justice Statistics, Sourcebook of Criminal Justice Statistics tbl. 6.53 (Timothy J. Flanagan & Kathleen Maguire eds., 2004); U.S. Dep't of Justice, Bureau of Justice Statistics, Sourcebook of Criminal Justice Statistics tbl. 1.79 (Ann L. Pastore & Kathleen Maguire eds., 2003); U.S. Dep't of Justice, Bureau of Justice Statistics, Sourcebook of Criminal Justice Statistics tbl. 6.57 (Timothy J. Flanagan & Kathleen Maguire eds., 1990); Admin. Office of U.S. Cts., Ann. Rpt. of Dir., Jud. Bus. of U.S. Cts. tbl. D-2 (1992).