

“20 Years Later: The Federalization of State Crimes, 18 U.S.C. § 2422(b),
and the Prosecution of Jeffrey Epstein”

I. Introduction

In 1996, 18 U.S.C. § 2422(b) was added to the Mann Act as part of the Telecommunications Act of 1996. The enactment of § 2422(b) was part of an unprecedented expansion of federal crimes, which began in 1980 and extended to the mid-1990’s.¹ Because the creation and prosecution of crimes were historically under the control of state and local governments² and because the new federal statutes were largely duplicative of state statutes³, the legislation was the subject of extensive criticism and consequent debate among academics, prosecutors, and judges.⁴

Twenty years having passed since the adoption of § 2422(b), an analysis is now possible of whether the consequences anticipated by certain commentators with respect to the expansion of federal crimes—specifically the erosion of state and local sovereignty and the violation of civil liberties—have materialized. This article approaches this inquiry through an examination

¹ Greg Hollon, *After the Federalization Binge: A Civil Liberties Hangover*, 31 Harv. C.R.-C.L. L. Rev. 499 (1996); Jamie S. Gorelick & Harry Litman, *Prosecutorial Discretion and the Federalization Debate*, 46 Hastings L. Journal 967 (1995); Stephen Chippendale, Note, *More Harm Than Good Assessing Federalization of Criminal Law*, 79 Minn. L. Rev. 455, 455-57 (1994).

² Stephen Chippendale, *More Harm Than Good Assessing Federalization of Criminal Law*, 79 Minn. L. Rev. 455, 457-58 (1994); Roger J. Miner, *Federal Courts, Federal Crimes, and Federalism*, 10 Harv. J. L. & Pub. Policy 117, 118-120 (1987).

³ See Stephen Chippendale, *More Harm Than Good Assessing Federalization of Criminal Law*” 79 Minn. L. Rev. 455, 463 (1994) (“Freed by *Perez* from the fetters of the Commerce Clause, Congress has increasingly federalized criminal offenses that were historically regarded as within the domain of the states.”); Susan N. Herman, *Double Jeopardy All Over Again: Dual Sovereignty, Rodney King, and the ACLU*, 41 UCLA L. Rev. 609, 629 (1994) (discussing the “increasingly substantial overlap between state and federal crime”).

⁴ See *Symposium: Rethinking Federal Criminal Laws*, 1 Buff. Crim. L. Rev. 1 (1997); *Symposium: Federalism and the Criminal Justice System*, 98 W. Va. L. Rev. 757 (1996); *Symposium: The Federal Role in Criminal Law*, 543 Annals Am. Acad. Pol. & Soc. Sci. 15 (1996); *Symposium: Federalization of Crime: The Roles of the Federal and State Governments in the Criminal Justice System*, 46 Hastings L. Journal 965 (1995); Stephen Chippendale, *More Harm Than Good Assessing Federalization of Criminal Law*, 79 Minn. L. Rev. 455 (1994).

of 18 U.S.C. § 2422(b) and its application in an individual case, the prosecution of Jeffrey Epstein.

- II. The Expansion of Federal Crimes: Congressional Legislation from 1980 Through the Enactment of 18 U.S.C. § 2422(b)
 - A. Summary of Criminal Statutes Adopted During the Period 1980-1996.
 - B. Legal⁵ and Political⁶ Context For the Expansion of Federal Crimes From 1980 to the Adoption of 18 U.S.C. § 2422(b).
 - C. Summary of Contemporaneous Criticism of the Federalization of State Crimes.

⁵ Greg Hollon, *After the Federalization Binge: A Civil Liberties Hangover*, 31 Harv. C.R.-C.L. L. Rev. 499 (1996) (“Relying primarily on an expansive reading of the Commerce Clause, Congress has criminalized a variety of activities traditionally considered to be purely state matters.”); Jamie S. Gorelick & Harry Litman, *Prosecutorial Discretion and the Federalization Debate*, 46 Hastings L. Journal 967, 968 (1995); Sanford Kadish, *Comment: The Folly of Overfederalization*, 46 Hastings L. Journal 1247, 1248 (1995) (“No one can doubt Congress’s virtual plenary authority over criminal matters as a consequence of the Supreme Court’s expansive interpretation of the Commerce Clause.”); Stephen Chippendale, *More Harm Than Good Assessing Federalization of Criminal Law*, 79 Minn. L. Rev. 455, 462-63 (1994) (attributing the federalization of crime to the expansion of the Commerce Clause under *Perez*).

⁶ Sara Sun Beale, *What’s Law Got To Do With It? The Political, Social, Psychological and Other Non-Legal Factors Influencing the Development of (Federal) Criminal Law*, 1 Buff. Crim. L. Rev. 23, 29 (1997) (“Why have these policies been adopted? The epithet ‘soft on crime’ is the contemporary equivalent of ‘soft on Communism.’ In the United States, politicians have learned that to win you need to convince the public that you are tough on crime.”); Greg Hollon, *After the Federalization Binge: A Civil Liberties Hangover*, 31 Harv. C.R.-C.L. L. Rev. 499, 499-500 (1996) (“The rapid expansion of federal criminal jurisdiction, fueled by politicians’ desire to appear increasingly tough on crime, has led to the enactment of more than 3000 federal criminal statutes.”); Sanford Kadish, *Comment: The Folly of Overfederalization*, 46 Hastings L. Journal 1247, 1249 (1995) (“Some dramatic crimes or series of crimes are given conspicuous media coverage, producing what is perceived, and often is, widespread public anxiety. Seeking to make political hay, some legislator proposes a new law to make this or that a major felony or to raise the penalty or otherwise tighten the screws. Since other legislators know well that no one can lose voter popularity for seeming to be tough on crime, the legislation sails through in a breeze. That the chances of the legislation working to reduce crime are exceedingly low, and in some cases the chances of it doing harm are very high, scarcely seems to be a relevant issue.”).

The federalization of criminal law was the subject of substantial contemporaneous criticism based upon: a) constriction of the authority of state and local governments⁷; b) violation of civil liberties, including the rights to due process and equal protection as well as the Sixth Amendment right to be informed of the nature and factual basis for criminal prosecutions⁸; and c) overloading the federal courts⁹.

⁷ Greg Hollon, *After the Federalization Binge: A Civil Liberties Hangover*, 31 Harv. C.R.-C.L. L. Rev. 499, 524 (1996); Sanford Kadish, *Comment: The Folly of Overfederalization*, 46 Hastings L. Journal 1247, 1251 (1995) (“the costs of the further spread of federal criminal law are substantial: not only is there the threat of the breakdown of our federal civil justice system to which our judicial and bar leaders have called attention, but also the needless compromise of the virtues of federalism, the waste of resources with duplicating systems doing much the same thing, and finally, the net increase and nationalization of knee-jerk legislation.”); Stephen Chippendale, *More Harm Than Good Assessing Federalization of Criminal Law*, 79 Minn. L. Rev. 455, 465 n.52 [q. contents of note] (1994); William W. Schwarzer & Russell R. Wheeler, *On the Federalization of the Administration of Civil and Criminal Justice*, 23 Stetson L. Rev. 651 (1994); Roger J. Miner, *Federal Courts, Federal Crimes, and Federalism*, 10 Harv. J. L. & Pub. Policy 117, 127 (1987) (contending that federalization of crimes has undermined “the traditions of democratic self-government and of individual involvement and neighborly concern that have been the hallmarks of our society. To invite federal authorities to define and prosecute crime involving activities primarily of state and local interest is to concede that state and local government cannot be moved to serve the will of the people.”).

⁸ Greg Hollon, *After the Federalization Binge: A Civil Liberties Hangover*, 31 Harv. C.R.-C.L. L. Rev. 499, 499-500, 501-510, 515-518 (1996).

⁹ Thomas M. Mengler, *The Sad Refrain of Tough on Crime: Some Thoughts on Saving the Federal Judiciary From the Federalization of State Crime*, 43 U. Kan. L. Rev. 503 (1995); Jamie S. Gorelick & Harry Litman, *Prosecutorial Discretion and the Federalization Debate*, 46 Hastings L. Journal 967, 968 (1995) (“proposals for the creation of new federal crimes have drawn fire on a number of grounds. Some claim that the continuing federalization of crime will swamp the federal courts with ‘local’ crimes, thereby preventing them from fulfilling a traditional role of adjudicating distinctively federal matters. Other critics believe that some of the recently enacted federal crimes inappropriately infringe on federalism interests by taking matters traditionally of local concern out of the hands of local officials. Still others believe that the new federal criminal laws are political gimmicks that will do nothing to address the nation’s real crime problems.”); Sanford Kadish, *Comment: The Folly of Overfederalization*, 46 Hastings L. Journal 1247, 1250-1251 (1995); Stephen Chippendale, *More Harm Than*

D. Legislative History and Enactment of 18 U.S.C. § 2422(b).

The intent of the legislators was to protect children from harm on the internet by “equip[ing] law enforcement with the tools necessary for combatting internet child predators.” *United States v. Cote*, 504 F.3d 682, 686 (7th Cir. 2007)¹⁰.

E. General Criticism of § 2422(b).

The statute has been criticized on the grounds of vagueness, namely that the ambiguity of the language threatens to criminalize speech which is constitutionally protected—for example, speech by a party that is far removed from any contact with a minor and only speaks with another adult. Korey J. Christensen, *Reforming Attempt Liability Under 18 U.S.C. S 2422(b): An Insubstantial Step Back from United States v. Rothenberg*, 61 Duke L.J. 693, 696 (2011); Andriy Pazuniak, *A Better Way to Stop Online Predators: Encouraging A More Appealing Approach to S 2422(b)*, 40 Seton Hall L. Rev. 691 (2010). Judge Posner of the Seventh Circuit has also warned that the statute’s broad language and prohibition of attempts could lead, absent a limiting interpretation, to criminalization of empty talk. *United States v. Gladish*, 536 F.3d 646, 648 (7th Cir. 2008).

Sec. 2422(b) has also been criticized on the grounds that it potentially imposes a 10 year sentence on a “john” for using the internet while merely crossing the border to engage in the same conduct has a much lower sentence. Heather C. Gregorio, *More Than “Johns,” Less Than Traffickers: In Search of Just and Proportional Sanctions for Buyers of Sex with Trafficking Victims*, 90 N.Y.U. L. Rev. 626, 663 (2015).

IV. Case Study: The Prosecution of Jeffrey Epstein

A. Background.

1. State Investigation and Criminal Process.
2. Federal Intervention in the State Process.
 - a. The Failure of Federal Prosecutors to Consult and Coordinate with State Authorities.

Good Assessing Federalization of Criminal Law, 79 Minn. L. Rev. 455, 466 (1994); Nancy Levit, *The Caseload Conundrum, Constitutional Restraint and the Manipulation of Jurisdiction*, 64 Notre Dame L. REV. 321, 323-27 (1989); Roger J. Miner, *Federal Courts, Federal Crimes, and Federalism*, 10 Harv. J. L. & Pub. Policy 117, 124 (1987).

¹⁰ See *United States v. Hite*, 769 F.3d 1154, 1603 (D.C. Cir. 2014).

- b. Misrepresentations and Concealments by Federal Prosecutors Regarding the Nature of the Alleged Victims and the Absence of Evidence to Support a Prosecution Under 18 U.S.C. § 2422(b).
- c. The Resulting Non-prosecution Agreement and the Forced Waiver of Rights Regarding Civil Suits.
- d. The State Plea Agreement and Misrepresentations Made to the Court Regarding the Factual Basis for the State Charges.

B. The Unprecedented Application of § 2422(b) to Jeffrey Epstein

- 1. The Federal Prosecution Was Contrary to the Language and Legislative Intent of § 2422(b).
 - a. Plain Language of 18 U.S.C. § 2422(b).

There was no communication in “interstate or foreign commerce” necessary to satisfy the text and case law under § 2422(b) and no evidence that a minor was persuaded, induced, enticed, or coerced to engage in unlawful sexual conduct.

- b. Legislative History of 18 U.S.C. § 2422(b).

The federal prosecution was contrary to the legislative history of § 2422(b), *supra*.

- c. The Novel Application of the Statute was Conceded by Federal Prosecutors.

- 2. The Prosecution Was Void for Vagueness.

The application of § 2422(b) in the circumstances surrounding Jeffrey Epstein rendered the statute unconstitutionally void for vagueness, criminalizing activity which is either not criminal under state law or is categorized as a misdemeanor.

- 3. The Wrongful Intervention of Federal Prosecutors.

The unprecedented intervention by federal prosecutors violated the authority of state and local governments, overthrowing principles of comity, contravening the “clear statement rule” as well as the *Petite* Policy, and undermining a comprehensive state investigation and resolution of the case. As a result of the unwarranted interference of federal prosecutors, the sentence was out of line with any state sentence that had been imposed under similar circumstances.

- C. Prosecutorial Misrepresentations and Concealments Regarding the Factual Predicate Underlying the Plea Pursuant to § 2422(b) Violated the Sixth

Amendment Right to be Informed of Criminal Charges¹¹ as well as the Fifth Amendment Right to Due Process¹².

1. Federal Prosecutors Knowingly Misled Epstein and the Courts.

Federal prosecutors failed to disclose to Epstein and the courts the absence of a factual predicate for a prosecution and plea under § 2422(b)—*i.e.*, the absence of any alleged victim whose testimony would satisfy the elements of § 2422(b). Such prosecutorial misconduct violates the Sixth Amendment rights of Jeffrey Epstein as well as his right to procedural due process under the Fifth Amendment.

2. Improper Federal Intervention.

Federal prosecutors intervened in the state process for the unlawful purpose of enhancing Epstein's sentence and conferring financial benefits on those personally connected to the prosecutors who initiated and conducted the investigation.

D. Conditioning a Plea Agreement on the Waiver of the Right to Contest Civil Liability and Compensatory Damages Violates the Constitutional Right to Civil Due Process.

1. The Concept of Civil Due Process Under the Constitution.

2. The Unconstitutional Conditions of the Non-Prosecution Agreement.

¹¹ See, *e.g.*, Roger J. Miner, *Federal Courts, Federal Crimes, and Federalism*, 10 HARV. J. L. & PUB. POLICY 117, 122 (1987) (“the expanded interpretation of mail fraud implicates the Sixth Amendment right to be informed of the nature and cause of the accusation”). Sixth Amendment: “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.”

¹² H. Mitchell Caldwell, *The Prosecutor Prince: Misconduct, Accountability, and a Modest Proposal*, 63 CATHOLIC UNIV. L. REV. 57, 62 (2013) (“charging a greater offense than the defendant’s conduct warrants” is a form of prosecutorial misconduct because “defendants may plead to charges beyond their level of culpability”); Michael T. Fisher, *Harmless Error, Prosecutorial Misconduct, and Due Process: There's More to Due Process than the Bottom Line*, 88 COLUMBIA LAW REVIEW 1298 (1988).

The conditions set forth in the federal non-prosecution agreement rendered the agreement unconstitutional. *Robert Ward Cady v. County of Arenac*, Case Number 07-11369-BC, E.D. Michigan, Northern Division, April 15, 2008 (applying the test of *Town of Newton v. Rumery*, 480 U.S. 386 (1987)).

V. Conclusion