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Federalism, Federalization, and the Politics of Crime

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FEDERALISM, FEDERALIZATION, AND THE POLITICS OF CRIME

GERALD G. ASHDOWN*

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I. PROLOGUE

Any discussion of crime involves issues of power and social control, and any consideration of power, in the legal context, raises the question of jurisdiction. Jurisdiction over criminal enforcement has been, throughout the history of American law, primarily local. From colonial times onward, the problem of crime¹ has been understood as of immediate geographical concern. Even with societal expansion on this side of the Atlantic, the reasons for local prerogative and responsibility for dealing with antisocial behavior were rather straightforward.

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1. The concept of "crime" has obviously changed over time from blasphemy, fornication, and theft to murder, rape, robbery, and narcotics violations.

Outside of itinerant lawbreakers,² crime affects immediate interests (and even itinerant lawbreakers, when captured, usually have most recently affected local interests). Simplistically speaking, the harm — irrespective of whether there is a particular victim — is generally localized, and regardless of the theory or theories of criminal punishment one selects, the hoped-for benefits to be achieved are locally focused.

This was certainly the case in colonial times when communities were small and geographically separated, and it remains true today although on a somewhat broader geographical plane. The United States Constitution granted relatively little criminal law enforcement authority to the newly created federal government;³ the Tenth Amendment leaving the general police power and responsibility for criminal law enforcement in the hands of the states.⁴ To be sure, some criminal legislation was enacted by Congress during the early part of the nineteenth century,⁵ but it was not until mobility and vast resources led to geographic and economic expansion that federal influence began to be felt.

Much of this was born of necessity. States as geographic jurisdictional units could no longer handle or manage problems that crossed state boundaries. The impetus to federalize was economic, both to regulate the movement of commodities⁶ and to control economic power. The mechanism for federal economic regulation was, of course, the

2. The numbers of these folks increased with mobility and geographic expansion.

3. Article I, Section 8 gave Congress the power to punish counterfeiting, piracies, and offenses committed on federal property. U.S. CONST. art. I, § 8, cls. 6, 10, 17. Article III, Section 3 defined treason and granted Congress the power to declare the punishment therefore. U.S. CONST. art. III, § 3.

4. U.S. CONST. amend. X.

5. The first federal crime bill, the Crimes Act of 1790, addressed conduct affecting interests that were peculiarly federal, such as crimes committed on federal property or crimes outside the jurisdiction of any state, forgery of United States certificates or securities, perjury committed in federal court, treason, piracy, and violence against an ambassador. Into the nineteenth century, federal criminal legislation was minimal and again involved only exclusively federal interests, for example, theft by a bank employee from a federal bank, arson of a federal vessel, protection of the sanctity of the country's borders, and tax violations. See Kathleen F. Brickey, *Criminal Mischief: The Federalization of American Criminal Law*, 46 HASTINGS L.J. 1135, 1138-39 (1995).

6. For example, in 1884 Congress created the Bureau of Animal Industry under the Commissioner of Agriculture making it illegal for any railroad or boat company to transport any livestock infected with disease. Animal Industry Acts, ch. 60, 23 Stat. 31 (1884).

commerce power; the authority granted Congress by the Constitution “[t]o regulate Commerce . . . among the several States.”⁷ The early paradigm was the Sherman Antitrust Act, passed in 1890.⁸ Senator James K. Jones of Arkansas expressed the main sentiment when he argued that the steam engine and electricity had “well-nigh abolished time and distance” and that monopolies, so-called trusts, were “commercial monsters” that required the “iron hand of the [federal] law” to be “heavily” laid on in order to protect the “boasted liberty of the citizen.”⁹ The states were helpless. The power of the trusts had transcended their boundaries. Federal criminal legislation,¹⁰ with the Commerce Clause as its source, had to be brought to bear.

The tiger was now loose. Federal jurisdiction no longer had to be limited to peculiarly federal issues — counterfeiting, piracy, the governance and protection of federal property, and treason. Any activity affecting more than one state or crossing state boundaries was the legitimate subject of federal regulation. Early recognition and use of the commerce power to combat problems out of the reach of the individual states did not produce, however, an immediate rush to federalize criminal law. But with broad-based jurisdiction established, the pace began to quicken. The early twentieth century witnessed the first serious encroachment of Congress and federal law into activities traditionally controlled by, and within the control of, the states. It became a federal crime to engage in prostitution,¹¹ deal in stolen motor vehicles,¹² sell liquor,¹³ run lotteries,¹⁴ and to sell or possess narcotics.¹⁵ Kidnapping,¹⁶ interstate flight,¹⁷ transportation of stolen

7. U.S. CONST. art. I, § 8, cl. 3.

8. Sherman Anti-Trust Act, ch. 647, 26 Stat. 209 (1890).

9. 20 CONG. REC. 1457 (1889); *see also* LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 117 (1993).

10. The antitrust laws were (and are) criminal in form. *See* 15 U.S.C. §§ 1-2 (1994).

11. White-Slave Traffic (Mann) Act, ch. 395, 36 Stat. 825 (1910).

12. National Motor Vehicle Theft (Dyer) Act, ch. 89, 41 Stat. 324 (1919).

13. Volstead Act, ch. 85, 41 Stat. 305 (1919).

14. Anti-Lottery Act, ch. 908, 26 Stat. 465 (1890).

15. Harrison Narcotics Act, ch. 1, 38 Stat. 785 (1914); Narcotic Drugs Import and Export Act of 1922, ch. 202, 42 Stat. 596.

16. Lindbergh Kidnapping Act, ch. 271, 47 Stat. 326 (1932).

17. Fugitive Felon Act, ch. 301, 48 Stat. 301 (1934).

property,¹⁸ robbery and extortion¹⁹ all became federal offenses. Securities²⁰ and firearms²¹ were also made subject to federal regulation for the first time. Of course, the theory underlying the extension of the arm of federal law to these offenses was the mobility of crime and criminals, and each required the necessary interstate connection. Nevertheless, there was no overriding indication, like in the case of the early national trusts, that these activities were beyond the control of the states.

The Supreme Court validated the use of the Commerce Clause to federalize criminal conduct in two early twentieth century cases, *Champion v. Ames*²² and *Brooks v. United States*.²³ However, it was later that the ominous sweep of the commerce power was revealed. In 1968, Congress passed the extortionate credit transactions statutes²⁴ (loan sharking) which, along with other federal criminal legislation of that era,²⁵ was designed to deal with organized crime. These provisions criminalized the whole class of loan sharking activities even though a particular transaction might have no connection with interstate commerce. When this theory of commerce power jurisdiction reached the Supreme Court, the Court upheld application of the statute to wholly intrastate activity, concluding that the only question was whether the prohibited class of activities generally affected commerce. If so, then each incidence was within the reach of federal power even if entirely intrastate in nature.²⁶

18. National Stolen Property Act, ch. 333, 48 Stat. 794 (1934).

19. Hobbs Anti-Racketeering Act, ch. 569, 48 Stat. 929 (1934).

20. Securities Act of 1933, ch. 38, 48 Stat. 74; Securities Exchange Act of 1934, ch. 404, 48 Stat. 881.

21. National Firearms Act, ch. 757, 48 Stat. 1236 (1934).

22. 188 U.S. 321 (1903) (discussing the federal lottery statute).

23. 267 U.S. 432 (1925) (upholding constitutionality of Dyer Act prohibiting transportation of stolen motor vehicles across state lines).

24. 18 U.S.C. §§ 891-96 (1994).

25. The Travel Act made it a federal crime to travel in interstate or foreign commerce or use the mail or any facility of interstate or foreign commerce with the intent to commit any crime of violence or engage in certain enumerated unlawful activities, including all the vice offenses, extortion, bribery, and arson. Travel Act, Pub. L. No. 87-228, 75 Stat. 498 (1961). The Racketeer Influenced and Corrupt Organizations Act (RICO) was also enacted during this time. Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922.

26. *Perez v. United States*, 402 U.S. 1246 (1971).

Federal criminal jurisdiction thus became virtually limitless, and the next two-and-a-half decades witnessed federalization with a vengeance. Although many of the federal crimes enacted earlier were dual-jurisdictional, covering conduct already prohibited by state law, nearly all of the federal criminal legislation of the latter part of the twentieth century falls into this category. Included in the itinerary of contemporary offenses are those covering narcotics and dangerous drugs,²⁷ firearms,²⁸ currency reporting and money laundering,²⁹ carjacking,³⁰ child support payments,³¹ domestic violence,³² environmental deprecations,³³ workplace injury and death,³⁴ animal enterprises,³⁵ continuing criminal enterprises,³⁶ violent career criminals,³⁷ and repeat offenders.³⁸ And last, but certainly not least, a new strict (and harsh) federal sentencing system has been superimposed on top of the federal structure.³⁹

The wholesale entry of federal power into the criminal arena has created some curious tension, not so much between the states and the federal government (federalism), but more so within the federal system itself (as a product of federalization). As indicated previously, nearly all of the federalizing of crime which has taken place during the twentieth century, certainly the latter half, has involved conduct already covered in one form or another by state law. This has created a structure of dual or matching jurisdiction.⁴⁰ Nevertheless, I suppose that it

27. 21 U.S.C. § 841 (1994).

28. 18 U.S.C. § 921 (1994).

29. 31 U.S.C. § 5311 (1994).

30. 18 U.S.C. § 2119 (1994).

31. 18 U.S.C. § 228 (1994).

32. 18 U.S.C. § 2261 (1994).

33. See 33 U.S.C. § 1319 (1994); see also 42 U.S.C. § 7413 (1994).

34. 29 U.S.C. § 666 (1994).

35. 18 U.S.C. § 43 (1994).

36. 21 U.S.C. § 848 (1994).

37. 18 U.S.C. § 924(e) (1994).

38. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796.

39. See 18 U.S.C. § 3551 (1994); see also 28 U.S.C. §§ 991-98 (1994).

40. See William Van Alstyne, *Dual Sovereignty, Federalism, and National Criminal Law: Modernist Constitutional Doctrine and the Nonrole of the Supreme Court*, 26 AM. CRIM. L. REV. 1740 (1989).

should come as no surprise that the states have not been particularly finicky about protecting their own criminal enforcement turf. Generally speaking, the states enforce ninety percent of the criminal law and the federal government ten percent. The states are unlikely to whine when the federal government wants a bigger piece of this enforcement action. The principal complaint from the perspective of the states has come when procedural standards have been forced upon them through the Due Process Clause of the Fourteenth Amendment. The friction created from the federalization of substantive crime has come, on the other hand, from within the federal system itself as more and more pressure is being placed on federal courts to handle criminal cases.

Criminalization on both the state and federal level tends to be reactive, and consequently politically influenced. Rather than predicting antisocial behavior before it occurs, legislatures tend to respond to particular incidents of harmful behavior after it happens.⁴¹ With the modern media fueling this process and creating its own self-propelling fear of crime, legislating crime becomes political make-work. It is virtually inconceivable today to imagine a political position that does not include a "get tough on crime" stance.⁴² Given the number of officials parroting this policy which they have gathered from public opinion, itself created by media fixation on crime and violence, it should come as no surprise that criminal legislation is often precipitous. Plainly speaking, it has been heavily politicized. This clearly has been the fate of the federal effort regarding both enactment and enforcement. The query is now where (or in which direction) to turn. Before directly addressing that inquiry, however, a brief excursion into an arena where federalism and federalization have found themselves somewhat compatible may prove enlightening.

41. The federal Lindbergh kidnapping law and more recent carjacking statute, and state stalking laws are paradigms. *See* 18 U.S.C. §§ 10, 1201-02 (1994).

42. As early as 1838 Abraham Lincoln warned about the "increasing disregard for law which pervades the country." RICHARD M. BROWN, *STRAIN OF VIOLENCE: HISTORICAL STUDIES OF AMERICAN VIOLENCE AND VIGILANTISM* 3-36 (1975).

II. FEDERALISM AND THE FEDERALIZATION OF CRIMINAL PROCEDURE

The history of criminal procedure in the states has not necessarily been a happy one. As early as 1880 a lawyer in Detroit reported to the press that “[m]en have for years been arrested . . . ‘on suspicion,’ confined for days and nights in a station house where nobody is allowed to . . . communicate with him, and finally [he is] . . . ‘discharged’ in the same arbitrary manner” without any court oversight of the process.⁴³ In *Powell v. Alabama*,⁴⁴ black defendants, without the assistance of counsel, were tried, convicted, and sentenced to death the day after they were charged with raping two white girls. In *Brown v. Mississippi*,⁴⁵ black defendants were whipped and beaten and told that they would continue to be tortured until they confessed to a murder.

It was this kind of history that led an activist Supreme Court in the 1960s and ’70s to impose federally created rules of criminal procedure on the states. This, of course, was done by incorporating provisions of the Bill of Rights, which originally only applied to the federal government,⁴⁶ into the Due Process Clause of the Fourteenth Amendment, which applies to the states. This process included not only an application of a particular constitutional guarantee to the states as part of Fourteenth Amendment due process, but also concomitantly the specific federal rules crafted to give the guarantee more procedural precision.⁴⁷ This process was not without its critics. The second Justice John Harlan consistently argued that incorporation and the federalization of criminal procedure were misguided. His view was that the states had a much different problem of enforcement than did the federal government. The states enforced ninety percent of the criminal law and the federal government ten percent. Federal agents were better

43. FRIEDMAN, *supra* note 9, at 150 n.7.

44. 287 U.S. 45 (1932).

45. 297 U.S. 278 (1936).

46. *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833).

47. *See, e.g.*, *Gideon v. Wainwright*, 373 U.S. 334 (1963) (discussing right to appointed counsel); *Mapp v. Ohio*, 367 U.S. 643 (1961) (discussing exclusionary rule); *Miranda v. Arizona*, 384 U.S. 436 (1966) (holding that warnings are necessary prior to custodial interrogation).

trained, and federal investigations tended to more deliberate whereas police practices on the local level were reactive and spontaneous. Justice Harlan also noted that the states were not alike. Law enforcement in large metropolitan areas encountered different kinds of crime and problems than those encountered in primarily semi-rural states. Thus Justice Harlan saw saddling the various states with the same procedural rule that applied to federal proceedings as unwise.⁴⁸

Much of the Supreme Court's procedural federalizing was due to failures at the state level and the civil rights movement of the mid-twentieth century. When both the political environment and the perceived needs of law enforcement changed in the '70s, so did the attitude of the Court toward the criminal process. For the past twenty years or so, the Court has heeded Justice Harlan's concern and has been lenient with the states, allowing more flexibility in administration of their criminal justice processes.⁴⁹ This produced two interesting phenomena. First, decisions favoring law enforcement provided the same leniency in the federal system since the Supreme Court never uncoupled the Bill of Rights and the Fourteenth Amendment Due Process Clause.⁵⁰ In other words, the rights of federal defendants were diluted along with those facing state charges. Second, some state courts rejected this dilution, preferring to provide defendants in their own criminal courts with more procedural protections than the United States Supreme Court was willing to provide under the federal Constitution. This was ingenuously accomplished by utilizing their own state constitutions as

48. See *Mapp*, 367 U.S. at 672-86 (Harlan, J., dissenting); *Miranda*, 384 U.S. at 505-26 (Harlan, J., dissenting).

49. See, e.g., *Illinois v. Gates*, 462 U.S. 213 (1983) (liberalized standard for probable cause); *United States v. Leon*, 468 U.S. 897 (1984) (good faith exception to exclusionary rule); *California v. Greenwood*, 486 U.S. 35 (1988) (no expectation of privacy in garbage); *United States v. Place*, 462 U.S. 696 (1983) (dog sniff of luggage not a search); *Florida v. Bostick*, 501 U.S. 429 (1991) (narrowing description of "seizure"); *Oregon v. Mathiason*, 429 U.S. 492 (1977); *California v. Beheler*, 463 U.S. 1121 (1983) (narrowing concept of custody for purposes of *Miranda* warnings); *Moran v. Burbine*, 475 U.S. 412 (1986) (suspect has no right to be told of presence of attorney trying to see him); *Davis v. United States*, 114 S. Ct. 2350 (1994) (requiring unambiguous and unequivocal request for counsel).

50. Again, this was criticized by Justice Harlan for unwisely diluting federal procedural rights along with those available in the states. See *Williams v. Florida*, 399 U.S. 78, 117-38 (1970) (Harlan, J., dissenting in part and concurring in part).

the source of the state procedural protection⁵¹ — a process which became referred to as the “new federalism in criminal procedure.”⁵²

Why mention these procedural vacillations in a symposium whose focus is on substantive criminal law? There are lessons to be learned. The lesson is not that this process occurred peaceably and without vigorous criticism. Some of the procedural notions imposed on the states and incidentally on the federal system are still vehemently attacked today; most notably, the exclusionary rule of *Mapp v. Ohio* and the so-called *Miranda* warnings.⁵³ Nor is the lesson necessarily that federalizing rules of criminal procedure was philosophically sound; although I happen to believe that it was, especially for the time when it occurred. Nor is it the lesson that it was pragmatically sound, and without difficulty, to impose uniform procedural rules on the country as a matter of constitutional imperative. The states are different from each other and the federal system, and constitutionally imposed procedural requirements, no doubt, did cause problems with varying degrees of difficulty.

There are, however, at least two lessons worth noting which resulted from the constitutionalization of criminal procedure, one inimical to the process itself, and one possibly relevant to our topic in this symposium. Within the process, the constitutional rules have had the salutary effect of producing better trained police officers. Whatever else may

51. See Justice Robert Utter, *State Constitutional Law, the United States Supreme Court, and Democratic Accountability*, 64 WASH. L. REV. 19, 27 (1989) (reporting that as of the date of the publication of this article “more than 450 published state court opinions [had interpreted] state constitutions as going beyond federal constitutional guarantees”). The process continues. See, e.g., *State v. Lopez*, 896 P.2d 899 (Haw. 1995) (rejecting the doctrine of “apparent authority” for valid consensual search adopted at the federal level in *Illinois v. Rodriguez*, 497 U.S. 177 (1990)).

52. The phrase “new federalism in criminal procedure” was first used by Professor Donald Wilkes, Jr. See Donald Wilkes, Jr., *The New Federalism in Criminal Procedure: State Court Evasion of the Burger Court*, 62 KY. L.J. 421 (1974); see also Honorable William Brennan, *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535 (1986); Ronald K. Collins, *Forward: The Once “New Judicial Federalism” & Its Critics*, 64 WASH. L. REV. 5 (1989); Chief Judge Kaye, *Forward: The Law and State Constitutional Law as Full Partners in the Protection of Human Rights*, 23 RUTGERS L.J. 727 (1992).

53. The most recent attack is contained in JUDGE HAROLD J. ROTHWAX, *GUILTY: THE COLLAPSE OF CRIMINAL JUSTICE* (1996).

have occurred,⁵⁴ the one clear benefit of imposing national rules of criminal procedure was the development of training programs that produced a more professional police force, a force that at least understands the perimeters of permissible police behavior.

The other notable aspect of the federalization of the procedural process is its fluidity. The United States Supreme Court consistently rejected wholesale application of the Bill of Rights to the states, preferring instead to examine each individual guarantee separately to determine whether it was fundamental within the criminal process. Although culminating in nearly complete incorporation,⁵⁵ the Court proceeded methodically and analytically. When the sociopolitical climate began to change in the 1970s, the scheme that the Court had developed proved flexible and responsive. Although not cutting the Fourteenth Amendment loose from the Bill of Rights, the interests of law enforcement were accommodated by crafting constitutional rules which were more permissive toward police practices.⁵⁶

The real beauty of the federalizing scheme, however, has been its ability to conform to federalist interests. Where the United States Supreme Court retrenched on the protection of criminal defendants, an activist state court was able to rely on its own state constitution to provide more procedural protection than the Supreme Court was willing to recognize as federally required. Even then, when the citizens of

54. The statistics and studies seem to indicate that the exclusionary rules have had only minimal impact on criminal prosecutions. Regarding the Fourth Amendment, see the studies cited by Justice White in his majority opinion in *United States v. Leon*, 468 U.S. 897, 907-08 n.6 (1984), and also those cited by Justice Brennan's dissenting opinion, *id.* at 950-51 n.11. With respect to the *Miranda* decision, see the material mentioned in YALE KAMISAR ET AL., *MODERN CRIMINAL PROCEDURE* 599-600 (8th ed. 1994).

55. The only provisions in the Bill of Rights dealing with the criminal process which have not been expressly applied to the states through the Due Process Clause of the Fourteenth Amendment are the Sixth Amendment right to be indicted by a grand jury and the excessive fines provision of the Eighth Amendment.

56. See, e.g., *United States v. Leon*, 468 U.S. 897 (1984) (creating good faith exception to exclusionary rule); *Illinois v. Gates*, 462 U.S. 213 (1983) (liberalizing standard of probable cause); *California v. Greenwood*, 486 U.S. 35 (1988) (finding there is no expectation of privacy in trash); *California v. Beheler*, 463 U.S. 1121 (1983) (espousing narrow view of custody for purposes of *Miranda* warnings); *New York v. Quarles*, 467 U.S. 649 (1984) (explaining public safety exception to *Miranda*).

a state viewed their courts as too activist, they have been able to overturn their decisions through democratic action.⁵⁷ In summary, in this context at least, federalization and federalism have been compatible.

III. FEDERALIZATION OF SUBSTANTIVE CRIMINAL LAW

The question to now consider is the relevance of the lessons in the procedural context to the movement toward federalizing criminal statutes themselves. Have any benefits been achieved by federalization and how flexible is the system to adapt in the case of overreaching?

A. *The Value of Federal Criminal Statutes*

From the beginning, there obviously was a need for federal crimes concerning activity over which the federal government had exclusive jurisdiction — smuggling, counterfeiting, tax evasion, treason, and offenses committed on federal property, come to mind. Our inquiry lies beyond this realm, however, to crimes of duality; where state criminal codes also cover the conduct in question. In this arena of dual jurisdiction, the federal government has played an important role. The Ku Klux Klan Acts of 1870 and 1871 were early examples of congressional efforts to intervene with criminal legislation where the (southern) states were unwilling to enforce their own laws. These statutes were designed to protect the rights of blacks following the Civil War and put an end to the Ku Klux Klan.⁵⁸ The Sherman⁵⁹ and Clayton Anti-trust Acts⁶⁰ represent early exercises of the commerce power to deal with national monopolies beyond the control of the individual states.

57. The California Victim's Bill of Rights (1982), called Proposition 8, adding Article I, Section 28 to the California Constitution's Bill of Rights, and a 1982 amendment to Article I, Section 12 of the Florida Constitution prohibited the courts in those states from interpreting the state constitutions more broadly than the U.S. Supreme Court had interpreted the United States Constitution. Also, an amendment to the Pennsylvania Constitution, Article I, Section 9, overturned the ruling of the State Supreme Court in *Commonwealth v. Triplett*, 341 A.2d 62 (Pa. 1975), refusing to allow statements taken in violation of *Miranda* to be used for impeachment purposes.

58. See FRIEDMAN, *supra* note 9, at 94.

59. Sherman Anti-Trust Act, 26 Stat. 209.

60. Clayton (Antitrust) Act, ch. 323, 38 Stat. 730 (1914).

Likewise, the federal securities laws of the 1930s⁶¹ were necessary to regulate and control the national and international securities markets. In a more contemporary vein, the federal statutes designed to attack organized crime — the Travel Act,⁶² the extortionate credit transaction statute,⁶³ and RICO⁶⁴ — all involve an effort to exercise federal jurisdiction with respect to a problem beyond the control of individual states.

Consequently, there appear to be two situations where congressional exercise of federal criminal jurisdiction is clearly warranted — cases where the states, although capable, are unwilling to engage the machinery of their own domestic criminal law or when local law enforcement is incapable of handling a problem national in scope. Civil rights protection and political corruption might be examples of the former, while protection of national markets and organized crime⁶⁵ represent activities in the latter category.

These classifications are immediately open to the criticism that they are less than precise and thus subject to ready manipulation. It would be hard to argue that standards like “demonstrated state failure”⁶⁶ or “demonstrable federal interest” or “organized crime (broadly defined)”⁶⁷ impose bright-line limits on federal criminal jurisdiction.⁶⁸

61. Securities Act of 1933, 48 Stat. at 74; Securities Exchange Act of 1934, 48 Stat. at 881.

62. 18 U.S.C. § 1952 (1994).

63. 18 U.S.C. §§ 891-96 (1994).

64. 18 U.S.C. §§ 1961-68 (1994).

65. I use this term more broadly than its common reference to the Mafia, La Cosa Nostra, or Wiseguys, but I use it more narrowly than its potential technical application — crimes committed by two or more persons. In the context of the utilization of federal resources, “organized crime” should mean organized group criminal behavior.

66. See Rory K. Little, *Myths and Principles of Federalization*, 46 HASTINGS L.J. 1029 (1995) (recommending this standard).

67. See John C. Jeffries & John Gleeson, *The Federalization of Organized Crime: Advantages of Federal Prosecution*, 46 HASTINGS L.J. 1095 (1995) (advocating this approach).

68. There are, of course, still other classificatory systems for delineating the justifiable exercise of federal criminal enforcement power. See Sara S. Beale, *Reporter's Draft for the Working Group on Principles to Use When Considering the Federalization of Criminal Law*, 46 HASTINGS L.J. 1277 (1995) (referring to suggestions by Professor Kathleen Sullivan and Judge Stanley Marcus). But, these tend to be simply a more specific breakdown of the cate-

But this kind of criticism misses the mark. Attacking efforts to adequately describe the legitimate exercise of federal power in the dual jurisdictional area is largely superfluous. General notions apply here, not tight legally drawn lines, which, of course, would be an impossible task even if this were the goal. To refer to an overused analogy, generalized principles are satisfactory when trying to delimit serious federal criminal concerns because we have some sense of “know[ing] it when [we] see it.”⁶⁹ The focus of the federalization debate is not on precise classification or categorization of legitimate federal interests, and it is simply disingenuous to place this cast on it.

B. Overextension of Federal Jurisdiction

Where does the debate then lie? Initially, the point must be emphasized that the issue is not joined each time Congress passes criminal legislation that applies to conduct already covered by state law — dual or overlapping jurisdiction does not necessarily trigger the debate. As noted above, dual jurisdiction is often essential. The problem arises when Congress makes federal crimes of behavior already adequately covered by state law. The difficulty is then compounded when significant federal resources are devoted to enforcement.

Unavoidably, here again we back into the question of where to draw the line of demarcation — when is state law adequate to the task? But that issue is no more troubling now from this perspective than it was earlier when discussing the general definitional boundaries of federal criminal jurisdiction. There exist fields subject to adequate state enforcement that can be generally agreed upon — “[we] know it when [we] see it.” For example, prostitution, carjacking, domestic violence, most weapons offenses, and even many drugs crimes, can be sufficiently regulated by state and local enforcement.

What produces unnecessary federal involvement, and more importantly, what are the ramifications, especially to the federal system, of nonessential federal enforcement? The reason for the explosion in the

gories referred to above.

69. See *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (referring to obscenity).

federalization of crime is rather straightforward. Getting tough on crime, advocating law and order, and strongly supporting law enforcement interests is simply good politics. This results in the legislative branch, Congress, making federal crimes out of problems which are characteristically local, and the executive branch, the President and the Justice Department, exercising enforcement discretion which is questionable.

There currently are over three thousand federal crimes, many of which cover conduct prosecutable under state law. In fact, the blanket of federal criminal law is now so broad that coverage includes most activity made unlawful by the states. The list of dual coverage includes everything from robbery,⁷⁰ kidnapping,⁷¹ arson,⁷² narcotics,⁷³ and weapons offenses⁷⁴ to intrastate carjacking,⁷⁵ loan sharking,⁷⁶ and most schemes to defraud.⁷⁷ It has also recently become a federal crime to fail to pay child support,⁷⁸ and to engage in acts of terrorism toward abortion clinics.⁷⁹ The 1994 crime bill⁸⁰ added to this list domestic violence,⁸¹ credit card and ATM misuse,⁸² computer hacking,⁸³ and art theft,⁸⁴ among others. The crime bill also proposed making it a federal offense to use a gun that had traveled in interstate commerce to commit a crime of violence, that is, all gun crimes.⁸⁵

The late twentieth century barrage of federal criminal legislation has created broad prosecutorial authority, which has placed tremendous demands on the federal enforcement machinery, including the federal

70. 18 U.S.C. § 1951 (1994).

71. 18 U.S.C. §§ 10, 1201-02 (1994).

72. 18 U.S.C. § 844 (1994).

73. 21 U.S.C. § 841 (1994).

74. 18 U.S.C. § 921 (1994).

75. 18 U.S.C. § 2119 (1994).

76. 18 U.S.C. §§ 891-94 (1994).

77. 18 U.S.C. § 1341 (1994) (prohibiting mail fraud).

78. 18 U.S.C. § 228 (1994).

79. 18 U.S.C. § 248 (1994).

80. Violent Crime Control and Law Enforcement Act of 1994, 108 Stat. at 1796.

81. 18 U.S.C. § 2261 (1994).

82. 18 U.S.C. § 1029(a) (1994).

83. 18 U.S.C. § 1030(a)(5) (1994).

84. 18 U.S.C. § 3294 (1994).

85. This proposal was not passed.

courts. Clearly, some of this legislation is symbolic; major federal crackdowns have not happened and are not expected. Nevertheless, sweeping discretion has been placed in the hands of United States attorneys. Federal prosecutions for all dual jurisdictional offenses have occurred and will continue, accompanied by pervasive enforcement efforts with respect to some areas targeted by federal policy, even though state law is arguably up to the task. Burgeoning federal criminal jurisdiction and its concomitant exercise has resulted in the dilution and misguided focus of federal law enforcement, and has produced a serious drain on federal judicial resources.

Federal criminal case filings have recently increased dramatically. In 1980, there were 27,968 cases filed representing 38,033 defendants prosecuted,⁸⁶ and in 1992 there were 47,472 filings representing 67,632 defendants.⁸⁷ This, however, does not tell the entire story since federal filings have vacillated widely during this century. In 1972, the number of federal criminal filings (47,043) was comparable to 1992, and in 1932 the number was well over 80,000,⁸⁸ primarily liquor offenses. The real story lies elsewhere in the increase in the number of drug and weapons prosecutions, federal procedures and sentencing, and constantly expanding prosecutorial discretion.

As mentioned above, between 1980 and 1992 the number of criminal case filings in the federal courts increased by seventy percent, whereas the number of drug cases more than quadrupled, from 3,130 cases involving 6,678 defendants prosecuted in 1980, to 12,833 cases and 25,033 defendants in 1992.⁸⁹ Firearms prosecutions also more than quadrupled (like drug cases an increase of over three hundred percent) during this period from 931 in 1980 to 3,917 in 1992.⁹⁰ The impact of this combined with federal practices and procedures has been

86. ADMINISTRATIVE OFFICE OF THE U.S. COURTS, 1980 ANNUAL REPORT OF THE DIRECTOR A-56, tbl. D-2 (1980) [hereinafter 1980 ANNUAL REPORT].

87. ADMINISTRATIVE OFFICE OF THE U.S. COURTS, 1992 ANNUAL REPORT OF THE DIRECTOR 248, tbl. D-2 (1992) [hereinafter 1992 ANNUAL REPORT].

88. FEDERAL JUDICIAL CTR., ON THE FEDERALIZATION OF THE ADMINISTRATION OF CIVIL AND CRIMINAL JUSTICE 31 n.84 (1994).

89. 1980 ANNUAL REPORT, *supra* note 86, tbl. D-2; 1992 ANNUAL REPORT, *supra* note 87, tbl. D-2.

90. *Id.*

ominous for the federal judicial system. First, the Speedy Trial Act⁹¹ requires dismissal of a criminal case that does not go to trial within the time period provided in the Act — seventy days.⁹² Consequently, criminal trials are forced to take priority over civil trials. Second, and more significant, the federal sentencing guidelines that went into effect in 1987 have had a serious impact on the federal judicial process. Harsh mandatory minimum sentences in the case of drug offenses⁹³ have eliminated the incentive to plea bargain resulting in a high percentage of these cases going to trial.⁹⁴ Additionally, sentencing under the federal sentencing guidelines requires extensive factual and legal determinations which has resulted in federal judges devoting anywhere from twenty-five percent to fifty percent more time to sentencing.⁹⁵ Third, the increase in drug cases in the federal courts in combination with the federal sentencing guidelines also has had a significant impact on the appellate process. Professor Brickey reports from Department of Justice statistics that the number of drug appeals tripled between 1974 and 1990, and that drug cases now account for fifty-five percent of all criminal appeals.⁹⁶ Lastly, the increase in federal criminal cases, and drug cases in particular, has had a tremendous impact on the final stage in the criminal justice apparatus. The federal prison population more than tripled between 1980 and 1993 from 19,025 to 69,143,⁹⁷ and there is every indication to believe that by the end of 1995, it will either have quadrupled or quintupled.⁹⁸

91. 18 U.S.C. § 3161 (1994).

92. 18 U.S.C. §§ 3161(c)(1)-(2), 3162(a)(2) (1994). The time period is tolled, however, in the case of certain pretrial proceedings. 18 U.S.C. § 3161(h) (1994).

93. 21 U.S.C. § 841 (manufacture and distribution of controlled substances); 21 U.S.C. § 844 (possession of controlled substances); 21 U.S.C. § 960 (1994) (importing or exporting controlled substances); 21 U.S.C. § 924(c) (1994) (possession of a firearm during a drug or violent crime).

94. Between 1980 and 1993, the number of criminal trials increased by 43% from 6,634 to 9,465. During this same period, the number of civil trials declined by 20% from 13,191 to 10,527. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES: 1993, 332 (1993). The Federal Courts Study Committee reported that drug cases amounted to 44% of federal criminal trials. REPORT OF THE FEDERAL COURTS STUDY COMM. 36 (1990); *see also* Brickey, *supra* note 5, at 1155 n.131.

95. REPORT OF THE FEDERAL COURTS STUDY COMM., *supra* note 94, at 137.

96. *See* Brickey, *supra* note 5, at 1155-56.

97. *See* Beale, *supra* note 68, at 1289.

98. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE tbl. 6.68 (1992) (project-

Proliferating federal criminal jurisdiction and prosecutions also, not surprisingly, has resulted in less judicial time being devoted to civil cases. Between 1980 and 1993, the number of criminal trials increased dramatically from 6,634 to 9,465, or forty-three percent, while the number of civil trials went from 13,191 to 10,527, a decline of twenty percent.⁹⁹ As federal criminal jurisdiction expands generally, and as drug and weapons prosecutions have increased in particular, attention is diverted from more legitimate federal concerns. The exercise of prosecutorial discretion by U.S. attorneys to pursue large numbers of drug and gun cases, along with the authority to prosecute carjacking, domestic violence, and child support deadbeats, diverts federal enforcement resources from civil rights, organized crime, terrorism, and corporate and health care fraud. The federal system simply cannot afford this. Much of this enforcement could and should be left to the states.

IV. STRUCTURAL MECHANISMS REGULATING THE FEDERALIZATION PROCESS

A. Congress

As mentioned earlier, the process of federalizing (constitutionalizing) criminal procedure contained an internal structural design which allowed its course to be halted, altered or redirected. When the United States Supreme Court concluded that the uniform application of federal rules to the criminal process had produced a handicap to law enforcement, it reversed the trend through the internal mechanism of constitutional adjudication. More flexible (and lenient) rules were provided law enforcement through the interpretation of the Bill of Rights. This phenomenon took some time,¹⁰⁰ but it demonstrated the pliability of the system. Additionally, during the United States Supreme Court's retreat, the interests of federalism have been accommodated by the ability of state courts to apply their own consti-

ing 104,000); Theresa W. Karle & Thomas Sager, *Are the Federal Sentencing Guidelines Meeting Congressional Goals?: An Empirical and Case Law Analysis*, 40 EMORY L.J. 393, 418 (1991) (projecting an increase in the prison population of nearly 117,000).

99. See *supra* note 94.

100. Roughly twenty years, to date.

tutions to mandate more protective rules within their own individual criminal processes.

Since it is Congress, acting through the legislative process, that is responsible for the federalizing of substantive criminal law, the inquiry regarding structural correction initially must focus on that body. Unfortunately, the lesson from the procedural context is not likely to play itself out with Congress. In theory, legislative reform and repeal of misguided lawmaking ought to be more flexible and responsive than the judicial process, which traditionally has been based on the principle of *stare decisis*. If the legislative branch desires to amend or repeal outmoded or ill-advised laws, all it ultimately has to do is vote. There is no presumption that earlier laws will not be changed or repealed.

Nevertheless, the legislative process contains its own kind of precedential principle, probably nowhere more applicable than in the case of contemporary criminal law-making. Criminal statutes occasionally are amended to clarify, close loopholes, and expand coverage. However, outright repeal is rare, generally occurring only when a modern statutory structure is drafted to cover an area already governed by a statutory scheme which has become anachronistic.¹⁰¹

This must be coupled with the contemporary political climate, which is a climate of law-and-order, crime control, and generally getting tough on crime.¹⁰² Media fixation on crime and violence has created an age when Congress is willing to pass one crime bill after another,¹⁰³ even in the face of statistics indicating that the crime rate is

101. For example, the Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236, overhauled a mishmash of earlier narcotics laws, including the Harrison (Narcotics) Act, 38 Stat. at 785, the Narcotic Drugs Import and Export Act of 1922, 42 Stat. at 596, the Marijuana Tax Act of 1937, ch. 553, 50 Stat. 551, the Opium Poppy Control Act, ch. 720, 56 Stat. 1045 (1942), a law adding synthetic opiates to the law governing opium, Act of Mar. 8, 1946, ch. 81, 60 Stat. 38, the Narcotic Manufacturing Act of 1960, Pub. L. No. 86-429, 74 Stat. 55, and amendments to the Federal Food, Drug, and Cosmetic Act, Drug Abuse Control Amendments of 1965, Pub. L. No. 89-74, 79 Stat. 226.

102. I use the term "contemporary" here somewhat broadly to refer to the latter part of the twentieth century. It should be noted, however, that crime has historically been a political football. According to Lawrence M. Friedman, Herbert Hoover was the first President to actually refer to crime in his inaugural address in 1929. See FRIEDMAN, *supra* note 9, at 273.

103. Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82

declining.¹⁰⁴ Additional criminal legislation is more likely rather than repeal of some that now exists; the latter, simply put, would be bad politics. In fact, there is an interesting political paradox currently impacting the federalization debate. Liberals in Congress generally favor federal initiatives respecting issues concerning health, poverty, and welfare, but tend to oppose the further extension of federal criminal jurisdiction. On the contrary, politicians who support decentralization of federal power on these same social matters, who advocate ceding control to the states, simultaneously tend to be crime control proponents of more federal criminal law.¹⁰⁵ This is a conflicted political conundrum unlikely to sponsor a rethinking of the federalization phenomenon.

B. *The Federal Judiciary*

Virtually all of the federal criminal legislation of the twentieth century has been based on the Commerce Clause. Thus, federal court review and control of proliferating federal crime is possible through Commerce Clause jurisdictional analysis. The Supreme Court historically has not shown any inclination to circumscribe congressional legislative power in this manner¹⁰⁶ until the decision last term in *United*

Stat. 197; Organized Crime Control Act of 1970, 84 Stat. at 922; Comprehensive Drug Abuse Prevention and Control Act of 1970, 84 Stat. at 1236; Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837; Anti-Drug Abuse (ADAA) Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207; Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181; Crime Control Act of 1990, Pub. L. No. 100-647, 104 Stat. 4789; and the Violent Crime Control and Law Enforcement Act of 1994, 108 Stat. at 1796.

104. Statistics can be elusive, but if we credit Department of Justice figures, between 1973 and 1992, crimes against the person dropped 26%, theft crimes dropped 35 percent, and household crimes 30%. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS tbl. 3.3 (1993). A 1993 study by the Justice Department also concluded that violent crime decreased by 9% between 1981 and 1992. *Id.*

105. See Little, *supra* note 66, at 1065-66; Sanford H. Kadish, *Comment: The Folly of Overfederalization*, 46 HASTINGS L.J. 1247 (1995).

106. See *Perez v. United States*, 402 U.S. 146 (1971) (adopting the "class of activities" theory to validate the application of federal law to conduct completely intrastate in nature). *But see United States v. Bass*, 404 U.S. 336 (1971) (reversing a conviction under former 18 U.S.C. § 1202(a) which made it a crime for a felon to "receiv[e], posse[ss], or transpor[t] in commerce or affecting commerce . . . any firearm" and holding that the statute required the Government to show a nexus between the possession component and interstate commerce).

States v. Lopez.¹⁰⁷ *Lopez* invalidated the Gun-Free School Zones Act, which made it a federal offense to possess a firearm in or within one-thousand feet of a school. Concluding that this statute represented an illegitimate exercise of Congress' Commerce Clause power, Chief Justice Rehnquist's majority opinion may indicate a new willingness on the part of the Supreme Court to scrutinize federal criminal law enacted under this jurisdictional base.¹⁰⁸

I do not intend to carefully analyze the *Lopez* opinion. Others have done that and will continue to do so, including some of the authors in this symposium. I do have, however, a few comments. *Lopez* is clearly a substantive, principle-based decision, and not a narrow procedural holding based on the lack of congressional findings. Although the Fifth Circuit based its invalidation of the statute on the lack of sufficient congressional findings and legislative history,¹⁰⁹ Chief Justice Rehnquist's majority opinion for the Supreme Court rests on an analysis of the scope of Congress' authority under the commerce power, and his conclusion for the Court is that it is limited to the regulation of "economic activity [which] substantially affects interstate commerce."¹¹⁰ The opinion consistently refers to "economic activity," "commercial transactions," and "commercial activities" as the legitimate focus of congressional Commerce Clause power, concluding that possession of a gun in a school zone does not qualify. Legislative findings are mentioned briefly only as relevant to analyzing legislative judgment

107. 115 S. Ct. 1624 (1995).

108. The prosecution of *Lopez* exemplifies the blatancy of the exercise of federal authority. In Chief Justice Rehnquist's words:

Acting upon an anonymous tip, school authorities confronted respondent, who admitted that he was carrying the weapon. He was arrested and charged under Texas law with firearm possession on school premises. The next day, the state charges were dismissed after federal agents charged respondent by complaint with violating the Gun-Free School Zones Act of 1990.

Id. at 1626 (citations omitted).

109. *Id.*

110. *Id.* at 1630. The opinion also makes it clear that Congress may regulate "the use of the channels of interstate commerce" and "the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities." *Id.* at 1629. Neither, however, were involved in this case. *Lopez*, 115 S. Ct. at 1630.

and as an aid to “our independent evaluation of constitutionality under the Commerce Clause.”¹¹¹

Lopez could be profound in breaking, and even reversing, the overfederalization of criminal law. The majority opinion is sprinkled with the bouquet of federalism and the change in the sensitive relation between federal and state criminal jurisdiction when Congress criminalizes conduct already made criminal in the states. Even though a fragile decision,¹¹² it is difficult logically to limit the analysis and holding in the *Lopez* case to the Gun-Free School Zones Act. Nevertheless, to date, the lower federal courts have been terribly stingy with the decision.¹¹³ It may take another foray by the Supreme Court into

111. *Id.* at 1631-32. The concurring opinions of Justices Kennedy and Thomas also make it clear that the majority opinion is based on the substantive constitutional reach of the Commerce Clause. *Id.* at 1634-35.

112. *Lopez* was decided by a 5 to 4 vote, and all four dissenting Justices joined the principal dissent of Justice Breyer, which takes a broad view of the criminal jurisdiction of Congress under the Commerce Clause. *Id.* at 1657-65.

113. The following decisions have rejected Commerce Clause challenges to various federal statutes after *Lopez*: *United States v. Diaz-Martinez*, 71 F.3d 946 (1st Cir. 1995) (possession of a firearm with obliterated serial number); *United States v. Bishop*, 66 F.3d 569 (3d Cir. 1995) (federal carjacking statute); *United States v. Leshuk*, 65 F.3d 1105 (4th Cir. 1995) (Comprehensive Drug Abuse Prevention and Control Act); *United States v. Kirk*, 70 F.3d 791 (5th Cir. 1995) (transfer or possession of machine guns); *United States v. Martin*, 63 F.3d 1422 (7th Cir. 1995) (federal arson statute); *United States v. Wilson*, 73 F.3d 675 (7th Cir. 1995) (Freedom of Access to Clinic Entrance Act); *United States v. Lee*, 72 F.3d 55 (7th Cir. 1995) (possession of firearm by convicted felon); *United States v. Jensen*, 69 F.3d 906 (8th Cir. 1995) (money laundering); *United States v. Mosby*, 60 F.3d 454 (8th Cir. 1995) (possession of ammunition by convicted felon); *United States v. Robinson*, 62 F.3d 234 (8th Cir. 1995) (carjacking); *United States v. Oliver*, 60 F.3d 547 (9th Cir. 1995) (carjacking); *United States v. Wilks*, 58 F.3d 1518 (10th Cir. 1995) (transfer and possession of machine guns); *United States v. Bolton*, 68 F.3d 396 (10th Cir. 1995) (Hobbs Act); *Cheffer v. Reno*, 55 F.3d 1517 (11th Cir. 1995) (Freedom of Access to Clinic Entrance Act); *United States v. Garcia-Beltran*, 890 F. Supp. 67 (D. P.R. 1995) (carjacking); *United States v. Salmiento*, 898 F. Supp. 45 (D. P.R. 1995) (Drug Free School Zones Act); *United States v. Medina*, 901 F. Supp. 59 (D. P.R. 1995) (sentencing enhancement); *United States v. Taylor*, 897 F. Supp. 1500 (D. Conn. 1995) (weapons offenses); *United States v. Snow*, 899 F. Supp. 1059 (W.D.N.Y. 1995) (possession of firearms and ammunition by felons); *United States v. Campbell*, 891 F. Supp. 210 (M.D. Pa. 1995) (possession of firearm by felon); *United States v. Brown*, 893 F. Supp. 11 (M.D.N.C. 1995) (same); *United States v. Murphy*, 893 F. Supp. 614 (W.D. Va. 1995) (Child Support Recovery Act); *United States v. Williams*, 893 F. Supp. 617 (S.D. W. Va. 1995) (felon in possession of firearm); *United States v. Hart*, 895 F. Supp. 189 (N.D. Ohio 1995) (felon in possession of firearm); *United*

Commerce Clause criminalization to make the message clear.

C. *Executive Discretion*

To the extent that the lower federal courts, and the United States Supreme Court, are unwilling¹¹⁴ or unable¹¹⁵ to extend the decision in *Lopez* to other federal criminal statutes, prosecutorial discretion may be the only potential ameliorating tool. It is occasionally argued that the federalization of crime is not problematic, largely because of the scarcity of federal resources.¹¹⁶ The difficulty with this "resource-based" approach is that it is completely unprincipled, offering no guidelines as to how and where these resources should be utilized. It is like the grant of plenary power based on a promise to wield it wisely.

Moreover, the record does not attest to the wise exercise of federal prosecutorial discretion. As noted previously, federal drug and gun

States v. Bell, 897 F. Supp. 1039 (M.D. Tenn. 1995) (felon in possession of firearm); *United States v. Edwards*, 894 F. Supp. 340 (E.D. Wis. 1995) (same); *United States v. Fryer*, 896 F. Supp. 763 (N.D. Ill. 1995) (sentence enhancement for possession of firearm during a robbery); *United States v. Hopper*, 899 F. Supp. 389 (S.D. Ind. 1995) (Child Support Recovery Act); *United States v. Gonzalez*, 893 F. Supp. 935 (S.D. Cal. 1995) (distribution of controlled substances); *United States v. White*, 893 F. Supp. 1423 (C.D. Cal. 1995) (Freedom of Access to Clinic Entrance Act); *United States v. Bramble*, 894 F. Supp. 1384 (D. Haw. 1995) (Migratory Bird Treaty Act); *United States v. Garcia-Salazar*, 891 F. Supp. 568 (D. Kan. 1995) (Drug-Free School Zones Act); *United States v. Hampshire*, 892 F. Supp. 1327 (D. Kan. 1995) (Child Support Recovery Act); *United States v. Lucero*, 895 F. Supp. 1421 (D. Kan. 1995) (Freedom of Access to Clinic Entrance Act).

The only cases to date upholding a Commerce Clause challenge based on *United States v. Lopez* are: *United States v. Pappadopoulos*, 64 F.3d 522 (9th Cir. 1995) (federal arson statute); *Mack v. United States*, 66 F.3d 1025 (9th Cir. 1995) (background check requirement of Brady Handgun Violence Prevention Act); *United States v. Schroeder*, 894 F. Supp. 360 (D. Ariz. 1995) (Child Support Recovery Act); *United States v. Bailey*, 902 F. Supp. 727 (W.D. Tex. 1995) (Child Support Recovery Act).

114. It would seem that there are other obvious candidates for the *Lopez* analysis: the federal statutes covering carjacking, domestic violence, child support, and drug-free school zones to name a few.

115. It is unlikely that certain federal statutes will be susceptible to a Commerce Clause challenge: such as the comprehensive drug laws, securities laws, and the statutes designed to deal with organized crime.

116. See Jamie S. Gorelick & Harry Litman, *Prosecutorial Discretion and the Federalization Debate*, 46 HASTINGS L.J. 967 (1995); Jamie S. Gorelick, "Perspectives on the Federalization of Crime," 58 CRIM. L. REV. 1174 (1995).

prosecutions have skyrocketed in the last fifteen years.¹¹⁷ Between 1980 and 1995, the federal prison population has quadrupled.¹¹⁸ Due to the federal sentencing guidelines, defendants in federal court are treated much more harshly than their counterparts charged under state law, even though the nature of the crimes are identical. To this we must add, of course, all the new offenses providing additional opportunities for federal prosecutors to exercise their jurisdictional discretion. This record is troubling primarily and precisely because the federal government has chosen to utilize its scarce resources to prosecute conduct that could just as well be handled by the states under state laws and procedures adequate to the task. Federal attention should instead be focused on corporate and white collar crime, organized crime, and civil rights violations. These are the kinds of cases that truly transcend state boundaries and call for federal tools and expertise in their investigation and prosecution. This is where the real Commerce Clause problems lie.

I would like to take Deputy Attorney General Jamie Gorelick at her word regarding the conscientious exercise of pervasive federal jurisdiction.¹¹⁹ However, with Congress on a federalization rampage, and unless the federal courts reign back the excesses, I would feel much more comfortable with carefully analyzed "principle-based" discretion emanating from the Justice Department. Suggestions for principles to steer the use of federal authority certainly are not lacking, all of which, not surprisingly, point to the prosecution of something other than street crime.¹²⁰ The point is that it is time for them to be taken seriously.

117. See 1980 ANNUAL REPORT, *supra* note 86, tbl. D-2; 1992 ANNUAL REPORT, *supra* note 87, tbl. D-2.

118. See 1992 BUREAU OF JUSTICE STATISTICS, *supra* note 98, tbl. 6.68.

119. See Gorelick, *supra* note 116.

120. See Little, *supra* note 66, (demonstrating state failure); Jeffries & Gleeson, *supra* note 66, (broadly defining organized crime); Honorable Vaughn R. Walker, *Comment: Federalizing Organized Crime*, 46 HASTINGS L.J. 1127 (1995) (excluding street crime); Richard Leighton, "Perspectives on the Federalization of Crime," 58 CRIM. L. REV. 1174 (1995) (protecting a national interest).

V. EPILOGUE

Discussion of the federalization of crime must eventually come around to a consideration of the value of federalism and the concomitant virtue of decentralization in the criminal justice system. Crime, whatever its shape, is usually committed on a local victim and its effects and threats are primarily local. Citizens look to their state, county, and city police, prosecutors and courts to protect them from and deal with crime. Our constitutional government, based on delineated federal authority, combined with the Tenth Amendment's express reservation of remaining governmental power to the states, is a recognition of these facts. It is the concept of local law-making authority that gives rise to the police power of the states. Federal jurisdiction, on the other hand, emanates directly from the constitutional text. There is no general federal police power, absent an expansive view of the Commerce Clause.

This diffusion of power within the criminal justice process is clearly worthwhile. First, on a practical level, state and local prosecutors and judges are both more attuned to local problems and more beholden to the local political pressures. State prosecutors and courts are more convenient for those who participate in their processes, and state correctional facilities and institutions are better geographically suited to inmates, their families and friends. Second, from a policy perspective, it is preferable to have state and local legislative bodies define crimes, supply defenses, and impose penalties. Policies can best be tailored to local conditions, and local policy-making facilitates experimentation within the criminal justice system.

States and localities are well-equipped to handle criminal activity which is characteristically street crime or which primarily affects local interests. The states have historically enforced over ninety percent of the criminal law covering this kind of conduct. When the federal government gets involved at this level of criminal law enforcement, things get muddled at both the practical and policy levels. For instance, of practical concern is the disparity in treatment of defendants. Although a federal crime may be virtually identical to its state counterpart (narcotics offense, for example), a defendant prosecuted in the federal system will be subject to different procedures and much harsher sentencing

under the federal sentencing guidelines. This difference, in fact, conflicts with the basic policy of the Guidelines to make sentencing uniform among criminal defendants.

Federal involvement in crimes of local concern also can create questionable policy decisions. Politics is often the primary reason for the decision to prosecute a particular crime (domestic violence) or class of crimes (drugs and weapons offenses). A United States attorney who wants to bring recognition to his or her office would be better served by prosecuting either white collar or truly organized crime. Drugs, guns, domestic violence, failure to pay child support, and carjacking really do not belong in federal court. If the federal government wants to contribute to this aspect of criminal law enforcement, the currently popular notion of providing block grants to the states appears to be a better choice. Wholesale federal criminalization and enforcement of local crime heads the country in the direction that the framers of the Constitution wanted to avoid — the creation of a strong and pervasive national police and criminal justice system. It is politically en vogue to argue that we too often turn to the federal government for the solution to local problems. Irrespective of the degree to which one subscribes to this view, it is ever-increasingly true with regard to crime. We need to resist the temptation to walk across the street to the federal courthouse.

