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THE CONSTITUTIONAL BASIS FOR COOPERATIVE CRIME CONTROL

A. C. Breckenridge

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This article traces the constitutional development for closer national-state cooperation in crime control, indicating the legal methods sanctioned, and suggests the course of future action in the federal system.—EDITOR.

". . . Let a spirit of national as well as local patriotism once prevail; let unfounded jealousies cease, and we shall hear no more about the impossibility of harmonious action between the national and state governments in a matter in which they have a mutual interest."[1]

There exists extreme decentralization in many fields of governmental administration in the United States as a result of the division of Constitutional authority between the states and the national government. One of the most important of these is the administration of justice—the detection, apprehension, and prosecution of persons who commit criminal actions.

As a result, the actions which other nations may take in the field of criminal law by a centralized authority must be done under two systems in the United States if the enforcement powers are fully exercised. Under the classic division of powers, criminal law enforcement operations have fallen into three main categories, first, the sphere in which the states seem to have full and complete power, second, the sphere in which the national government is supreme and has plenary control, and third the twilight zone in which the states are either forbidden to act, or are incompetent to act, and in which both the state and national governments must work together if the gaps in ineffective crime control are closed. The complications resulting from these spheres of legal action have demonstrated an increasing need for greater and more extensive cooperation between the state and national governments, and among the states themselves.

Is the constitutional system of divided responsibility sufficiently flexible to assure a coordinated program for the prevention and control of crime?

The states are the major unit for the control of the administration of criminal laws and are responsible for most all criminal law enforcement.[2] The official charged with the enforcement of

1 *Ex parte Siebold*, 100 U. S. 371 (1879), 387.

2 For a general discussion of the administration of justice at the local government level, see Arthur C. Millspaugh, *Local Democracy and Crime Control* (Washington, D. C., 1936).

the law has for centuries been the sheriff, who is the chief authority for rural crime control.[3] The sheriff to this day is a political officer and his connections with local politics and his numerous civil duties tend to discourage any desire he might have to be more active in police work.[4] His term of office is short, and he is frequently ineligible to succeed himself. This condition prevents him from acquiring any great skill as a crime detector. Whenever sheriffs have been asked about their law-enforcement duties, they have admitted their limited interest in this portion of their work and their preoccupation with their many civil functions.[5] These factors have been one of the contributing elements toward the steady growth of *state* police systems operating throughout the entire jurisdiction of the state. Every state has established state-wide patrol or police units operating upon the major state highways, and has organized scientific laboratories to assist their own officers as well as local peace officers in the fight against the criminal. The radio has been utilized to make communications with patrolmen and local peace officers speedier and more effective. In some of the states where reorganization attempts have been effective, departments of justice have been instrumental in formulating plans to coordinate the work of detection, apprehension, and prosecution.

Even though the states were completely centralized for criminal law enforcement, the national crime problem would be only partially solved.[6] The states themselves are too small and too numerous to satisfy all the requirements of effective crime control. The automobile makes it possible to enter, leave, or cross a state in a matter of hours or even minutes, where it was formerly a matter of slow and weary days. Modern gangdom plans a crime in one state, executes it in another, and either returns to the first state, or goes into some remote region for the needed cooling-off period.[7] Thus, the territorial range of criminal operations is interstate and national in character, and crime control methods must be interstate and national also if the heavy toll against lives and property is to be reduced and controlled. The pursuit of a criminal cannot stop because of an artificial city, county, or state line.[8] A clue which is found in one jurisdiction must be followed up in still another. In short, the complete evi-

3 The Missouri Association for Criminal Justice, *The Missouri Crime Survey*, (New York, 1926), p. 59.

4 Bruce Smith, *The State Police* (New York, 1925), p. 18.

5 *The Missouri Crime Survey, op. cit.*, p. 65.

6 Arthur C. Millspaugh, *Crime Control by the National Government* (Washington, D. C., 1937), p. 46.

7 *Ibid.*

8 See W. Berge, "Criminal Jurisdiction and the Territorial Principle", 30 *Michigan Law Review* (1931), pp. 238 ff.

dence in both major and minor crimes may be spread from one coast to the other, and from Canada to Mexico.

What, then, are the constitutional devices which make effective crime control possible in the United States?

The historic constitutional device for federal cooperation in crime control resulting from limited jurisdictions is the method of interstate rendition or extradition of criminals or persons accused of crime. This scheme of federal cooperation dates from early colonial days and as early as 1643. The right of an asylum state or country to arrest and surrender a fugitive from justice of another nation or state had been recognized at that early date and the courts in this country followed the practices announced in decisions by the courts in England. This agreement in colonial days apparently did not give any discretion to the magistrate of the government where the offender was found. He was bound to arrest the offender and deliver him, upon the production of the certificate under which the offender was demanded.[9]

In 1781 the colonies united against the mother country under the Articles of Confederation. Evidence of the importance of the problem of inter-colonial crime is the provision respecting fugitives from justice.[10]

If any person guilty of or charged with treason, felony, or other high misdemeanor in any State, shall flee from justice, and be found in any of the United States, he shall, upon demand of the Governor or Executive power of the State from which he fled, be delivered up and removed to the State having jurisdiction of his offence.

This agreement was made in the absence of a strong, central government vested with the power of enforcement. Consequently, it had little more force than any other treaty between States. The return of a criminal fugitive depended almost entirely upon the discretion of the government of the asylum state. When the Constitution was adopted, however, the relations among the states were fundamentally changed. A new government was organized which was intended to knit the loosely bound communities into a firmer union. The system provided a unique experiment in constitutional government. Two governments over the same and contiguous territory was unusual,[11] and the settlement of conflicting problems arising under it have since

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9 See *Winthrop History of New England, 1630-49* (Hosmer ed. 1908), vol. 2, pp. 100, 104-5. Also, John Bassett Moore, *Extradition* (1891), vol. 2, pp. 819 ff. H. S. Toy and E. E. Shepherd, "The Problem of Fugitive Felons and Witnesses", 1 *Law and Contemporary Problems* (1934) p. 418. *Ex parte Kentucky* v. *Dennison*, 24 Howard 66 (1861).

10 *Articles of Confederation*, Article IV, par. 2.

11 *Ableman* v. *Booth*, 21 Howard 506 (1859), 516.

provided the elements for a vast proportion of American Constitutional Law. The Constitution enumerated the powers for the central government, and reserved all powers, not delegated, to the states and to the people. Certain definite powers were conferred upon three coordinate branches of the central government which in turn gave rise to implications of power not otherwise expressed in the document.[12]

Among the powers of the central government was one dealing with the subject of interstate rendition. With some slight changes, the provisions of the extradition compact of the Articles of Confederation were embodied in the Constitution,[13] and later extended by an act of Congress.[14]

> A person charged in any State with treason, felony, or other crime, who shall flee from justice, and be found in another State, shall, on demand of the executive authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the crime.

A statute of 1794 made it the duty of the governor of the asylum state, upon requisition of the executive of the state of primary jurisdiction over the fugitive and his crime, to honor the demand and issue his warrant authorizing arrest and removal. But in *Ex parte Kentucky* v. *Dennison*,[15] the Supreme Court declared that a federal court was powerless to force the governor of Ohio to honor the requisition of the executive in Kentucky. It was held that while extradition between the states is provided for in the Constitution and the laws enacted under it were supreme, if the governor of an asylum state refused to discharge this duty, there was no power delegated to the central government, either through the judicial department or any other department to use coercion to compel him to act. This meant that the central government was powerless to enforce its own law, that is, through state officers. It meant that the matter of extradition in any particular case rested entirely upon the discretion of the governor of the asylum state. And if he should choose to consider any extraneous evidence, political or otherwise, which had a bearing upon the guilt or innocence of the accused, or any other facts actually outside his province, he might do so with impunity.[16] The governors of the states thus held the key to control until 1934 when President Roosevelt

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12 *McCulloch* v. *Maryland*, 4 Wheaton 316 (1819).
13 *Constitution of the United States*, Art. IV, sec. 2, par. 2.
14 Act of Feb. 12, 1793. 1 Stat. 302.
15 The lower federal courts have held that extradition proceedings are controlled entirely by the federal laws, and any state laws on the subject are only in aid of the federal law. See *U. S. ex rel McCline* v. *Meyering*, 75 Fed. (2d) 716.
16 Toy and Shepherd, *op. cit.*, p. 419.

approved a bill making it unlawful for any person to flee from one state to another for the purpose of avoiding prosecution or the giving of testimony in certain cases.[17] This law made it possible for national agents to pursue and apprehend criminals without regard to the provisions and technicalities of interstate rendition.

There is a second device for federal cooperation in crime control which has been seldom used—the interstate compact. The Constitution provides that "No State shall, without the consent of Congress . . . enter into any agreement or compact with another state or with a foreign power . . ."[18]

The possible value of this somewhat dormant provision was in part recognized in 1934 by authorizing in advance agreements or compacts on the subject of crime control. This law provides for "cooperative effort and mutual assistance in the prevention of crime and in the enforcement of their respective criminal laws and policies, and to establish such agencies, joint or otherwise, as they deem desirable for making effective such agreements and compacts."[19]

These two constitutional devices have thus authorized interstate cooperation in the administration of justice. However, it is evident that difficulties arise when action must be taken which involves two or more states not having a common boundary. It is not difficult for New York, New Jersey, and Pennsylvania, for example, to cooperate under the compact and rendition clauses of the Constitution. But it is another matter when one or more of these states is required to operate in conjunction with Illinois or California. The element of time is all important in criminal apprehension, and delays arise during the time required to transmit formal papers to secure the arrest of persons wanted in New York who happen to be in California or who are believed to be in California. It is true that the agents of these states do transmit information and cooperate with one another in holding criminals until the necessary legal paths are smoothed for extradition. But the history of interstate rendition is overflowing with examples of snarls among the states on this very question.

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17 Act of May 18, 1934. 48 Stat. 782.

18 *Constitution,* Art. I, sec. 10, par. 3.

19 See Felix Frankfurter and James Landis, "The Compact Clause in the Constitution: A Study in Interstate Adjustments," 34 *Yale Law Journal* (1925): Marshall E. Dimock and George C. S. Benson, *Can Interstate Compacts Succeed?* (Chicago, 1937); Jane Perry Clark, "Interstate Compacts", 50 *Political Science Quarterly* (1935), pp. 502 ff. See also, Act of June 6, 1934. 48 Stat. 909. Thirty-six states had entered into a parole and probation compact by 1943. See *Book of States, 1943-44,* p. 52.

The greatest strides in federal cooperation in crime control have been via the constitutional jurisdiction of the national government over crime itself. The Constitution has delegated certain powers to the Congress, and one writer has stated that the criminal statutes of the national government can be traced to more than 25 provisions of the document.[20] Certain of the delegated powers relate directly to the field of crime control. Under these powers, Congress has enacted a voluminous criminal code, based upon provisions specifically relating to crimes, and to other provisions which authorize such legislation by indirection. The Federal Criminal Code rests upon such provisions as the powers over treason, piracies, and felonies on the high seas and against international law, counterfeiting United States coin and securities, naturalization and immigration, uniform bankruptcy, post offices and post roads, the power to enforce laws by military units, and the tax and commerce powers.[21]

But how could the massive Code be erected from the meager constitutional framework? In addition to the enumerated powers, Congress has power "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers . . ."[22] And the Congress was not slow to take advantage of this necessary and proper clause to enact criminal statutes, for this provision has been the basis for most of the law enforcement authority of the national government.[23]

These national laws, based upon national powers, find their statutory anchorage in two main sources: the powers over commerce, and the power to tax.[24] These powers have been instrumental in not only increasing tremendously the national powers over criminal law enforcement, but have made it possible for greater and more effective federal cooperation in the war against crime.[25] It is under the powers over commerce that the greatest progress has been made in federal-state cooperation. Under the commerce power laws have been predicated upon previously existing state laws. Certain acts have been prohibited

20 B. Thorn Lord, "Criminal Power of the Federal and State Governments", *New Jersey Conference on Crime, 1935* (Abstract of Addresses), p. 150.

21 These provisions have been conveniently classified as follows: (1) crimes against the law of nations; (2) crimes against the sovereignty of the U. S.; (3) crimes against public justice; (4) crimes against the person; (5) crimes against property. See J. E. Hoover, "Some Legal Aspects of Interstate Crime", 21 *Minnesota Law Review* (1937), p. 235.

22 *Constitution,* Art. 1, sec. 8, par. 18.

23 Bruce Smith, *Police Systems in the U. S.* (New York, 1940), pp. 206-10. *U. S. Government Manual,* 1947.

24 *Constitution,* Art. 1, sec. 8, pars. 1 & 3.

25 "Federal Control over Crime—the Scope of Power to Regulate Crime under the Commerce Clause", 32 *Michigan Law Review* (1934), pp. 378 ff. J. Rodgers, "Federal Criminal Statutes—Validity", 28 *Journal of Criminal Law and Criminology* (1936), pp. 762-5.

as illegal and offenders must suffer the penalties of the national law and in the national courts. These laws tend to prevent or at least discourage interstate crime, or crime on a nation-wide scale. The Supreme Court has held, in considering the commerce clause, that the right of the citizen to use these facilities does not give him the right to abuse them.[26] Thus, when Congress sought to stamp out a declared evil and prevent the use of interstate commerce in the selling of lottery tickets, the Court held valid the power over commerce among the states and stated that carrying lottery tickets was commerce.[27] This decision was the result of testing the validity of the national law, which was, in effect, an aid to those states which themselves had outlawed the sale of lottery tickets within their own boundaries, but were helpless in preventing an influx of lottery tickets from without. The Court upheld the right of the national government to prohibit articles from being transported from state to state to protect the people of all the states. Likewise, in construing the respective powers of the state and national governments over the sale of intoxicating liquors, the Court found that Congress had "... considered the nature and character of our dual system of government, State and Nation, and instead of absolutely prohibiting, had so conformed its regulation as to produce cooperation between the local and national forces of the government ..."[28]

The commerce power was expanded further to aid the states in controlling the practice of stealing automobiles and their subsequent interstate transportation. Cars were stolen in one state and transported over the highways into another state to be sold. The practice had grown to such proportions that the states were unable to deal with it effectively. There was some cooperation among the states in an extra-legal way, generally informal practices among the state and local police promoting mutual aid. But these methods were cumbersome and often difficult to conclude. These conditions were instrumental in forcing the passage of the National Stolen Motor Vehicle Act by Congress.[29] The Supreme Court held that Congress could regulate interstate commerce to the extent of forbidding and punishing the use of such commerce as an agency which promoted immorality, dishonesty, or the "spread of any evil or harm to the people of other states from the state of origin,"[30] and that Congress was

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26 *Hoke* v. *U. S.*, 227 U. S. 308 (1913); *Champion* v. *Ames*, 188 U. S. 321 (1903); *Caminetti* v. *U. S.*, 242 U. S. 470 (1917); *Brooks* v. *U. S.*, 267 U. S. 432 (1925); *U. S.* v. *Darby Lumber Co.*, 312 U. S. 100 (1941).

27 *Champion* v. *Ames*, 188 U. S. 321 (1903).

28 *Clark Distilling Co.* v. *Western Md. Ry. Co.*, 242 U. S. 311 (1917), 331.

29 Act of Oct. 29, 1919. 41 Stat. 324.

30 *Brooks* v. *U. S.*, 267 U. S. 432 (1925), 436.

merely exercising the police power, for the benefit of the public within the field of interstate action.

> The quick passage of the machines into another state helps to conceal the trail of the thieves, gets the stolen property into another police jurisdiction, and facilitates the finding of a safer place in which to dispose of the booty at a good price. This is a gross misuse of interstate transportation by anyone with knowledge of the theft because of its harmful results and its defeat of the property rights of those whose machines against their will are taken into other jurisdictions.[31]

This law was later amended to include other stolen property,[32] and it tends to discourage the interstate transportation of stolen property: thus it becomes an aid to the states in the enforcement of their law.

Another example of national action to supplement state law is the anti-racketeering statute.[33] This law made it a felony to obtain the payment of money or other valuable "considerations" or the purchase or rental of property or other "prospective services" by the use of or the threat to use "force, violence, or coercion" when this conduct is "in connection with or in relation to any act in any way or in any degree affecting" interstate or foreign commerce. This has struck a heavy blow at the web of nationally organized rackets.

One of the most highly publicized examples of the use of the interstate commerce power by the national government in the administration of justice was the legislation to control and prevent kidnapping. The first law on the subject was passed in 1932 after state laws were found to be inadequate without being supplemented by national law.[34] The United States Circuit Court of Appeals considered that power to regulate commerce among the states included the power to prohibit the use of it to "facilitate wrongful injurious acts or practices . . . To prohibit the use of the channels of interstate commerce to facilitate the crime of kidnapping is clearly within the power of Congress."[35]

A law of 1910 forbids the transportation in interstate commerce of women for immoral purposes. When considered in the *Hoke* case,[36] it was maintained that if interstate transportation was used to fortify or sanction wrongs that its use could be properly denied under the penalty of national law.

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31 *Ibid.*, pp. 438, 439.

32 Act of May 22, 1934, as amended by Act of August 3, 1939. 48 Stat. 794.

33 Act of June 18, 1934. 48 Stat. 979. Sustained in *U. S.* v. *Gramlich,* 19 Fed. Supp. 422.

34 Act of June 22, 1932. 47 Stat. 326. Amended by Act of May 18, 1934. 48 Stat. 781.

35 *Bailey* v. *U. S.*, 74 Fed. (2d) 451 (1934), 453.

36 *Hoke* v. *U. S.*, 227 U. S. 308 (1913). Sustained act of June 25, 1910. 36 Stat. 825.

Our dual form of government has its perplexities, State and Nation having different spheres of jurisdiction, as we have said; but it must be kept in mind that we are one people; and the powers reserved to the states and those conferred on the nation are adapted to be exercised, whether independently or concurrently, to promote the general welfare, material and moral.[37]

The national government has thus promoted and fostered federal cooperation through the indirect sanction of the commerce power. While this power has been the root of the most extensive cooperation, the power of the national government to lay and collect taxes has provided still another technique. The Constitution provides that Congress shall have the power "to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defense and general welfare of the United States."[38] Thus, if the government obtains compliance with its tax laws, it becomes necessary and proper to prescribe penalties for non-payment of taxes. Likewise it is necessary for the government to maintain a force of trained officers to detect tax evasions and attempt the prevention of tax violations. It is by this route that the national government entered the field of narcotics control, previously a problem for purely local and state law enforcement. Through an elaborate system of licensing based upon the taxing power, the national government has brought the narcotic traffic under control, and yet it remains an aid to the previously enacted state laws controlling the use of narcotics. The Supreme Court sanctioned this kind of cooperation in upholding the taxing power of the national government as it applied to bank notes.[39] When the Court was confronted with an attack on the Harrison Anti-Narcotic Act of 1914,[40] it maintained that Congress could not, however, in the exercise of this power, exert authority which was wholly reserved to the states, and it refused the request that the Court was bound to inquire into the motives for the exercise of the taxing power.

If the legislation enacted has some reasonable relation to the exercise of the taxing authority conferred by the Constitution, it cannot be invalidated because of the supposed motives which induced it.[41]

It is emphasized that these tax laws provide criminal penalties for non-compliance, and it can be seen that they are direct auxiliaries to state law enforcement. In each case the vice aimed at is beyond the adequate and effective control of the states acting singly.

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37 *Hoke* v. *U. S.*, 322.
38 *Constitution*, Art. 1, sec. 8, par. 1.
39 *Veazie Bank* v. *Fenno*, 8 Wallace 533 (1869).
40 Act of Dec. 17, 1914. 38 Stat. 788.
41 *U. S.* v. *Doremus*, 249 U. S. 86 (1919), 93.

The exercise of authority presumes the enactment of laws. But mere statutory enactment does not, *ipso facto,* mean compliance with those laws. The question may be asked: how can these laws be effectively administered? Consider, for example, the law which made it a felony for a criminal to cross a state line to avoid prosecution.[42] This law has the effect of avoiding the complexities of the rendition process, and it may have the effect of reducing rendition to a minimum of operation. This fleeing felon law makes it easier to remove the criminal wherever he may be found.[43] After a criminal has been released from the national authorities, there is nothing that prevents the state authorities from prosecuting him if he has violated a state law. And this practice works both ways. The prison officials in both state and national governments generally inform the state and local police when it is about to release a prisoner. In this manner the prisoner can be "picked up" if he is wanted by one of the other authorities. Much time is saved, at the expense of the criminal, and he is forced to face trial for any previous action which violated a law of another govermental unit—city, state, or nation. It has long been settled that the provisions of a national and state law making the same act a crime against both governments are not a violation of the guarantees of the right to freedom from governmental aggression—from being put twice in jeopardy of life and limb for the same offense.[44] Almost every citizen owes allegiance to two sovereigns in the United States and he may therefore be liable to punishment for an infraction of the laws of either or the same act may be a violation of the laws of both.[45] In the *Siebold* case, the Supreme Court announced that there was nothing in the Constitution to forbid the kind of cooperation existing in the enforcement of the election laws. On the contrary, it recognized that there was a kind of silent sanction for such cooperation whenever the Congress "deems it expedient to interfere merely to alter or add to existing regulations of the state"[46] on that subject. Cooperation

42 Act of May 18, 1934. 48 Stat. 782.

43 While the rule in international law applying to extradition provides that the criminal may be tried only for the crime for which he was extradited, such a limitation does not apply in interstate rendition in the U. S.

44 *Ex parte Siebold,* 100 U. S. 371 (1879).

45 It is interesting to note that in an early Ohio case involving the prosecution of an offense against violation of counterfeiting laws the U. S. Supreme Court held that the states were without power to prosecute cases of that kind, but speaking of the subject of possible double jeopardy, it said that "nothing can be more repugnant or contradictory than two punishments for the same act. It would be a mockery of justice and a reproach to civilization. It would bring our system of government into merited contempt." *Fox* v. *State of Ohio,* 5 Howard 410 (1847), 437. It is obvious that this line of reasoning was not followed as applied to double jeopardy.

46 *Op. cit.* 392.

was necessary in the eyes of the Court for "if the two governments had an entire equality of jurisdiction, there might be an intrinsic difficulty in cooperation."[47]

When the question was raised in relation to a concurrent authority over prohibition of intoxicants, the Supreme Court found in the *Lanza* case[48] that the state and national governments derived their power from different sources, each of which was capable of dealing with the same subject matter and within the same territory. Each government could enact prohibition laws without interference from the other, limited only by the provisions of the eighteenth amendment then in force. Each government could determine what acts constituted an offense against its peace, and, in so doing, exercised its own sovereign powers and not those of the other. Therefore, an act denounced as a crime by both the national and state governments was an offense against the peace and dignity of both and could be punished by each. Such procedure was not double jeopardy, even though a person might by the same act be prosecuted by two governments. The Court did offer a means to prevent double prosecutions, suggesting that the national government could forbid prosecutions in its courts if the same person had been prosecuted and convicted for the same act in the state courts.[49]

It is obvious that the most successful cooperation must result from or be the outgrowth of many voluntary and mutual agreements or understandings among the administrative and judicial officers of all levels of government. Most of these agreements are extra-legal and purely moral obligations. Generally speaking, there is seldom much friction arising from national-state, interstate, and national-local agreements of this kind. But this does not mean that disagreements, frictions, and jealousies do not arise from any such arrangements.

This kind of cooperation prevails in the enforcement of the laws against kidnapping.[50] It is difficult to determine accurately after the disappearance of a person, presumed to have been kidnapped, whether or not he has been taken across a state line, thus legalizing the operations of the Federal Bureau of Investigation. The national law allows a lapse of seven days, after which time it is assumed that the kidnapped person must have been transported across a state line and thus taken into interstate commerce. During this interval the burden of the work of

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47 *Ibid.*

48 *U. S.* v. *Lanza,* 260 U. S. 377 (1922), 385.

49 *Ibid.*

50 Horace L. Bomar, Jr., "The Lindbergh Law", 1 *Law and Contemporary Problems* (1934), pp. 441 ff.

investigation falls largely upon the state and local officers, even though it may later develop that the kidnapped person has been carried across a state boundary. After the national officers have "officially" entered the case, the state officers generally continue to assist in the search, because the states have laws against kidnapping as well, and some of them are more severe than the national law.

In the case of violation of the Fugitive Felon Act the state and local officials invariably furnish the original information to the national officers, for prosecution under the law must result from a flight across a state line to avoid prosecution by a state. The Department of Justice has indicated that cooperation among the several levels of government is highly successful.[51] The fact remains, however, that the success of such a plan rests upon the mutual good faith of national, state, and local enforcement officials, and that it is a voluntary undertaking.

This cooperation extends to the prosecution of offenders as well as to the process of detection and apprehension. In the notable *Ponzi* case[52] the Supreme Court held that cooperation by the national and state prosecuting authorities need not necessarily rest upon statute. In this case one Ponzi was serving a sentence in a federal prison located in the state of Massachusetts. He had violated a state law prior to his prosecution and imprisonment by the national government, and through an agreement between the Department of Justice and the local authorities, Ponzi was produced from day to day in the state court where he was tried for larceny. He was acquitted for this crime, however.

In another case, the national government was still more accommodating.[53] One Chapman was serving a term in the federal prison at Atlanta for robbery. He was transferred by an order of the Attorney General of the United States to a state prison in Connecticut. He, like Ponzi, had violated a state law and was produced from day to day in the state court for trial. He was tried and convicted on a murder charge, an action committed during an escape from prison. After the conviction in the state court, President Coolidge commuted Chapman's sentence and the state penalty, which was death, was carried out. It was suggested that the President did not have the legal authority to honor the *habeas corpus* of the state judge and allow the trial of Chapman. However, the federal court hearing the case pointed out that the custody of federal prisoners and their disposition

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51 See Jane Perry Clark, *Rise of a New Federalism* (New York, 1938), pp. 129 ff.
52 *Ponzi* v. *Fessenden*, 258 U. S. 254 (1922).
53 This case, *Chapman* v. *Scott*, 10 Fed. (2d) 156 (1925), was suggested in reading E. D. Fite, *Government by Cooperation* (New York, 1932), pp. 41-49.

was charged with the Attorney General and that it was not uncommon for the national government to "board" its prisoners at state prisons from time to time. But it remains a question where the President found the legal power to allow the state to try the prisoner already serving in federal custody.[54]

In both the Ponzi and Chapman cases the procedure was a matter of voluntary cooperation between the national and state authorities exercised at the discretion of the President of the United States. But the Supreme Court found that ". . . there is no express authority authorizing the transfer of a federal prisoner to a state court for such purposes. Yet we have no doubt that it exists . . ."[55] For the United States to surrender its prisoners to the states in such a manner was a concern for the national government alone. This procedure of voluntary arrangements has been followed in numerous other cases of record.[56] The meaning of these decisions is that the courts of the national and state governments rightfully practice comity and mutual assistance to promote due and orderly procedure.[57] Chief Justice Taft, who delivered the decision for the Court said that "this arrangement of comity between the two governments works in no way to the prejudice of the prisoner of either sovereignty."[58] The Chief Justice opened the opinion in these words:

> We live in a jurisdiction of two sovereignties, each having its own system of courts to declare and enforce its laws in common territory. It would be impossible for such courts to fulfill their respective functions without embarrassing conflicts unless rules were adopted by them to avoid it. The people for whose benefit these two systems are maintained are deeply interested that each system shall be effective and unhindered in its vindication of its laws. The situation requires therefore, not only definite rules fixing the powers of the courts in cases of jurisdiction over the same persons and things in actual litigation, but also a spirit of reciprocal comity and mutual assistance to promote due and orderly procedure.[59]

Thus the two seemingly sovereign and independent governments are not absolute in their respective spheres, but are regarded as cooperative units, performing their tasks through coordinated effort. The Supreme Court has generally always regarded any kind of voluntary cooperation as completely within the legal bounds of the Constitution, and it has sanctioned the attempts by Congress to legislate crime out of existence even

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54 *Chapman* v. *Scott*.
55 *Ponzi* v. *Fessenden*, 261-262.
56 See Fite, *op. cit.*, p. 87.
57 *Ponzi* v. *Fessenden*.
58 *Ibid.*, 266.
59 *Ibid.*, 259.

when it invaded "cherished rights" in local self-government. Within the legal bounds of the Constitution these various techniques permit cooperative government with the states assisting the national government, and the national government aiding the states in a problem of mutual interest. The no-man's land of governmental operation in crime control is thus more effectively closed, and the easy channels of escape are being gradually eradicated.

While most of the cooperation has resulted from the necessities of the time, the extension of national laws as aids to the state and local units has been enhanced through the efforts of several official and unofficial agencies. For example, the United States Department of Justice serves as a clearing house of information serving national, state, and local enforcement officers. The Department has interested Congress in authorizing consent in compacts among the states on the subject of crime control.[60] Some of the unofficial[61] agencies have recently concentrated effort to secure the adoption of laws to permit officers of one state, on crossing a state line into another state to pursue and arrest a fugitive, laws which would authorize the waiver of formal interstate rendition proceedings in the state of arrest, laws which would enable the courts in one state to detain and send witnesses into another state where needed in a criminal prosecution, and laws to authorize the supervision by the authorities of the state which a paroled person has entered from another state where he was convicted.[62]

There is no question but that much duplication of policing prevails in this country, and another device for cooperation and the elimination of unnecessary duplication of personnel is the use of state officials for enforcement of national laws. Under this plan the state and local police are commissioned to administer national laws, not in the capacity of state officers, nor of national commission, but rather in a dual or federal capacity. They thus become the agents of both. There are numerous examples of this kind of cooperation. The method was practiced under the Fugitive Slave Law of 1850. Local peace officers acted under warrants issued by local magistrates to apprehend fugitive slaves and return them to their masters. Under such a procedure the officer practiced the dictates of two governing bodies. Although there may be some legal obstacles to this kind

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60 See Smith, *Police Systems in the United States*, pp. 291-340.

61 Such as *The National Conference of Commissioners on Uniform State Laws*, *The Interstate Commission on Crime*, and *The Council of State Governments*.

62 John H. Wigmore, "State Cooperation for Crime Repression", 28 *Journal of Criminal Law and Criminology* (1937), pp. 327-34.

of cooperation, the use of state and local officials to assist in national law enforcement was practiced extensively in World War II. In an early case,[63] the Supreme Court assumed that it was proper for the national government to constitute state officers as its agents. It said that even though the general government was in some respects superior to and independent of the state governments and could enforce its laws through its own officers, the general government had been in the habit of using the officers, tribunals, and institutions of the states as its agents, but only with their consent. Such a use was not in violation of any principle of the supremacy of the national government, but was a matter of convenience and a saving of expense. "The laws of the union may permit this agency, but it is by no means clear that they can compel it."[64]

In *Robertson* v. *Baldwin* the Court held that

> . . . Congress is still at liberty to authorize the judicial officers of the several states to exercise such power as is ordinarily given to officers of courts not of record; such for instance, as the power to take affidavits, to arrest and commit for trial offenders against the laws of the United States; to naturalize aliens, and to perform such other duties as may be regarded as incidental to the judicial power rather than a part of the judicial power itself.[65]

State courts which act as agents for the national government serve to exercise authority of the national government and must be bound by its actions in accordance with national law.[66]

In *Kentucky* v. *Dennison* it was stated that Congress might authorize a particular state officer to perform a particular duty, but it made it clear that no force could be applied to compel a state officer to act. If the national government had that power, it might overload the officer with duties which would fill up all his time and disable him from performing his obligations to the state. It might, indeed, impose duties upon him of a character which would be incompatible with "the rank and dignity to which he was elevated by the State."[67] It did not

63 *Wayman* v. *Southard*, 10 Wheaton 1 (1825). Also, *Prigg* v. *Pennsylvania*, 16 Peters 539 (1842); *U. S.* v. *Jones*, 109 U. S. 513 (1883); *Robertson* v. *Baldwin*, 165 U. S. 275 (1897).

64 *Wayman* v. *Southard*, 39, 40.

65 165 U. S. 275 (1896), 279.

66 *U. S.* v. *Jones*.

67 *Op. cit.*, 108. On the other hand, see the recent case of *Testa* v. *Katt*, decided March 10, 1947, reported in Law Ed., Adv. Ops., vol. 91, no. 10, 776. The Court held that it could not accept the basic premise on which a state court "held that it has no more obligation to enforce a valid penal law of the U. S. than it has to enforce a penal law of another state or a foreign country. Such a broad assumption flies in the face of the fact that the States of the Union constitute a nation . . . It cannot be assumed, the supremacy clause considered, that the responsibilities of a state to enforce the laws of a sister state are identical with its responsibilities to enforce federal laws."

deny that Congress could authorize a particular state officer to perform a particular act, but because it might do so, it did not mean that this officer could be forced to follow the national law.

On the other hand, some states will not permit this kind of cooperation. These provisions prohibit a person from holding a state office and an office of trust or profit under the United States.[68] If he accepts the latter, he is disqualified from continuing in the capacity of the former.[69] A national law of 1894 provided that no person receiving a salary from the national government of more than $2500 annually could serve as a paid state officer.[70] These restrictions seem to operate to prevent dual enforcement by a single individual, but the latter requirement is statutory and would be easier to relax than a state constitutional restriction. This distinction is sometimes overcome in the interpretation of what constitutes an *officer* and an *employee.* The Supreme Court has defined an officer of the United States in such a manner that few state agencies cooperating with it need be adversely affected. The term *office* embraces the ideas of "tenure, duration, emolument, and duties."[71] Under average conditions in which an officer of one government serves another the amount of pay may not be previously determined or fixed definitely. However, these practices are not uniform and a general rule cannot be laid down.

In recent years the state and national governments have utilized still another technique for cooperation—the grant-in-aid.[72] This scheme has been adapted in such undertakings as road and highway building, relief grants, education, social security, to mention some of them. In granting these funds to the states, the national government has voiced its demands for the establishment of standards and uniform practices in state administration. Grants-in-aid have not as yet found their place in criminal law enforcement, but it is not inconceivable to consider its possibilities as a method of bringing some local crime control methods out of the mire of antiquity. Any such procedure would have to begin first with a study of conditions within the entire country, and by a series of conferences with state and local officials, to determine the conditions upon which funds would be granted and the method of distributing such funds.[73]

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68 Notably state constitutional restrictions.

69 The opposite is true for election administration.

70 Act of July 31, 1894. 28 Stat. 205.

71 *U. S.* v. *Hartwell,* 6 Wallace 385 (1868), 393.

72 H. J. Bitterman, *State and Federal Grants in Aid* (New York, 1938).

73 Paul H. Sanders, "Federal Aid for State Law Enforcement", 1 *Law and Contemporary Problems* (1934), pp. 472-83.

Just what the future course of action will be in the relations of the several levels of government in the field of criminal law enforcement is not a matter of conjecture.[74] The relations of the national, state, and local officials have evidenced the basis for and the growth of government by extensive cooperation. No longer are the paths of lax enforcement beyond the combined control of society under our dual system of government. While it is true that much of the machinery of the horse and buggy days remains, it is rapidly undergoing an overhauling and a new model is appearing on the assembly line. Some of the difficulties which naturally arise out of a division of powers over crime control do remain, but the union of the forces of law operating within the Constitution and under the division of powers evidence an answer to the challenge of extreme nationalists, and to those who despair of our federal system and decentralization of authority.

The history of the constitutional growth of criminal law enforcement indicates an increasing interest by the national government and shows advancement by the state and local units. The state and national governments alike have broken their silence and now speak in the form of new methods of combatting crime. The hitherto dormant segments of constitutional powers have been awakened from an overdose of local self-government by the adoption of new devices made possible through the developments in scientific methods of detection and apprehension. For example, the application of photography has made possible the wide distribution of fingerprints of criminals and suspects. The great collection of fingerprints of the FBI can be quickly distributed to local units by the photostatic process.

Perhaps the most important development in policing has been the development of the personnel program. No longer are the services of a police force so simple that they can be performed by the average individual unless he is especially equipped to handle the task. Personnel training programs have been adopted in numerous metropolitan police systems, and the state police and patrol agencies have long recognized the value of the trained expert. Of course, much needs to be done to extend the science of personnel administration to all units of government, for there remain the locally elected police officials in virtually every county in the country who possess by chance only the necessary requirements of a trained expert.

It is only through the trained officer that the more technical phases of police science can be applied. The layman knows little

74 See David Fellman, "Some Consequences of Increased Federal Activity in Law Enforcement", 35 *Journal of Criminal Law and Criminology* (1944), pp. 16-33.

about microscopic and photographic comparisons, so vital to police science, little about the chemistry of blood analysis, often the only clue in homicide cases, little about the value of ballistics. Whenever new inventions have been made available to society, many persons find use for them to further their own ends without much regard for the rights of property or person. Under these conditions it has been necessary for law enforcement agencies to adopt new methods to cope with the present day criminal and the one of the future.

A sizeable volume could be written upon the administrative phases of federal cooperation in crime control. This would not only involve the subject of constitutional theory and practice, but also the exchange of services, the exchange of information, and much informal aid in an extra-legal way. Such a study might indicate that a greater extension of control by the national government is the only way through which adequate and full control over crime will be met. There is no question but that there has been a vast expansion of control by the national government and the consequences of this increased federal activity have made impact upon American Constitutional doctrine. Indeed, it may have a demoralizing effect upon constitutional morality.[75]

There is a tendency to expand cooperation and this is desired by national enforcement agencies. But the future of this cooperation must rest upon the mutual good faith of the governmental agencies concerned. It is admitted that inter-agency jealousies and struggles for supremacy are ever present problems of administration. And it is true that misunderstandings arise whenever the officers of one "government" operate in the territory of another. These problems are important and must be controlled as may be permitted within human endeavor. Yet the test of effective crime control is not only in the elimination of human weaknesses, but also in the success of rescuing police organizations from the mire of graft, corruption, and favoritism.

These pages have attempted to indicate the existing legal channels through which cooperation may succeed. At the turn of the present century many of these cooperative devices were not seriously considered, and if they had been their legality might well have been questioned. The rapid development of the means of communication and transportation have necessitated the transformation of nineteenth century methods of police operation. No longer is crime always a local matter. Yet local crime should be handled locally as long as it remains local. It is when

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75 *Ibid.*, p. 23.

crime becomes intrastate and interstate that the federal processes must come into play. And there seems to be room enough in the constitutional processes for the national and state governments to operate together, each calling upon the other for assistance whenever convenient and necessary.

Much remains to be done to foster full application of federal cooperation. But that is a subject of governmental processes, and one of legislative and administrative study, based upon the "go ahead" signal given by the judicial branches of government. Yet, this cooperative federalism will not mean less national direction and assistance, nor will it require national dictation. The states will continue as a laboratory for police science, serving as the unit for the protection of life, liberty and property, and will continue the starting point for most crime control. The local units of government will assume a more important role, for it is in the centers of population concentration that much crime is bred.

Not only is the police official faced with a task of getting his man, but the prosecuting officials as well are confronted with perplexing tasks. Little can be done in law enforcement if criminals are only caught. Something must be done with criminals if crime is to be lessened. Likewise, our efforts should be centered upon the causes and prevention of the urge to commit crime. In the field of prosecution, some improvement will be necessary. Studies made in recent years show that much is to be desired in the whole process of prosecutions. Many jurisdictions are lax in prosecutions, and criminals do not overlook that factor. New controls must be exercised over the excessive independence of the local prosecutor in those regions where the ratio of crime to successful prosecutions favors the former. Prosecution failures are often the heart of the difficulties in successful crime control. And prosecutors are sometimes dishonest and some are forgetful of duty. They generally operate in a small domain in which they are relatively supreme. Removals are not an easy task.[76]

The future in legislation will mean more uniform state laws, the reform of state criminal codes, the use of interstate cooperative devices, the development of closer state and local operations with an exchange of services, and the promotion of good will among all enforcement officials. These should make possible the fullest exercise of legal powers sanctioned, and cooperative federalism should bridge the span of limited jurisdictions and limited authority.

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76 J. G. Heinberg and A. C. Breckenridge, *Law Enforcement in Missouri* (1942), pp. 73 ff.