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Federalization of State Law: Enhancing Opportunities for Three-Branch and Federal-State Cooperation

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FEDERALIZATION OF STATE LAW: ENHANCING OPPORTUNITIES FOR THREE-BRANCH AND FEDERAL-STATE COOPERATION*

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INTRODUCTION

This Article presents the practice and theory of the Department of Justice's approach to the exercise of the expanded jurisdiction Congress has seen fit to establish for the federal courts. In early 1994, the Attorney General requested that a "Three-Branch Roundtable" be convened to discuss institutional issues raised by overlapping federal and state jurisdiction.[1] The Attorney General's plan had been inspired by the thoughtful letter from Chief Judge Clifford Wallace of the Ninth Circuit Court of Appeals expressing concern that recent legislative enactments expanding the reach of federal jurisdiction and the resulting affects on federal court dockets evidenced an erosion of the traditional mission of the federal courts.[2] Judge Wallace suggested that the federal courts would be undermined unless the three branches of the federal government reached some agreement on the role of the federal courts.[3]

Judge Wallace is not unique in expressing this concern.[4] In issuing the annual report for the federal courts, in late December, 1994, Chief Justice William H. Rehnquist noted:

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1. One of my first projects at the Department of Justice was to conduct this Three Branch Roundtable. *See infra* note 90 and accompanying text (discussing the Three-Branch Roundtable conference).

2. Letter from J. Clifford Wallace, Chief Judge, United States Court of Appeals for the Ninth Circuit, to The Honorable William H. Rehnquist, The Honorable Janet Reno, The Honorable Joseph R. Biden, The Honorable Jack Brooks (Mar. 29, 1993) [hereinafter Letter].

3. *See* Letter, *supra* note 2, at 6 (proposing a national three-branch conference to evaluate the problems facing the federal court system and to produce a long-range statement about the mission of the federal courts).

4. *See infra* notes 6-12 and accompanying text (discussing concerns of other scholars, judges, and lawyers about the expansion of the federal court system).

> There is considerable sentiment in the federal judiciary at the present time against further expansion of federal jurisdiction into areas which have been previously the province of state courts enforcing state laws.[5]

Leading jurists and scholars of other generations have also argued for the preservation of the federal courts as courts of limited jurisdiction.[6] These warnings have not been heeded. In his 1994 year-end statement, Chief Justice Rehnquist noted that, "[t]he current climate in the country and the U.S. Congress increases the likelihood that federal jurisdiction will continue to be expanded."[7]

Other judges and federal courts scholars have joined Chief Justice Rehnquist and Judge Wallace in criticizing the expansion of federal jurisdiction into areas previously the subject of state law. The Federal Judicial Center recognized this debate and devoted a substantial amount of time and resource to investigate the issue.[8] It recently published a survey of the principle arguments for and against federalization of law. The survey also evaluated several approaches to allocating jurisdiction between federal and state courts, and presented an alternative approach to dividing jurisdiction between federal and state court systems.[9]

Jon O. Newman, Chief Justice of the Second Circuit Court of Appeals, has argued for limiting the number of federal judges to

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5. Chief Justice William H. Rehnquist, 1994 Year-End Report On the Federal Judiciary 8 (Dec. 30, 1994).

6. *See, e.g.*, Henry S. Friendly, *Averting the Flood by Lessening the Flow*, 59 CORNELL L. REV. 634, 657 (1974) (asserting that the only way to curtail the flow of cases into the federal courts is to enact legislation which will "concentrate all levels of the federal judiciary on their proper tasks"); William Howard Taft, *Possible and Needed Reforms in the Administration of Civil Justice in the Federal Courts*, 6 J. AMER. JUDICATURE SOC'Y 36 (1922) (noting the continuing expansion of federal court cases and supporting legislation aimed at reorganizing and simplifying the federal judicial system); Charles Warren, *Federal Criminal Laws and the State Courts*, 38 HARV. L. REV. 545, 545 (1925) (arguing that the federal courts were over burdened because Congress continued to expand the scope of the body of federal crimes).

7. Rehnquist, *supra* note 5, at 10.

8. WILLIAM H. SCHWARZER & RUSSELL R. WHEELER, ON THE FEDERALIZATION OF THE ADMINISTRATION OF CIVIL AND CRIMINAL JUSTICE 9-38 (Fed. Jud. Ctr. 1994) (discussing arguments for and against certain propositions concerning the federalization of law)

Specifically, Schwarzer & Wheller noted that these propositions:

> 1.) "The Constitution dictates a limited role for the federal courts;" 2.) "Sound public policy mandates a limited role for the federal courts;" 3.) "The continued expansion of the role of the federal courts subverts their traditional role and purpose;" 4.) "The continued expansion of the role of the federal courts threatens their quality and competence.").

Id. at 9.

9. *Id.* at 46 (discussing the need to balance efficiency with fairness and the need to accommodate present demands without sacrificing the "long view").

1,000 to preserve the quality of the federal bench and to preserve coherence in the development of the law.[10] More recently, Judge Newman has proposed creating concurrent jurisdiction over most federal law claims in federal and state courts and investing federal judges with discretion to hear claims in federal court as a way of preserving the federal courts as elite forums, where a high quality of justice can be rendered.[11] The *Proposed Long Range Plan for the Federal Courts* also devoted substantial argument to defining a mission for the federal courts and to establishing criteria for the appropriate allocation of jurisdiction to the federal courts.[12]

The Department of Justice is quite aware of the pressures that recent expansions of jurisdiction have placed on the federal court system,[13] and it agrees with Judge Wallace that interbranch steps must be taken to ensure that the federal courts continue to function effectively. However, the Department does not subscribe to the view that it is possible—or even desirable—to arrive at a theoretical description of the mission of the federal courts in a democracy where values and public concerns fluctuate over time.[14]

As Professors Chemerinsky and Kramer have written, "Our priorities as a nation change so fast that investing substantial time articulating a well-defined model federal jurisdiction would be a waste."[15] Professors Chemerinsky and Kramer recognize that, even

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10. Jon O. Newman, *1,000 judges - the limit for an effective federal judiciary*, 76 JUDICATURE 187, 187-88 (1993) (proposing to limit the number of authorized federal judges, both district and appellate, to 1,000, a number he thinks is the limit for an effective federal judiciary).

11. *See* Jon O. Newman, *Discretionary Access to Federal Courts: Issues and Alternatives*, CONN. L. REV. (forthcoming) (proposing a system of "discretionary access" to the federal courts as a mechanism for reallocating some federal cases to state courts; a system the author believes is the most efficient way to prevent the continued growth of the federal judiciary).

12. COMMITTEE ON LONG RANGE PLANNING OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, PROPOSED LONG RANGE PLAN FOR THE FEDERAL COURTS 4-10, 20-24 (1994) (stating that the "mission of the federal courts is to preserve and enhance the rule of law by providing society with a just, efficient, and inexpensive mechanism for resolving disputes that the Constitution and Congress have assigned to the federal courts" and later setting forth recommendations for defining and maintaining a limited federal jurisdiction).

13. *See* Thomas B. Marvell, *The Rationales For Federal Question Jurisdiction: An Empirical examination of Student Rights Litigation*, 1984 WIS. L. REV. 1315, 1327 (describing the pressures put on federal courts by expanding jurisdiction).

14. Deputy Attorney General Jamie S. Gorelick, Luncheon Address to the American Law Institute 3, 6 (May 20, 1994) (noting that the federalization debate arises every time the federal government attempts to expand its role in response to pressing national problems and that therefore, the Justice Department's approach to federalization "incorporates the broader *programmatic* efforts" to solve the current needs of the nation).

15. Erwin Chemerinsky & Larry Kramer, *Defining the Role of the Federal Courts*, 1990 B.Y.U.L. REV. 67, 76.

though there is an unavoidable political dimension to questions of federal jurisdiction, there are some principles that appear constant.[16] Therefore, while the Department of Justice agrees that attempts to define some "correct" model of federal jurisdiction would be folly, federal jurisdiction as a theoretical and practical matter should not be viewed as having infinite flexibility.[17] Judge Learned Hand got it exactly right. As Professor Gunther notes in his acclaimed biography, Hand disavowed the possibility of a single overarching test to demarcate the border between the state and federal spheres.[18] "The truth really", Hand wrote "is that where the border shall be fixed is a question of degree, dependent upon the consequences in each case."[19]

The decision of the Federal Courts Section of the Association of American Law Schools to explore the issue of federalization of state law at this time is a good one.[20] Congressional action in relation to crime,[21] health care reform,[22] welfare reform[23], products liability reform[24] and civil justice reform,[25] generally, keeps attention focused

16. *Id.* at 76-77 (listing the six "constant principles" of federal jurisdiction as: 1) Enforcing the United States Constitution; 2) Protecting the interests of the federal government as a sovereign; 3) Serving as an empire in interstate disputes; 4) Assuring uniform interpretation and application of federal law; 5) Developing federal common law; and 6) Hearing appeals).

17. *See* Gorelick, *supra* note 14, at 27-28 (arguing that extensions of federal jurisdiction must be selective, clearly identified as national priorities, and implemented through mechanisms with cooperation among state and local government).

18. *See* GERALD GUNTHER, LEARNED HAND: THE MAN AND THE JUDGE 449 (1994).

19. *Id.* (quoting Justice Learned Hand).

20. Judith Resnik, *Dependent Sovereigns: Indian Tribes, States and the Federal Courts*, 56 U. CHI. L. REV. 671, 685 (1989) (noting that in 1986, a federal court section was added to the American Association of Law Schools).

21. *See, e.g.*, Anti Car Theft Act of 1992, Pub. L. No. 102-519, 106 Stat. 3384 (1992) (codified at 18 U.S.C. § 2111 (1994)) (making carjacking a federal crime); Child Support Recovery Act of 1992, Pub. L. No. 102-521, 106 Stat. 3403 (1992) (codified at 18 U.S.C. § 228 (1994)) (making failure to pay child-support a federal crime).

22. *See* 141 CONG. REC. S1944 (daily ed. Feb. 1, 1995) (statement of Sen. Hatfield) (commenting on the Health Partnership Act and advocating looking "to the States to help develop the database we need to determine the appropriate Federal role in health care reform. . . . this is the essence of the federalism on which our country was founded."); *see also id.* 307 (daily ed. Mar. 8, 1995) (reporting that the Committee on Labor and Human Resources concluded hearings on proposed legislation authorizing funds for the health profession's programs of Public Health Service Act, and noting that the hearings focussed on the federal role in the health care area).

23. *See* Work-First Welfare Reform Act of 1995, H.R. 315, 104th Cong., 1st Sess. (1995) (proposing legislation that would offer states a national welfare reform option); *see also* 141 CONG. REC. S1685 (daily ed. Jan. 27, 1995) (statement of Sen. Thurmond) ("[The Unfunded Mandates Reform Act of 1995] is another step toward restoring the Federal-State partnership as it was designed and intended by the Founders of the Constitution.").

24. *See* 138 CONG. REC. S13,269 (1986) (discussing the possibility of federalizing product liability suits and the past and present role of the states); *id.* ("I think the crisis crys out for a

on the questions of what is the appropriate role for federal courts in this evolving federal system and how concurrent jurisdiction can be effectively shared with the states in these and other areas.[26] The remainder of this piece describes how the Department of Justice is responding to the challenges and the opportunities posed by the trend toward federalization of law.

I. DOJ RESPONSES TO FEDERALIZATION

The Department of Justice has articulated a notion of federalization that encompasses more than the question of whether to create or to prosecute federal offenses.[27] In an address to the American Law Institute in May, Deputy Attorney General Jamie Gorelick noted: "Federalization incorporates the broader *programmatic* efforts of the federal government to join with state and local governments in innovative approaches to crime prevention, treatment and prosecution."[28]

The debate over the merits of the recently enacted Violent Crime Control and Enforcement Act of 1994[29] focused largely on the jurisdictional issues raised by the expansion of federal jurisdiction.[30] There also were accusations that the programmatic aspect of federalization contained in the legislation constituted mere "pork".[31] Per-

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Federal solution. I think the Federal Government has an appropriate role to play in this field, and should we be able to get an opportunity to vote on this, I would hope that a majority of my colleagues in the Senate would agree.") (statement of Sen. Morton).

25. *See, e.g.*, Federal Courts Administration Act of 1992, Pub. L. No. 102-572, 106 Stat. 4506, 4521-24 (1992) (codified as amended in scattered sections of 28 U.S.C.) (creating a civil claim in federal court for victims of international terrorism).

26. *See* notes 21-25 and accompanying text (citing legislation and Congressional debates concerning appropriate roles of state and federal courts in certain areas).

27. Gorelick, *supra* note 14, at 5 (stating that federalization should be "seen in broader terms than simply the issue of when to create new federal crimes").

28. *Id.* at 6-7.

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

30. . . . [the] Constitution gives to Congress the power to determine what should and should not be subject to Federal, civil, and criminal jurisdiction. However, we ought also recognize that this power should be exercised with an awareness of its consequences for law enforcement and the administration of justice. . . . [c]riminal law and its enforcement in our society is primarily a State responsibility, rather than a Federal responsibility.

Violent Crime Control and Law enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796, 140 CONG. REC. S12566, S12583 (statement of Sen. Cochran, Aug. 18, 1994).

31. *See* Elaine S. Povich, *Crime Bill Ok'd, Health Reform May Be Stalled*, CHI. TRIB., Aug. 26, 1994, at A3 ("The bill includes $6.9 billion for crime-prevention programs — such as youth recreation, efforts like 'midnight basketball' leagues — much of which was labeled 'pork' projects by some Republicans."); *see also* Paul Bedard, *Clinton Happily Signs the Crime Bill, Dole Cries*

haps the reaction to these programs was so vehement because the opponents recognized the aggressive and broader impact of this programmatic aspect of federalization.[32] As an aside, on January 4, 1995, Senator Dole, Majority Leader, and Senator Hatch, Chair of the Senate Judiciary Committee, filed the Violent Crime Control and Law Enforcement Improvement Act of 1995.[33] Among other things, the Hatch/Dole bill would eliminate a majority of the programs contained in the 1994 Crime Bill, most of which are not scheduled to receive funding until fiscal year 1996.[34] At the same time, the Hatch/Dole proposal would dramatically increase funding for the Federal Bureau of Investigation and Drug Enforcement Administration.[35]

Attorney General Reno saw the 1994 Crime Act as a necessary response to the problem of crime and consequently, the Justice Department is moving away from its traditional role as a law enforcement agency in an attempt to provide new solutions.[36] We like to say that the 1994 Crime Act can be described by focusing on four "p" words - partnership, prevention, policing and punishment.[37] The

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'Pork' Says Fight Isn't Over, WASH. TIMES, Sept. 14, 1994, at A4 ("Mr. Dole called the measure an 'awful crime bill' that contains billions in wasteful pork-barrel spending as he announced legislation to slash $5 billion in social programs and enact some new tough criminal penalties."). *But see* John Wildermuth, *Feinstein Buoyed By Passage of Crime Bill,* S.F. CHRON., Aug. 27, 1994, at A1 ("Money for drug treatment, education and employment programs are important, [Senator Feinstein] said, because the country will never eliminate crime if it concentrates only on putting people in jail.").

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> The continuation of the past decade's trend toward large-scale federalization of the criminal law has the enormous potential of changing the character of the Federal judiciary. . . . This accelerating trend [federalization] contributes to the collapse of self-government as communities slough of responsibilities, even for hiring police and building prisons, onto a distant federal government.

Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796, 140 CONG. REC. S12566, S12583 (statement of Sen. Cochran, Aug. 18, 1994).

33. Violent Crime Control and Law Enforcement Improvement Act of 1995, S. 3, 104th Cong., 1st Sess. (1995).

34. The Hatch/Dole bill would also eliminate funding for drug courts and boot camps funded for fiscal year 1995. *Id.* § 701. ("Subtitles A-S and subtitles U and X of Title III, Title V, and Title XVII of the Violent Crime Control and Law Enforcement Act of 1994, and the amendments made thereby, are repealed.").

35. *Id.* §§ 301-02 (authorizing a funding schedule for the FBI and the DEA, respectively, through the year 2000).

36. Gorelick, *supra* note 14, at 7-8 (discussing the expanding leadership role of the Department of Justice).

37. *See id.* at 9-15 (detailing some of the programs of the Anti-Crime Act which focus on: forming cooperative *partnerships* between federal, state, and local authorities; crime *prevention*; and creating programs for community *policing* and *punishment*).

1994 Crime Act reflects the serious commitment of the Department to working in partnership with state and local communities to prevent crime.[38] Such emphasis on forming cooperative partnerships with state and local governments has been what Deputy Attorney General Gorelick calls "the signal feature of Attorney General Reno's Department."[39] Programs include: Community Oriented Policing Services Program (COPS), designed to put 100,000 new officers trained in community-oriented-policing on the streets;[40] Drug Courts, modeled after a program with which the Attorney General was involved when she was the prosecutor in Dade County, Florida;[41] the Model Intensive Grants Program;[42] the Ounce of Prevention Council;[43] Prison and Boot Camps;[44] and programs to address violence against women.[45] These programs recognize that we can no longer afford to consider criminal law as the exclusive province of the states — or as an area where the federal government superimposes its will on local problems.[46] Only by working in a coordinated fashion with programs that emphasize prevention as well as punishment, can the problem be addressed effectively.

Regarding the jurisdictional question, the Department has developed a practical response to the creation of new federal crimes. Be-

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38. *Id.* at 8 (noting that the Department of Justice will quadruple the amount of money it can give directly to state and local actors for programs dealing with youth and stating this is in an "indication of the depth of the Department commitment to working with state and local communities to help prevent crime").

39. *Id.* at 9.

40. Violent Crime Control and Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796, 1808, Part Q, Sec. 1701(b) (granting the Attorney General authority to make grants for the hiring and training of officers for deployment in community-oriented- policing across the nation).

41. *Id.* Sec. 50001(a)(3), at 1955-56 (granting the Attorney General the authority to make grants for programs that involve continuing judicial supervision over non-violent offenders with substance abuse problems and the integrated administration of other services including mandatory, periodic tests for controlled substance use; substance abuse treatment; diversion, probation, or other supervised release programs and programmatic offender management, and aftercare services).

42. *Id.* § 30301(a)(1), at 1844 (providing multidisciplinary funding to fifteen targeted areas with high rates of crime).

43. *Id.* § 30102(a)(1-4), at 1837 (providing grants to community programs aimed at helping youths occupy themselves to avoid criminal activity).

44. *Id.* § 20101(a), at 1815 (granting the Attorney General authority to make grants for the construction, development, expansion, modification, operation, or improvement of correctional facilities, including boot camp facilities and other alternative correctional facilities).

45. *Id.* § 40121(a)(3), at 1910 (authorizing grants to provide personnel, training, technical assistance, data collection, and other equipment for the more widespread apprehension, prosecution, and adjudication of persons committing violent crimes against women).

46. *See* Gorelick, *supra* note 14, at 9-10 ("This falsely rigid approach to law enforcement is not effective.").

cause of the 1994 Crime Act,[47] the Violence Against Women Act,[48] the Freedom of Access to Clinics Act,[49] and various recent expansions of the federal role in child support enforcement activities,[50] the federal government and the Department of Justice have been criticized for "federalizing" too much law that traditionally has been the province of the states.[51] Deputy Attorney General Gorelick discussed the Department's approach to federalization in her May 20, 1994 Luncheon Address to the American Law Institute:

> The Attorney General's vision is consistent with the history of approaches to "federalization" in the life of this nation. Indeed, one can discern three great "federalization events" in the history of the nation: the creation of the Constitution, the reconstruction era, and the New Deal. Each of these events resulted from a perceived need — on the part of the public and the government — for federal leadership and control in facing critical challenges.[52]

Further, Gorelick stated that the Department of Justice focuses on the following kinds of policy considerations in analyzing whether federal involvement in an area is appropriate:

> whether consistent with the now well-accepted federalization of civil rights law enforcement authority, federalization would serve to vindicate basic individual liberties; whether the federal government would have superior investigative, prosecutorial, and statutory resources to bring to bear on problems of national concern; whether solving the problem would require action at the interstate or international level; whether there is a clear and strong federal policy interest in the area.[53]

Gorelick cited the Administration's support for the Violence Against Women Act[54] and the Freedom of Access to Clinic En-

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47. Violent Crime Control and Enforcement Act of 1994, Pub.L. No. 103-322, 108 Stat. 1796 (1994).

48. *Id.* Title IV, at 1902-1955 (codified as amended in 18 U.S.C. § 2247) (expanding federal jurisdiction to encompass violent crimes against women).

49. 18 U.S.C. § 248 (1994) (prohibiting destructive conduct that is intended to injure, intimidate or interfere with persons seeking to obtain or provide reproductive health care services).

50. *See infra* notes 62-74 and accompanying text (discussing the expanding federal role in interstate child support enforcement).

51. *See* Daniel S. Meador, *The Federal Judiciary — Inflation, Malfunction, and a Proposed Course of Action*, 1981 B.Y.U. L. REV. 617 (discussing efforts to develop new structural and jurisdictional arrangements that would enable the federal courts to function more effectively in contemporary circumstances).

52. Gorelick *supra* note 14, at 17.

53. *Id.* at 18.

54. 18 U.S.C. § 2247 (1994).

trances Act[55] as an application of these considerations.[56] According to Gorelick, the Administration's support for this legislation "reflects the high national priority accorded measures aimed at protecting basic civil liberties and the exercise of individual rights."[57]

In drafting the 1994 Crime Act[58], America's elected federal officials responded to the urgent cries of the people for action against crime and violence which undermine the ability of citizens to exercise basic rights.[59]

In some cases, such as cases in the child support enforcement area, the federalization of traditionally state crimes can help law enforcement efforts. The Child Support Recovery Act of 1992[60] recognizes the areas of federal expertise by limiting federal involvement to interstate cases where the non-custodial parent has refused to pay, for one year or longer, or the unpaid amount exceeds $5,000.[61] Other statutes such as the Child Support Enforcement Amendments of 1984[62] and 1988,[63] and predecessor legislation, take advantage of superior federal capacity to locate and track parents and to identify employers of non-paying parents.[64] Recently, the Department of Justice announced the results of a joint program with Health and Human Services to regularize the handling of federal criminal non-support cases under the Child Support Recovery Act of 1992.[65] Essential elements of that plan involve establishing for-

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55. *Id.* § 248.

56. Gorelick, *supra* note 14, at 18.

57. *Id.* at 18-19.

58. Violent Crime Control and Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (1994).

59. Gorelick, *supra* note 14, at 20.

60. 18 U.S.C. § 288 (1992).

61. *Id.* § 228(d)(1)(B).

62. Child Support Enforcement Amendments of 1984, Pub. L. No. 98-378, 98 Stat. 1305 (codified as amended in scattered sections of 42 U.S.C.).

63. Family Support Act of 1988, Pub. L. No. 100-485, 102 Stat. 2343 (codified as amended in scattered sections of 42 U.S.C.).

64. Child Enforcement Act 1984, 42 U.S.C. § 654 (requiring the operation of a parent locator service and disclosure of social security numbers to assist states in locating absent parents after state resources have been exhausted). *See generally* MARY ANN GLENDON, ABORTION AND DIVORCE IN WESTERN LAW 86-91 (1987) (comparing the child support laws of France, Sweden and West Germany to the laws of the U.S.).

65. Attorney General Reno Announces Plan to Crack Down on Dead-beat Parents Who Fail to Pay Child Support, No. 94-720 (Dep't. of Justice Dec. 22, 1995) 2 [hereinafter Press Advisory on Child Support Enforcement] ("By working together with HHS, the FBI and state and local child support agencies, we will pursue the most egregious instances — parents who have the ability to pay but simply thumb their nose at the court and at their children.") (quoting Attorney General Janet Reno).

mal mechanisms of cooperation among designated representatives of United States Attorney's offices and liaisons in each state child support enforcement agency.[66] On the Thursday before Christmas, Attorney General Reno announced 28 new cases filed since October around the country.[67] It is hoped that by sharing information and resources, understanding one another's concerns and limitations, the states and federal law enforcement agencies will be able to make effective use of the 1992 statute and to reduce the ability of noncustodial parents to avoid meeting child support obligations by moving to another state.[68]

As in other areas of law mentioned here, the goal in the child support enforcement area is not to replace a system of state and local enforcement with a new federal enforcement scheme.[69] Instead, the goal is to use federal resources where they will be most effective and where interstate jurisdictional issues make it difficult for states to pursue delinquent parents.[70] Similarly, the enforcement mechanisms envisioned in the welfare reform plan proposed by President Clinton last year — to be reconsidered this year — also rely on state action.[71] The federal role will be expanded to ensure location and enforcement, particularly in interstate cases.[72] The National Clearinghouse, consisting of three components — an expanded Federal Parent Locator Service, the National Child Support Registry, and the National Directory of New Hires — will serve the first function.[73] The joint Department of Heath and Human Services and Department of Justice plan for action will address the interstate enforcement aspect.[74] By establishing federal standards for

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66. *Id.* at 2 (discussing coordination efforts between U.S. Attorneys and state child support agencies).

67. *Id.* at 1-2 ("These 28 cases are only the beginning of our enforcement efforts.")(quoting Attorney General Janet Reno).

68. *Id.* at 3 (outlining the three-point plan as: "1) Aggressively Investigate and Prosecute; 2) Develop Effective and Efficient Federal/State/Local Partnerships; 3)Provide Comprehensive Training and Support to Prosecutors.").

69. *Id.* at 2 (stating that the plan calls for close coordination between federal and state enforcement agencies).

70. *Id.* at 3 ("The Department expects that this increased coordination of state and federal enforcement efforts is result in increased and more efficient criminal child support enforcement.").

71. *See* Work and Responsibility Act of 1994, H.R. Doc. No. 273, 103d. Cong., 2d. Sess. 192 at 20,1202 (1994).

72. *Id.* §§ 621-28, at 417-443 (expanding the federal role in interstate child support cases); *id.* §§ 661-671, at 472-496 (enacting sections to provide for program improvements to increase collections).

73. *Id.* § 625, at 427 (assisting states in administrating their state plans).

74. *Id.* §§ 621-28, at 417-443 (expanding the federal role in interstate child support cases).

establishing paternity,[75] mechanisms for updating awards,[76] centralized collection,[77] license suspension,[78] and measures designed to encourage accurate information on assets,[79] the federal government will ensure fairness and predictability in awards and enforcement among the states. The Child Support Enforcement and Assurance demonstrations to be funded by the federal government will allow the gathering of data to guide future improvement in delivery of services to families modeled on some successful European programs.[80] Promoting such innovation is also an appropriate federal role.

Finally, given that federalization in the criminal code is a practical reality,[81] and given that the federal government has neither the resources nor the expertise to supplant all state law enforcement activity,[82] the actual reach of federal jurisdiction depends as much on Department of Justice changing policies as it does on Congressional action. Attorney General Reno has stated her policy clearly: Justice Department lawyers will work with local prosecutors to decide how best to allocate law enforcement resources in cases where both federal and local prosecutors are possible.[83] For example, in the child support enforcement area, the Department of Justice announced in December that it had filed 28 cases.[84] The Department estimates that it will undertake 200-300 federal prosecutions nationwide each year.[85] That number represents an average of two or three cases per federal district, hardly an avalanche of work for the federal courts.

Another example of this selective use of federal resources is found in Washington, D.C., where the United States Attorney is using federal laws to pursue and prosecute some of the worst criminals in

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75. *Id.* §§ 640-43, at 454-464 (creating federal procedures for establishing paternity).

76. *Id.* § 652, at 468-71 (modifying state laws concerning child support orders).

77. *Id.* § 622, at 420-23 (creating procedures to centralize the collection and disbursement of payments).

78. *Id.* § 667, at 488-89 (authorizing states to withhold, restrict or suspend licenses to facilitate the compliance with subpoenas or warrants relating to paternity or child support proceedings).

79. *Id.* § 666, at 487-88 (authorizing the voiding of fraudulent transfers).

80. *Id.* § 681, at 496-504.

81. *See supra* note 23 (giving examples of legislation which federalized crimes which were traditionally within the jurisdiction of the states).

82. *See* SCHWARZER & WHEELER, *supra* note 8, at 37-38 (discussing the insufficiency of federal resources to meet the needs of the courts, given the expanding demands on them).

83. *See* Gorelick, *supra* note 14, at 10.

84. Press Advisory on Child Support Enforcement, *supra* note 65, at 1.

85. *See id.* (noting that as of December 22, 1994, more than 200 cases were under active review).

the city.[86] This collaboration between federal and local officials takes advantage of the superior investigative capacity and expertise of federal agents and the ability to use wiretaps and interstate resources to develop cases.[87]

These examples describe situations where federal involvement can contribute to local efforts to address violence or vindicate rights. Where federal jurisdiction would *not* enhance local capacity to handle problems, attempts at federalization are inappropriate. For that reason, the Department opposed the bill filed by Senator D'Amato that would have federalized all handgun crimes.[88] For the same reason the Department opposed a provision, proposed last year as part of the Senate version of the Crime Bill, that federalized criminal activities of street gangs.[89] Such attempts at federalization do not take advantage of any special federal resources or expertise and are, in the Department's view, inappropriate extensions of federal jurisdiction.

CONCLUSION

To return to where this discussion began, the Three-Branch Roundtable convened last year by the Attorney General is designed to promote opportunities for dialogue as new public problems and responsive legislative proposals raise concerns about inappropriate federalization of state law.[90] While the various federal and state ac-

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86. Gorelick, *supra* note 14, at 26 (noting that this exemplifies the "targeted, narrowly-tailored federal law enforcement effort that can work").

87. Ruben Castaneda, *Federal Agents Are Now an "Integral Part" of D.C. Law Enforcement*, THE WASH. POST, Sept. 14, 1994, at D1 (noting the belief that federal assistance is one of the reasons —along with improved homicide investigations, effective police patrols and an apparent decrease in crack use and sales — that the city has had a nine percent drop in violent crime this year).

88. Violent Crime Control & Law Enforcement Improvement Act of 1995, S.3, 104th Cong., 1st Sess. § 407 (1995).

89. The Department supported the provision finally adopted which limited federal jurisdiction to gang activities affecting interstate or foreign commerce. Violent Crime Control And Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796, 2033 (codified as amended at 18 U.S.C. § 521 (1994)).

90. A day-long conference entitled "Overlapping and Separate Spheres: A Three-Branch Roundtable on State and Federal Jurisdiction" was held in Washington D.C., on March 7, 1994. The conference attendance was limited to 50 participants including: Chief Justice William H. Rehnquist; Senator Joseph R. Biden, Chair of the Senate Judiciary Committee; Senator Orrin G. Hatch, Ranking Minority Member of the Senate Judiciary Committee; Congressman Don Edwards, Chairman of the House Judiciary Committee's Subcommittee on Civil and Constitutional Rights; Congressman Hamilton Fish, Jr., Ranking Minority Member of the House Committee on the Judiciary; and other public policy decisionmakers. *See* Letter from Attorney General Janet

tors may not be able to reach agreement in the abstract about what types of legal issues are amenable to a federal response, discussion of the institutional concerns of state and federal legislators, prosecutors, and judges can produce pragmatic jurisdictional and prosecutorial solutions that reduce the potential for federal overreaching in exercising jurisdiction granted by Congress.[91]

Finding the appropriate balance of federal and state power in the our federal system is an issue that has inspired controversy and spirited debate since before the founding of the Republic.[92] Indeed, one of the strengths of a governmental structure grounded in federalism is the shared responsibility among the various states and the national government. The complementary systems of federal and state courts, with jurisdictional overlaps defined by Congress, have became the focus of attention in the debate over federalization. Although many scholars, jurists, and officials in the executive and legislative branches of the government have sought to describe a role for federal courts that clearly delineates the appropriate boundaries of federal and state jurisdiction, the results have not met with universal agreement or satisfaction.[93] The practical response to the federalization issue adopted by the Department of Justice eschews the impossible task of creating an abstract theory of federal jurisdiction appropriate to all times and circumstances in favor of an approach that takes advantage of unique federal capacities to improve the

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Reno to Renee Landers, (Feb. 17, 1994) (on file with author).

91. The Three-Branch Roundtable Conference on State and Federal Jurisdiction, discussed *supra* in note 90 exemplifies an attempt to bring together legislatures, jurists, and attorneys to produce pragmatic solutions to federalization. For other examples of institutional discussions on the matter, see SCHWARZER & WHEELER, *supra* note 8, at 4-5 (explaining that the paper was prepared by the Federal Judicial Center to "encourage and inform discussion about the role of the federal courts in relation to the state systems"); PROPOSED LONG RANGE PLAN FOR THE FEDERAL COURTS. *supra* note 12, at 1 (noting that this document was prepared "under the authority of the Judicial Conference Committee on Long Range Planning for purposes of soliciting public comment").

92. The appropriate separation of powers between the state and federal governments has been bitterly debated since the founding of the United States. Alexander Hamilton, James Madison, and John Jay led the faction calling for a strong, centralized government. In contrast, founding fathers such as Thomas Jefferson, Patrick Henry, and John DeWitt clamored for states rights and feared a centralized government would be a tyrannical institution which would trample individual liberties. For a full account of these opinions and the debates that ensued, see THE FEDERALIST PAPERS (Clinton Rossiter, ed. 1961) and THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES (Ralph Ketcham, ed. 1986).

93. *See* notes 6-20 and accompanying text (discussing various criticisms and proposals from scholars, jurists, and governmental officials concerning the delineation of the appropriate boundaries of federal and state courts).

quality of criminal and civil justice rendered in state and federal courts.