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## The Federalization of Crime: Too Much of a Good Thing?

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## COMMENTS

### THE FEDERALIZATION OF CRIME: TOO MUCH OF A GOOD THING?

#### I. INTRODUCTION

Headlines announcing recent declines in crime rates have become commonplace across the United States.<sup>1</sup> In 1997, Atlanta, Georgia, experienced a 22% drop in homicides, an 11% decline in burglaries, and a 21% decline in larceny.<sup>2</sup> In Washington, D.C., the number of homicides dropped 24% in 1997.<sup>3</sup> From 1996 to 1997, the homicide rate in New York fell 23%; in Los Angeles it dropped 20%; and in San Antonio it dropped 17%.<sup>4</sup>

The reports usually seek an explanation for the declines.<sup>5</sup> A number of factors may be responsible: better police departments, improved weapons and training, "tough on crime" political agendas,<sup>6</sup> a stronger economy, and a general change in

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1. See, e.g., Robert Suro, *Drop in Murder Rate Accelerates in Cities; District, P.G. County Among Leaders in Trend*, WASH. POST, Dec. 31, 1997, at A1; Jack Warner, *City's Drop in Homicides a Victory, Campbell Says*, ATLANTA J. & CONST., Jan. 1, 1998, at B2.

2. See Warner, *supra* note 1.

3. See Suro, *supra* note 1.

4. See *id.*

5. According to Atlanta's Chief of Police, the recent decline in crime rate "can't be attributed to any one thing, [but factors include] more police, more bike patrols, [and] more horse patrols." Warner, *supra* note 1.

6. One example is former President Bush's program for fighting crime: "We're going to take back the streets. By taking criminals off the street. It's an attack on all four fronts—new laws to punish them, new agents to arrest them, new prosecutors to convict them, and new prisons to hold them." John A. Martin & Michelle

moral attitudes.<sup>7</sup> Some credit an aging gang population and the stabilization of gang territories.<sup>8</sup> However, there is one factor that has become the subject of increasing debate among scholars: the federal government's growing involvement in local law enforcement matters.<sup>9</sup> The passage of laws by Congress, prosecution in federal courts, and imprisonment in federal penitentiaries have clearly played some role in the recent decline of crime rates in the United States. However, unselfconscious and haphazard federal criminal legislation does not come without costs, such as lowered quality of justice, which may outweigh any benefits.<sup>10</sup>

The participation of the federal government in law enforcement has been a subject of controversy before this latest decline in crime rates, and federalization is not without its critics to-

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Travis, *Symposium: Assembly-line Justice: Preserving Fair Process for Indigent Defendants in an Overloaded System*, 1 CORNELL J.L. & PUB. POL'Y 69, 80 (1992) (quoting President Bush Proposes New Anti-Crime Measures, NAT'L INST. OF JUST. REP., July-Aug. 1989, at 7).

7. A wide variety of factors including higher rates of incarceration, a strong economy, a shrinking youth population and more effective police strategies are being cited to explain the broad reduction in violent crime registered nationwide. But no single factor seems to explain the sustained pace of the decline. "All the usual explanations do not really account for why we are seeing such sharp drops now on top of several years of decreased crimes," said Cheryl Maxson, a research associate at the University of Southern California's Social Science Research Institute.

Suro, *supra* note 1.

8. "[T]he fact remains that both police and the criminal justice system have benefited [sic] from factors they really had no control over: the aging of the population and the maturing of the crack market,' which meant fewer criminal turf wars between drug dealers, Fyfe [a Temple University criminologist] said." *FBI: Violent Crimes in U.S. Decreased 7 Percent in 1996*, AUSTIN AM.-STATESMAN, June 2, 1997, at A1.

9. This concept, the "federalization of crime," generally refers to congressional legislation "that provides for federal jurisdiction over criminal conduct that could also be prosecuted by state or local authorities." Rory K. Little, *Myths and Principles of Federalization*, 46 HASTINGS L.J. 1029, 1085 n.2 (1995).

10. See H. Scott Wallace, *Compulsive Disorder: Stop Me Before I Federalize Again*, PROSECUTOR, May/June 1994, at 21, 22 ("The fact is that the runaway growth of federal criminal jurisdiction has been unremittingly haphazard and without regard for its actual impact on the battle against crime nationwide."); see also Gerald G. Ashdown, *Federalism, Federalization, and the Politics of Crime*, 98 W. VA. L. REV. 789, 794 (1996) ("Criminalization on both the state and federal level tends to be reactive, and consequently politically influenced. Rather than predicting antisocial behavior before it occurs, legislatures tend to respond to particular incidents of harmful behavior after it happens.").

day.<sup>11</sup> Some argue federalization of crime is a threat to the sovereignty of the states and undermines the expression of federalism in our government.<sup>12</sup> Some police and law enforcement officials explain that the increased federal role "only serves to blur investigative authority, [waste] local expertise . . . and create unrealistic expectations among citizens."<sup>13</sup> Others question the federal interest in local criminal prosecutions, which were traditionally within the exclusive domain of the states,<sup>14</sup> and assert that federalization is responsible for swamping federal courts and stalling dockets.<sup>15</sup> Still others doubt that the reality is as harsh as this depiction and label such characterizations as a mere "federalization myth."<sup>16</sup>

The purpose of this comment is to examine the trend toward the federalization of criminal law enforcement, identify some of its costs and benefits, and evaluate its effectiveness as a means of addressing both the nation's and the states' crime problem. Part II will outline the history of the trend toward federalization of criminal legislation; Part III will identify some preliminary issues and provide two examples; Part IV will examine the federal caseload; and Part V will identify some guiding principles for the evaluation of future federalization efforts.

## II. HISTORICAL BACKGROUND

During the birth of the United States, the federal government was conceived as separate and distinct from the states.

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11. One of the earliest examples of federal criminal legislation is the Sherman Antitrust Act, ch. 647, 26 Stat. 209 (1890) (current version at 15 U.S.C. §§ 1-7 (1994)). See Ashdown, *supra* note 10, at 791.

12. *See id.*

13. *Police Executive Research Forum Opposes Federalizing Crimes*, CRIM. JUST. NEWSL., July 15, 1994, at 3.

14. Unites States Supreme Court Justice Antonin Scalia told members of Congress, "[m]urder is not a federal crime; murder of the president is." Martin & Travis, *supra* note 6, at 80 (citing to Nancy E. Roman, *Justices Hammer Needless Laws*, WASH. TIMES, Feb. 19, 1992, at A4).

15. See Hon. Sam J. Ervin, *The Federalization of State Crimes: Some Observations and Reflections*, 98 W. VA. L. REV. 761 (1996).

16. See Little, *supra* note 9, at 1032. Professor Little questions "some of the commonly expressed presuppositions of the federalization debate" and stylizes them as "myths." *Id.* at 1032.

James Madison explained his vision of the federal arrangement in *The Federalist* No. 45:

The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. The former will be exercised principally on external objects, such as war, peace, negotiation, and foreign commerce; with which last the power of taxation will, for the most part, be connected. The powers reserved to the several states will extend to all objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.<sup>17</sup>

The United States Constitution gave no power to the federal government to control activities that fell outside of its limited domain,<sup>18</sup> and its activities were initially limited to those that were peculiarly federal. The purpose of federal criminal law enforcement power was to govern activity that interfered with or injured the federal government itself.<sup>19</sup> This primarily included activity that crossed jurisdictions, such as interstate commerce,<sup>20</sup> or activity that exclusively implicated the federal government's authority, such as counterfeiting or treason.<sup>21</sup> Existing federal statutes generally covered four areas: "acts threatening the existence of the federal government, . . . misconduct of federal officers, . . . interference with the operation of the federal courts, . . . and interference with other governmental programs."<sup>22</sup> Except in areas such as these, crimes against individuals were originally subject exclusively to the states' control.<sup>23</sup>

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17. THE FEDERALIST NO. 45, at 292-93 (James Madison) (Clinton Rossiter ed., 1961).

18. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

19. See Sara Sun Beale, *Reporter's Draft for the Working Group on Principles to Use When Considering the Federalization of Criminal Law*, 46 HASTINGS L.J. 1277, 1278 (1995).

20. See U.S. CONST. art. I, § 8, cl. 3.

21. See U.S. CONST. art. I, § 8, cl. 6.

22. Beale, *supra* note 19, at 1277 n.1.

23. See *id.* at 1278.

During this period of nascent federal authority, the federal criminal statutes that did exist "provided for concurrent state court jurisdiction."<sup>24</sup> Ironically, this overlap was originally created to curb federal power by allowing state courts to hear federal criminal cases.<sup>25</sup> However, some came to view it as a challenge to state sovereignty.<sup>26</sup> For this reason, some state courts even refused to accept jurisdiction in cases involving federal criminal legislation.<sup>27</sup> Congress responded by providing exclusive federal jurisdiction for federal offenses.<sup>28</sup>

After the Civil War, industrial growth prompted Congress to expand federal criminal jurisdiction to include areas that had before been exclusively within the states' domain.<sup>29</sup> Unprecedented trade across state lines accompanied this growth and created problems that were national in scope.

Senator James K. Jones of Arkansas expressed the main sentiment when he argued that the steam engine and electricity had "well-nigh abolished time and distance" and that monopolies, so-called trusts, were "commercial monsters" that required the "iron hand of the [federal] law" to be "heavily" laid on in order to protect . . . liberty. . . .<sup>30</sup>

The Sherman Antitrust Act<sup>31</sup> soon followed, regulating industries and imposing criminal penalties for outlawed conduct.

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24. *Id.*

25. *See, e.g., State v. Wells*, 20 S.C.L. (2 Hill) 687, 695 (1835) ("An offense against the laws of the United States is an offense against the laws of South Carolina; and she has the right to punish it").

26. *See* Harold J. Krent, *Executive Control over Criminal Law Enforcement: Some Lessons from History*, 38 AM. U. L. REV. 275, 306-07 (1989).

27. *See id.* (citing *State v. McBride*, 24 S.C.L. (Rice) 400 (1839) (holding that courts of one sovereign lack jurisdiction to try crimes against another sovereign)); *see also Jackson v. Rose*, (2 Va. Cas.) 34, 35-38 (1815) (denying jurisdiction over federal penalty action).

28. *See* Beale, *supra* note 19, at 1278 (citing Rev. Stat. § 711 (1874) (codified as amended at 18 U.S.C. § 3231)). Today exclusive federal jurisdiction "includes crimes committed on federal territory or outside the borders of the fifty states and acts committed solely against a unique federal interest, such as treason." Little, *supra* note 9, at 1034.

29. *See* Beale, *supra* note 19, at 1278.

30. Ashdown, *supra* note 10, at 791 (quoting 20 CONG. REC. 1457 (1889)).

31. Sherman Antitrust Act, ch. 647, 26 Stat. 209 (1890) (current version at 15 U.S.C. §§ 1-7 (1994)).

[T]his [trend of expansion] was a recognition of the great changes that [were occurring] in the way business was carried on in this country. Enterprises that had once been local or at most regional in nature [were becoming] national in scope. But the doctrinal change also reflected a view that earlier Commerce Clause cases artificially had constrained the authority of Congress to regulate interstate commerce.<sup>32</sup>

Citizens also faced other new threats, such as mail and lottery fraud, which prompted Congress to criminalize misuse of the mails.<sup>33</sup> In an early case, *In re Rapier*,<sup>34</sup> the United States Supreme Court condoned such an exercise of congressional power on the grounds that "federal authority could be employed to prohibit misuse of facilities provided by the federal government."<sup>35</sup> Congress used this same authority to regulate other interstate facilities, such as railroads.<sup>36</sup> The creation of the Interstate Commerce Commission signified the emerging pattern of criminal legislation by "establishing a federal administrative agency, a regulatory framework, and a comprehensive range of criminal as well as civil penalties."<sup>37</sup> This authority has developed into a broad power to regulate criminal behavior reaching areas far beyond the original mail and transportation based activities, e.g., failure to pay child support,<sup>38</sup> fraudulent identification of documents,<sup>39</sup> and disruption of animal enterprises.<sup>40</sup>

Following the expansion of federal power driven by expanding industrialization and commerce, the Prohibition movement fueled the next major expansion of federal power. Though limited in scope to the prosecution of the sale or distribution of liquor,

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32. *United States v. Lopez*, 514 U.S. 549, 556 (1995).

33. *See* Beale, *supra* note 19, at 1279.

34. 143 U.S. 110 (1892).

35. Beale, *supra* note 19, at 1279 n.7.

36. *See id.* at 1279.

37. *Id.* at 1279.

38. *See* Child Support and Recovery Act of 1992, 18 U.S.C. §§ 228, 3563, 42 U.S.C. §§ 3793, 3769cc-3797 (1994).

39. *See* False Identification Crime Control Act of 1984, 18 U.S.C. §§ 1028, 1738, 39 U.S.C. § 3001 (1994).

40. *See* Animal Enterprise Protection Act of 1992, 18 U.S.C. § 43 (1994); Beale *supra* note 19, at 1282; *see also* *Champion v. Ames*, 188 U.S. 321 (1903).

the Eighteenth Amendment of the United States Constitution resulted in a tidal wave of federal prosecutions in the 1920s and 1930s.<sup>41</sup> The Amendment also provided for concurrent jurisdiction of state and federal courts resulting in the overlapping enforcement model that is common today.<sup>42</sup> The Eighteenth Amendment is perhaps most notable because it uniformly outlawed behavior not already against the public policy of all the states.<sup>43</sup> Therefore, by acting in concert with the ratifying states, Congress was able to marshal power over the states to an unprecedented extent.

The Prohibition movement also served as a harbinger of further expansion of the federal government's power. Even after the repeal of the Eighteenth Amendment in 1933, the tide of federal jurisdiction never receded to its previous level.<sup>44</sup> In the period during and following the Great Depression, the political climate was one of national crisis for which leaders sought national solutions. "[A]n influential congressional committee reported that the prevalence and severity of the crimes being committed and the inability of the existing [law enforcement] agencies to cope with them required federal action in 'a field which had, until then, been regarded as primarily a matter of local or State concern.'<sup>45</sup> Accordingly, in the 1930s, Congress passed many new federal laws which represented unprecedented ventures into areas affecting individuals and businesses: bank robbery, extortion, kidnapping, and firearms regulation.<sup>46</sup> Because congressional authority under the Commerce Clause had already been established, none of these laws broke new legal ground. However, they did "reflect a growing willingness on the part of [the New Deal] Congress . . . to assert jurisdiction over an increasingly broad range of conduct clearly within the traditional police powers of the states."<sup>47</sup>

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41. "In the peak year, 1932, there were 65,960 Prohibition-related criminal cases in the federal courts." Beale, *supra* note 19, at 1279.

42. *See id.*

43. *See* Mihir A. Munshi, Comment, *Share the Wine—Liquor Control in Pennsylvania: A Time for Reform*, 58 U. PITT. L. REV. 507, 509 (1997).

44. *See* Beale, *supra* note 19, at 1279.

45. *Id.* at 1279-80.

46. *See id.* at 1280.

47. *Id.*



The next phase of expansion came in the 1960s and 1970s in attacks on organized crime.<sup>48</sup> The authority of the federal government reached a high water mark in *Perez v. United States*.<sup>49</sup> This case addressed a federal statute that broadly targeted loansharking activity and made "extortionate credit transactions" subject to federal prosecution.<sup>50</sup> Congress stated "[e]xtortionate credit transactions are carried on to a substantial extent in interstate and foreign commerce and through the means and instrumentalities of such commerce. Even where extortionate credit transactions are purely intrastate in character, they nevertheless directly affect interstate and foreign commerce."<sup>51</sup> The Court required no explicit proof that the targeted criminal conduct had an effect on commerce; it merely required that the "prohibited class of activity [be] . . . within the reach of federal power."<sup>52</sup> This generous interpretation of the Commerce Clause gave Congress unprecedented authorization to regulate a given behavior.

Still, Congressional authority does have its limits, and the decision in *United States v. Lopez*<sup>53</sup> may help to define these limits. In *Lopez*, the Court held that Congress' Commerce Clause power does not authorize it to outlaw the possession of a gun within 1000 feet of a school.<sup>54</sup> The Court reasoned as follows:

[The challenged statute] is a criminal statute that by its terms has nothing to do with "commerce" or any sort of economic enterprise. . . . [The statute] is not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate

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48. *See id.*

49. 402 U.S. 146 (1971).

50. *See* Consumer Credit Protection Act, Pub. L. 90-321, 82 Stat. 159 (1968) (relevant section codified at 18 U.S.C. § 891 (1994 & Supp. 1998)).

51. *Id.* at § 201(a)(3).

52. Beale, *supra* note 19, at 1281. The rationale Professor Beale asserts is that a court would have no power to enforce the law in cases where individual violations resulted in only a trivial nexus with commerce. However, Justice Stewart thought that "the Framers of the Constitution never intended that the National Government might define as a crime and prosecute such wholly local activity through the enactment of federal criminal laws." *Perez*, 402 U.S. at 157 (Stewart, J., dissenting).

53. 514 U.S. 549 (1995).

54. *See id.*; *see also* Dennis E. Curtis, Comment, *Congressional Powers and Federal Judicial Burdens*, 46 HASTINGS L.J. 1019 (1995).

activity were regulated. It cannot, therefore, be sustained under our cases upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce.<sup>55</sup>

However, some argue that *Lopez* relied on procedural concerns with the legislation at issue. Professor Beale points to the majority's reliance on "the fact that there were no congressional findings supporting the legislative judgment that the activity affected interstate commerce."<sup>56</sup> The suggestion is that in the absence of any congressional findings, the majority could not in good faith conclude that Congress had demonstrated that the targeted activity had any effect on interstate commerce. Therefore, if Congress had merely cited a factual study or some other evidence, it is possible that the Court may have allowed the ban.

Because the Court's quest for a demonstrated nexus seems to contradict its analysis in *Perez*, other commentators argue that *Lopez* was not decided merely on procedural grounds:

*Lopez* is clearly a substantive, principle-based decision, and not a narrow procedural holding based on the lack of congressional findings. . . . Chief Justice Rehnquist's majority opinion for the Supreme Court rests on an analysis of the scope of Congress' authority under the commerce power, and his conclusion . . . is that it is limited to the regulation of "economic activity (which) substantially affects interstate commerce." . . . [Chief Justice Rehnquist concludes that] possession of a gun in a school zone does not qualify. Legislative findings are mentioned briefly only as relevant to analyzing legislative judgment and as an aid to "our independent evaluation of constitutionality under the Commerce Clause."<sup>57</sup>

Thus, *Lopez* may become the basis for legitimate future challenges to broad based federal authority over criminal activity.

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55. *Lopez*, 514 U.S. at 561 (citations omitted).

56. Sara Sun Beale, *Too Many and Yet Too Few: New Principles to Define the Proper Limits for Federal Criminal Jurisdiction*, 46 HASTINGS L.J. 979, 1007 n.112 (1995).

57. Ashdown, *supra* note 10, at 808-09 (quoting *Lopez*, 514 U.S. at 562-63).

At the very least, Congress' authority has been meaningfully limited by *Lopez*, but the exact reach of the opinion has yet to be delineated. Therefore, while Congress must approach law-making with a keen awareness of *Perez*, lower courts have been stingy in applying *Lopez*.<sup>58</sup> "It may take another foray by the Supreme Court into Commerce Clause criminalization to make the [*Lopez*] message clear."<sup>59</sup>

The debate over the boundaries of Congressional authority is important because it defines the limits of the debate over the proper role of the federal government in fighting crime. Where Congress cannot act under the present scheme, there need be no argument over whether it should. However, within any proscribed limits, issues of whether and how Congress should criminalize behavior still persist.

### III. PRELIMINARY ISSUES AND TWO EXAMPLES

Today, the federalization of crime is largely driven by political will and the desire of Congress to address specific problems it perceives to be important. Perception-driven legislation is one of the key concerns that brings out many of the issues present in the debate around federalization of crime. Legislation that simply reacts to specific media events tends to overlook important factors that impact the efficacy of such legislation. The chief concern for many critics is that creating new federal crimes overburdens the federal judiciary and threatens the efficiency and fairness of the courts.<sup>60</sup> However, before turning to federal caseload concerns, it is important to first examine the impetus for such legislation. Reactive, media-friendly legislation raises basic questions unrelated to the caseload. These include the quality of justice, strategic effectiveness, fairness of imple-

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58. *See id.* at 809.

59. *Id.* at 809-10.

60. [P]olitics has driven Congress to federalize increasing numbers of crimes. Largely in response to the rise in drug trafficking, which seemingly has overwhelmed the capacity of the states to investigate and prosecute extensive drug networks, Congress has passed numerous new federal offenses. . . . The result has been that the criminal dockets of the federal courts has increased by 46% over the last ten years (1981-1991).

Hon. Abner J. Mikva, *Fifty-Eighth Cleveland-Marshall Fund Lecture: "The Treadmill of Criminal Justice Reform,"* 43 CLEV. ST. L. REV. 5, 10 (1995).

mentation, and the wisdom of a particular use of resources. Such legislation, while momentarily attractive in light of contemporary media reports, is not necessarily consistent with good public policy.

#### A. *Anti Car Theft Act of 1992*

The federal carjacking statute, the Anti Car Theft Act of 1992,<sup>61</sup> is an example of event-specific federal crime legislation having an unintended, undesirable outcome. This piece of legislation was enacted at least partially, if not wholly, in response to a single particularly grizzly incident of carjacking.<sup>62</sup> In September of 1992, Pamela Basu was killed by car thieves while she was taking her daughter to nursery school in a prosperous residential area outside of Washington, D.C. As the two thieves drove her car away, Basu was entangled in the seatbelt strap, and she was dragged for a mile and a half. The driver sideswiped a fence in an attempt to dislodge her from the strap. She died from internal injuries resulting from the incident. Her child, though tossed from the vehicle by the assailants, was miraculously uninjured.<sup>63</sup>

This horrifying event brought national attention to the then unfamiliar crime of carjacking. Ironically, the attention generated by this event may have actually contributed to the spread of the crime by sensationalizing it and portraying it as a recreational crime often committed by thrill seeking youths.<sup>64</sup> In response to this national attention, Congress hastened to pass a law imposing federal penalties for carjacking. Pamela Basu's

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61. Pub. L. No 102-519, 106 Stat. 3384-3401 (1992) (codified as amended in scattered sections of 15 U.S.C., 18 U.S.C., 19 U.S.C., and 42 U.S.C.) (portions of the act were repealed in 1994).

62. Armed "carjacking" was little known until a particularly vicious attack in Maryland, when it was quickly legislated into a federal crime in October 1992. This occurred despite the fact that the Maryland offense was committed wholly intrastate and had been promptly prosecuted by state authorities, resulting in life sentences for both defendants.

Wallace, *supra* note 10, at 21; see Georgann Wing, *Putting the Brakes on Carjacking or Accelerating It? The Anti Car Theft Act of 1992*, 28 U. RICH. L. REV. 385 (1994).

63. See Wing, *supra* note 62, at 390-91.

64. See *id.* at 386. Though some perpetrators were motivated by economic reasons and sought to profit from the sale of stolen cars, youths began to see carjacking as a new, though more violent, form of joyriding. See *id.* at 397.

story served as a compelling backdrop for the campaign. Even as he signed the bill into law, President George Bush referred to the story: "We cannot put up with this kind of animal behavior. These people have no place in decent society, and . . . they can go to jail and they can stay in jail and they can rot in jail for crimes like that."<sup>65</sup> On the floor of Congress, at least four members of Congress referred to the Basu incident, including newspaper accounts admitted to the record by Senator Pressler.<sup>66</sup> Thus, the nation had a new problem, and along with it, a new law.

Unfortunately, the new law was more of a campaign slogan than a solution. "The majority of the legislative history behind the Act's enactment . . . focuses on a comprehensive plan for taking the profit out of car *theft* rather than thoughtful reasoning behind the creation of the federal crime of 'armed carjacking.'<sup>67</sup> The result of this is that it may have created another incentive to steal a car while it is in its owner's possession rather than from the parking lot.<sup>68</sup> Part of the law mandated more comprehensive and more costly marking of automobile parts by manufacturers to facilitate tracking stolen parts.<sup>69</sup> However, an exemption was allowed for manufacturers who installed anti-theft devices as standard equipment.<sup>70</sup> Therefore, when a "thief's motive is to steal a car for its parts . . . he will either learn ways to get past the continuing array of new anti-theft devices installed in vehicles, or the thief will take the easier route and bring the crime to the driver in the form of carjacking."<sup>71</sup>

Thus, the real problem may not be the federalization of crime, but the "politicalization" of crime.<sup>72</sup> This danger arises

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65. President George Bush, Remarks in St. Louis, Missouri, Sept. 28, 1992, available in LEXIS, Genfed Library, Fednews File.

66. See Mary C. Michenfelder, Note, *The Federal Carjacking Statute: To Be or Not to Be? An Analysis of the Propriety of 18 U.S.C. S 2119*, 39 ST. LOUIS U. L.J. 1009, 1010 n.6 (1995).

67. *Id.* at 1015 n.47 (emphasis added).

68. See Wing, *supra* note 62, at 439.

69. See 49 U.S.C. § 33107 (1994).

70. See *id.*; see also 49 U.S.C. § 33106 (1994).

71. Wing, *supra* note 62, at 439.

72. See J. Anthony Kline, Comment, *The Politicalization of Crime*, 46 HASTINGS L.J. 1087 (1995).

when the political process drives the legislative process. This, in turn, often results in legislation that is very different from what sounded attractive behind the campaign podium. The original problem goes unaddressed while legislators reap political gain. Indeed, the fact that the perpetrators of the Basu incident were tried, convicted and sentenced to life in prison by state prosecutors in a state court raises questions about the need for a new federal carjacking solution in the first place.<sup>73</sup> At the time, other than heightened awareness of the problem, there was nothing to suggest that the states were not able to address the problem without federal help.<sup>74</sup> Subjecting certain behavior that is already a crime under state law to federal criminal regulation creates a classic example of the law of unintended consequences.

### B. *Federal Sentencing Guidelines*

Another example of how federalization results in outcomes that are inconsistent with Congressional intent is the Federal Sentencing Guidelines (the "Guidelines").<sup>75</sup> Created in response to the perceived demand for political candidates to "get tough on crime," federal sentencing schemes take a different approach from state schemes and often yield grossly different results. For example, states often consider more aggravating and mitigating factors in the sentencing process, allowing more tolerance for departures from strict sentencing guidelines.<sup>76</sup> Also, states more often consider intermediate sanctions before resorting to incarceration.<sup>77</sup> Therefore, where the effect of a strict prison term would ripple out to an offender's family by imposing an

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73. While Maryland does not have a specific carjacking statute, it did have murder, robbery and kidnapping statutes which were used to prosecute the perpetrators of the Basu carjacking. See *Solomon v. State*, 646 A.2d 1064, 1065 (1994). After the Basu incident, Maryland passed its own carjacking statute. See MD. ANN. CODE Art. 27, § 348A (1995); see also *Price v. Maryland*, 681 A.2d 1206, 1209 (1996).

74. See Michenfelder, *supra* note 66, at 1046; see also *Washington Report: State Chief Justices Oppose Senate Crime Bill Provisions*, CRIM. JUST. NEWSL., Feb 15, 1994, at 1.

75. 18 U.S.C. §§ 3551-3586 (1994).

76. See Karen Lutjen, Note, *Culpability and Sentencing Under Mandatory Minimums and the Federal Sentencing Guidelines: The Punishment No Longer Fits the Criminal*, 10 NOTRE DAME J.L. ETHICS & PUB. POL'Y 389, 430 (1996).

77. See *id.*

economic hardship, a state sentencing guideline may allow for a flexible work release program.

The result is two systems of prosecution for the same criminal behavior which create vastly different consequences for those convicted, depending on the forum. Similarly situated offenders now receive radically different sentences.<sup>78</sup> For example, in *United States v. Williams*,<sup>79</sup> the recommended state sentence for a drug violation was eighteen months. However, the federal scheme required a mandatory minimum sentence of ten years, and the Guidelines recommended terms ranging from twelve to fifteen years for one defendant and fifteen to nineteen years for the other.<sup>80</sup> In another case, a defendant faced a five-year mandatory minimum sentence where the corresponding sentence in state court would have been zero to ninety days.<sup>81</sup> In yet another case, the difference between prosecution in federal and state court resulted in zero jail time for one defendant and a ten-year federal sentence for the other.<sup>82</sup>

This inconsistency creates a "cruel lottery"<sup>83</sup> which, at best, undermines respect for the system (particularly at the state level) and the law it enforces, and, at worst, is grossly unfair. While some might argue that this "crueling up" of the criminal justice system only serves to create more of a disincentive to engage in criminal behavior,<sup>84</sup> critics argue that there is little support for this. Scott Wallace, a former counsel to the United States Senate Judiciary Committee, asks, "[b]y what suspension of disbelief have we come to suppose that 'making an example' of every 20th offender advances the goals of certainty and uniformity of punishment that underlie the deterrent function of the law?"<sup>85</sup>

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78. See Beale, *supra* note 56, at 984.

79. 746 F. Supp. 1076, 1078-79 (D. Utah 1990), *rev'd on other grounds*, 963 F.2d 1337 (10th Cir. 1992).

80. See Beale, *supra* note 56, at 998.

81. See *id.* (citing *United States v. Oakes*, 11 F.3d 897 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 1569 (1994)).

82. See *id.* (citing *United States v. Palmer*, 3 F.3d. 300, 305 n.3 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 1120 (1994)).

83. *Id.* at 997.

84. See Craig Haney, *Psychology and the Limits to Prison Pain Confronting the Coming Crisis in Eighth Amendment Law*, 3 PSYCHOL. PUB. POL'Y & L. 499, 522-23 (1997).

85. Wallace, *supra* note 10, at 21.

The deterrence rationale for harsher sentences is not without its flaws. The deterrent force is weaker than appears when one considers that the typical criminal, especially a repeat offender, is less risk averse than the average citizen.<sup>86</sup> Indeed, jail time may even serve to enhance an individual's reputation within certain populations.<sup>87</sup> Furthermore, considered in economic terms, harsher sentences associated with additional federal criminalization can be counterproductive: "When possession or sale of a good is criminalized, the inherent uncertainty of being caught permits risk-takers to charge a high price for that good. Increasing the expected sentence thus creates opportunities for true profit. Dealers of criminalized goods are high-risk takers whose markets and profits are *expanded* by criminalization."<sup>88</sup> Lastly, the social stigma often associated with jail time, while viewed by many as a further deterrent, can produce results that inhibit any rehabilitative effect of incarceration. Once branded with a criminal record, freed prisoners may be less inclined to re-integrate into traditional society.<sup>89</sup> One criminal explained, "I can remember . . . on more than one occasion . . . going into a public library near where I was living, and looking over my shoulder a couple of times before I actually went in, just to make sure no one who knew me was standing about and seeing me do it."<sup>90</sup>

These flaws are inherent in any sentencing scheme, and they pose difficult problems for which there are no easy answers. But to the extent the Guidelines rely on traditional assumptions that may be faulty, increasing the number of acts for which those sentences may be imposed is unsound public policy.

Perhaps the most troubling flaw in the Guidelines is the disparity created in comparison with state systems. The structural disparity created by the parallel but unequal state and federal systems undermines the rationale for the stricter federal

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86. See Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968) (suggesting that some criminals prefer risky activities).

87. See Neal Kumar Katyal, *Deterrence's Difficulty*, 95 MICH. L. REV. 2385, 2415 (1997).

88. *Id.* at 2415-16 (emphasis in original).

89. See *id.*

90. *Id.* at 2460 (quoting TONY PARKER & ROBERT ALLERTON, *THE COURAGE OF HIS CONVICTIONS* 111 (1962)).



sentences.<sup>91</sup> The Federal Sentencing Commission, which sets the guidelines for sentencing in federal court, was created for the purpose of eliminating sentencing disparities within the federal system.<sup>92</sup> “[T]he deliberate selection of only a handful of [cases subject to both state and federal jurisdiction] for harsher treatment reintroduces the same disparity that Congress sought to eliminate when it reformed the federal sentencing process.”<sup>93</sup> Thus, increasing federalization may only frustrate what Congress set out to do by creating harsher, though more uniform, federal sentences.

Still, the tasks of Congress are generally so large in scope, there is little that it can do that will not result in some unintended and perhaps unforeseeable consequences. Also, because the system of democracy, in theory, creates policy that has the greatest appeal to the greatest number, media coverage of individual events will, perhaps legitimately, continue to drive the legislative process. But the federal carjacking law and the Guidelines provide two examples that raise questions about the participation of the federal government in criminal law issues otherwise left to state legislatures. Any faults with state and local level strategies do not necessarily justify a reflexive, national response to particular events which happen to be highlighted in the media. Such responses, while politically gratifying, can be ineffective and even costly.

The next portion of this comment examines some of the potential systemic costs of federalization and the issues they implicate.

#### IV. THE FEDERAL CASELOAD

There is a strong argument that the federalization of crime has and will continue to overwhelm the federal court system with criminal cases. During the period between 1980 and 1993, the number of filings of criminal cases increased by 70%.<sup>94</sup> The number of criminal trials increased by 43% while civil trials

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91. See Beale, *supra* note 56, at 982.

92. See *id.*

93. *Id.*

94. See Ashdown, *supra* note 10, at 803.

decreased by 19%.<sup>95</sup> Drug cases accounted for 44% of criminal trials<sup>96</sup> during that time period. The federal prison population more than tripled.<sup>97</sup> Firearms prosecutions more than quadrupled.<sup>98</sup> In 1996, drug cases accounted for 55% of all criminal appeals.<sup>99</sup> Federal judges battle swollen dockets, and prosecutors juggle increasing caseloads.<sup>100</sup> Judge Stephen Reinhardt, of the United States Court of Appeals for the Ninth Circuit, explains:

We seem to assume that judges can perform the same quality of work regardless of the number of cases they are assigned. That simply is not correct. Most of us are now working to maximum capacity. As a result, when our caseload increases, we inevitably pay less attention to the individual cases.<sup>101</sup>

However, statistics have varied over time, and "comparisons between any two isolated years, without an appreciation of the overall array of filing statistics, can yield wildly varying conclusions."<sup>102</sup> While the number of federal criminal prosecutions has changed, the number stood at similar levels in 1977 as well as 1995.<sup>103</sup> As the federal judiciary has grown, the caseload per judge has dropped.<sup>104</sup>

Furthermore, when compared to state judges, the federal bench's criminal caseload per judge is far lower than the typical caseload for state judges.<sup>105</sup> In 1992, federal judges in the

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95. *See id.* at 805.

96. *See id.* at 804.

97. *See id.*

98. *See id.* at 803.

99. *See id.* at 804.

100. *See, e.g.,* The Honorable Stephen Reinhardt, *Too Few Judges, Too Many Cases: A Plea to Save the Federal Courts*, A.B.A. J., Jan. 1993, at 52.

101. *Id.*

102. Little, *supra* note 9, at 1040 (citation omitted).

103. In 1995, criminal cases accounted for only seventeen percent of all filings in federal court, compared to roughly one-third in 1977. *See* Beale, *supra* note 19, at 1283. In 1932, there were more than 86,000 criminal cases filed compared to 45,500 cases filed in 1994. *See* Little, *supra* note 9, at 1040.

104. Still, with over 3000 federal crimes and a relatively inelastic number of federal judges, the numbers are sure to rise. Also, the threat to speedy dockets comes in another form: unfilled judicial appointments. This issue lies beyond the scope of this comment.

105. *See id.* at 1042.

Northern District of California faced four times fewer criminal filings than the average filings in state superior courts for the counties composing the Northern District.<sup>106</sup> Thus, "the argument that federal judges simply cannot handle more criminal cases is at least open to question in light of what state court judges are being asked to accomplish."<sup>107</sup>

In light of competing statistics and the varying conclusions they suggest, it becomes apparent that the analysis of the federal caseload is better examined in a different way. Notwithstanding variations in the numerical data, there is a systemic threat attributable to federalization: the changing character of the federal caseload, which is shifting more towards weapons and narcotics cases.<sup>108</sup> This may well be the root of the criticism of the federalization of crime. For it is not the numbers but the proportion that is problematic: "too many criminal cases can hinder the exercise of careful judgment and threaten a reduction in the quality of justice in the federal system."<sup>109</sup> Thus, because, according to at least one study, "the absolute number of criminal cases in the federal courts . . . is not unprecedented,"<sup>110</sup> it is this change in substance, rather than the number of cases, that may most threaten the system.

Drug cases demonstrate the cost incurred due to the change in the character of the caseload. Drug cases can pose an especially large threat to resources because "[i]n the present . . . environment, drug cases, especially those involving the sale of drugs, acquire special status. District Attorneys, state attorneys, and other local, state, and federal officials are often requested to redirect their efforts from other areas to the supposed 'crisis' created by drug sales and drug use."<sup>111</sup> Professor Beale offers an anonymous anecdotal example in which a federal judge noted during a drug case with fifteen defendants, that the pending case was his third in less than one year with more than twelve defendants.<sup>112</sup> In each case, nearly every defen-

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106. *See id.*

107. *Id.* (citation omitted).

108. *See id.* at 1043.

109. *Id.* at 1046.

110. Beale, *supra* note 19, at 1285.

111. Martin & Travis, *supra* note 6, at 74.

112. *See* Beale, *supra* note 19, at 1286.

dant required appointment of separate counsel, who then each had to separately review government documents and tape recordings. Because of the number of motions and status conferences accompanying the trial of such a case, these cases disproportionately consume more judicial resources than civil cases.<sup>113</sup>

The number of drug prosecutors from the past decade have increased without comparison in other time periods and, thus, uniquely illustrate the threat of overload represented by this imbalance. From 1980 to 1987, the total number of federal drug offense prosecutions increased 153%, with prosecution rates in drug cases higher than those of any other type of crime. The number of defendants convicted in federal courts increased by more than 340%.<sup>114</sup> Accordingly, for the same time period, the number of defendants sentenced to prison for federal drug possession charges increased by 434%.<sup>115</sup> The average sentence imposed by federal courts increased by 44%.<sup>116</sup> Thus, combined with the special attention that drug cases demand, the increase in proportion of drug cases is especially problematic.

Compounding the resource drain of increasing complexity of criminal litigation are the Guidelines,<sup>117</sup> which require extensive findings of facts and legal conclusions.<sup>118</sup> In one study, 90% of judges surveyed reported that sentencing had become significantly more time consuming.<sup>119</sup> Another study found that the sentencing process in cases involving the Guidelines took 25% more time than in other cases.<sup>120</sup> Moreover, these sentences may be appealed by either the government or the defendant, even where the defendant pleads guilty.<sup>121</sup>

The increased proportion of criminal cases necessarily decreases the proportion of resources available for disposition of

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113. *See id.*

114. *See* Martin & Travis, *supra* note 6, at 75.

115. *See id.*

116. *See id.*

117. 18 U.S.C. §§ 3551-3586 (1994).

118. *See* Beale, *supra* note 19, at 1286.

119. *See id.* at 1286-87.

120. *See id.* at 1287.

121. Also, the sentencing appeals process further complicates ordinary appeals from criminal cases. *See id.*

civil cases. One of the causes for this "civil squeeze" is the Speedy Trial Act<sup>122</sup> (the "Act"), which requires that criminal cases be tried within seventy days from the filing date of the information or indictment, or from the date the defendant has appeared in court, or whichever is later.<sup>123</sup> While there is a good argument that, because of generous exclusions provided for in the Act, criminal cases have no real trumping power over civil cases,<sup>124</sup> the Act appropriately pressures prosecutors to move cases quickly into court.<sup>125</sup> This pressure restricts the resources available for civil cases which, enjoying no similar priority status, must inevitably be delayed. Thus, while criminal cases account for only about 17% of all filings in federal court, they consume 48% of the court's time.<sup>126</sup>

This squeeze raises serious concerns about the nature of the federal docket and the ability of the federal courts to fulfill their constitutionally mandated duty: "interpreting federal law, declaring federal rights, and providing a neutral forum for interstate disputes."<sup>127</sup> Judge Maryanne Trump Barry, chair of the Judicial Conference Committee on Criminal Law, wrote a letter to Congress illustrating this point:

[T]he federal courts are designed to handle complex criminal cases . . . with nationwide impact that states lack the resources and/or jurisdiction to investigate and prosecute. . . . [T]he potential addition to the federal caseload of thousands of cases that the states routinely and efficiently prosecute would severely reduce if not cripple the federal courts' ability to handle those types of cases that we are best able—and geared—to handle.<sup>128</sup>

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122. 18 U.S.C. § 3161 (1994).

123. *See id.* § 3161(c)(1).

124. *See Little, supra* note 9, at 1051; *see also*, 18 U.S.C. § 3161(h) (1994).

125. *See* 18 U.S.C. § 3161(a) (1994).

126. *See Beale, supra* note 19, at 1285.

127. Beale, *supra* note 56, at 988-989; *see also* Justin Wiser, *Payne: Beware of Too Many 'Federalizing' Laws*, VA. LAW. WKLY., Nov. 24, 1997, at A1 (quoting United States District Court Judge Robert E. Payne: "We've created a circumstance in which civil dockets are backlogged . . . . The consequence of all that is that there's a decline in the quality of federal judiciary decision-making.").

128. Douglas E. Abrams, *Crime Legislation and the Public Interest: Lessons from Civil Rico*, 50 SMU L. REV. 33, 86 n.413 (1996) (quoting 139 CONG. REC. S15, 398 (remarks of Sen. Biden, presenting letter of Judge Maryanne Trump Barry, chair of the Judicial Conference Committee on Criminal Law)).

Considering the unique nature of the federal courts and their relatively tiny size in comparison to the state court system—there are less than 700 federal judges nationwide—we should not lightly ask the federal courts to shoulder an additional task that state courts are already equipped to perform. This situation is lost in the glare of the media spotlight that often drives event-specific criminal legislative agendas.

#### V. THE OUTLOOK: REEVALUATING PRINCIPLES AND SOLUTIONS FOR THE FUTURE

There is some consensus among experts that the current balance of federal versus state involvement in law enforcement is closer to ideal than not. “[T]he states should and must continue to play the dominant role in criminal law enforcement, and the federal government’s role should remain far more limited than that played by the states.”<sup>129</sup> Given that today’s state court systems handle 90% to 95% of criminal cases prosecuted in the United States, the status quo doesn’t seem too far from ideal. Still, this does not address the problems that the current system precipitates: haphazard, media-driven criminal legislation, disparity in sentencing, and bulging federal caseloads.

There are many specific proposals and approaches addressing the federalization issue that are beyond the scope of this comment. However, there are some guiding principles that may be usefully summarized.

##### A. *Demonstrated State Failure*

Advocating for the viability of a system of mixed federal and state courts, Alexander Hamilton wrote, “the national and state systems are to be regarded as ONE WHOLE.”<sup>130</sup> According to Chief Justice William H. Rehnquist, “Hamilton didn’t mean that literally . . . [but his] statement suggests the next step that state and federal courts can take towards improving judicial

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129. Beale, *supra* note 19, at 1294.

130. THE FEDERALIST NO. 82, at 494 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (emphasis in original).

federalism. We need to view our systems as one resource and use that resource as wisely and efficiently as we can."<sup>131</sup>

One such approach involves a threshold standard for federal criminal legislation in order to limit future federalization without denying the legitimate benefits it offers: remedying demonstrated state failure.<sup>132</sup> This would require a comparison of state and local versus federal realities, which avoids the problematic and sometimes disingenuous characterization of a crime as having a peculiarly state or federal nature. It avoids the problematic task of defining exactly where the line between federal and state interests lies: "Unique' federal interests is too limited; 'intrastate commerce' is too broad; and 'strong' federal interests is too manipulable."<sup>133</sup> In this context, state failure is not a quantitative judgment based only on docket crowding; rather, it is a qualitative judgment that also takes into account workload, resources, investigative expertise and opportunity, and law enforcement's familiarity with and presence in the community.<sup>134</sup> This creates a two way street for making the decision about whether to proceed under a federal or state system. States can assert their particular needs in a case, and federal officials can intervene, even over a state's objection, when they demonstrate some remediable state shortcoming, such as the civil rights prosecutions during the 1960s.<sup>135</sup>

This appeals to those who criticize the current system on federalism grounds. It establishes a presumption that the states will take care of local problems. Where the states either cannot or are not doing a sufficient job with the resources available to them, the federal government can fill in the gaps. Thus, in instances of corruption or systemic illegality, the federal government would fulfill its duty to protect its citizens and assume the role of enforcer. Where local law enforcement is overwhelmed, they can form partnerships with federal law enforcement officials to maximize both federal and state crime control efforts. Both of these situations are examples where federal

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131. William H. Rehnquist, *Welcoming Remarks: National Conference on State-Federal Judicial Relationships*, 78 VA. L. REV. 1657, 1658 (1992).

132. See Little, *supra* note 9, at 1078.

133. *Id.*

134. See *id.*

135. See *id.* at 1078-79.

courts appropriately shoulder the caseload. For "at least in some urban areas today it may be federal resources, the federal forum, and incapacitating federal penalties that stand between a plausible attempt to address the behaviors and total governmental abdication."<sup>136</sup>

The threshold for such a demonstration should be more than "a simple assertion of state failure . . . [and, indeed] it seems unlikely that a single instance [of failure] should suffice."<sup>137</sup> "Failure" is intended to mean only that there is a need going unaddressed by the local authorities; it need not necessarily attach blame.<sup>138</sup> States and localities would likely be evaluated on an individual basis; but if there is some regional failure demonstrated among several neighboring states or localities, a regional response would be appropriate under this model. "Congress would have to be convinced, rationally, that despite the state's efforts (good faith or otherwise) to address the crimes at issue, the results have been inadequate to protect the public interest."<sup>139</sup> Any decision made by Congress would be analogous to Congress's appropriation function, and would, therefore, not likely be appealable.<sup>140</sup>

It is important to recognize that the demonstration component distinguishes this use of federal resources from the current rationale that, generally speaking, states cannot address their crime problems alone.<sup>141</sup> It requires more than just a generalized sense that crime is getting worse. Even where there is a particularly egregious event, it is unlikely that such an event, while it may pave the way to passage of bills in the current scheme, would suffice to show demonstrated state failure. This would preclude passage without a rationally convinced body voting for it. There may even be imposed a judicial requirement for "rational basis in the record."<sup>142</sup> Still, one must acknowl-

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136. *Id.* at 1079.

137. *Id.* at 1080.

138. *See id.* at 1078.

139. *Id.* at 1080.

140. *See* U.S. CONST. art. I, § 8.

141. *See supra* notes 73-74 and accompanying text.

142. Little, *supra* note 9, at 1080 (citing *United States v. Lopez*, 514 U.S. 549, 557 (1995)).



edge that if an event is enough to galvanize Congress today, it will probably also galvanize it tomorrow.

Nonetheless, the demonstrated state failure model raises difficult issues that would persist to complicate the implementation of such a plan: defining a failure, establishing the burden one must meet to adequately demonstrate a state failure, ruling out or creating an avenue for appeal, deciding whether to involve a new or existing independent agency, and others. These uncertainties notwithstanding, the principle does serve to guide future debate about how the federal and state governments should interact as they combat crime. Furthermore, and perhaps most importantly, the model "articulates a rationale for many instances of past criminal federalization. . . ." <sup>143</sup>

### B. *Project Exile*

To completely address federalization issues, the debate must touch the laws that are already on the books. While most critics of federalization call for a halt to future legislation, few call for a wholesale repeal of federal criminal law.<sup>144</sup> This is, in part, because the federal laws do have positive impact. As a viable, though perhaps belated, rationale for present federal law, the principle of demonstrated state failure offers some guidance in this area. Because the state failure model is based on a system of feedback between localities and the federal government, once a failure is demonstrated, this partnership must continue.

An example of such a partnership is a program called "Project Exile." Established in November of 1996 in Richmond, Virginia, the project demonstrates a new approach to gun violence in mid-sized cities.<sup>145</sup> The program's name comes from its

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143. *Id.* at 1081.

144. *See, e.g., id.* at 1071 ("[Regarding future legislation, a] starting point ought to be a rebuttable presumption against federalization. . . . However, any such presumption must be rebuttable because all participants in this debate appear to agree that federalization of crime is appropriate or necessary in some circumstances.").

145. *See* Michael Janofsky, *Homicides Rise in Smaller Cities*, NEW ORLEANS TIMES-PICAYUNE, Jan. 15, 1998, at A8 ("Contrary to the trends that show homicide rates falling in many of the country's largest cities since 1994, some cities with populations of several hundred thousand are experiencing increases in killings.").

mandate that all felons caught with guns be prosecuted in federal court, "without regard to numbers or quantities."<sup>146</sup> Therefore, according to United States Attorney Helen F. Fahey, due to harsher federal penalties, "[i]f you are found carrying a gun . . . you will be exiled from our community to a federal prison."<sup>147</sup> While this may contribute to the docket squeeze complained of by critics of federalization, the high profile generated by a strong publicity campaign maximizes any deterrent effect.<sup>148</sup> Also, eliminating prosecutorial discretion addresses concerns of unfair and arbitrary disparity in sentencing experienced by similarly situated criminals prosecuted in different systems. By advertizing the project's slogan, "[a]n illegal gun will get you five years in federal prison,"<sup>149</sup> on billboards, television, and radio, the project takes the publicity past the passage of a federal law and spreads a message of uniform enforcement.<sup>150</sup>

The project began in response to Richmond's murder rate, which was higher than that of similar sized cities. Larger cities, on the other hand, had crime rates which were falling.<sup>151</sup> Richmond is a mid-sized city not seen traditionally as an urban center comparable to New York or Washington, D.C., but it had

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146. Project Exile Press release materials provided by S. David Schiller, Senior Litigation Counsel, United States Attorney's Office for the Eastern District of Virginia [hereinafter *Schiller Materials*].

147. Lynn Waltz & Tim McGlone, *Criminals Arrested for Carrying Guns . . . Task Force Aims to Take Them out of Violent Hands*, VIRGINIAN-PILOT & LEDGER-STAR, Jan. 23, 1998, at B1 (ellipsis in original).

148. The prosecutorial effort is accompanied by "affirmative use of the media carrying the message 'an [sic] illegal gun will get you five years in federal prison.'" *Schiller Materials*, *supra* note 146. The message is transmitted by "15 billboards, a fully painted city bus, TV commercials, 15,000 business cards with the message distributed on the street by local police, [and] print advertising." *Id.*

149. *Id.*

150. This use of the media should be distinguished from the use by legislators in the passage of laws to address specific events. *See* Wallace, *supra* note 10; *see also supra* text accompanying note 60. While the use of the media to disseminate Project Exile's message does have positive political fallout for the few elected involved, its main use is to deter crime by educating the population about the consequences of specific behavior.

151. "New York and Los Angeles recorded the lowest number [of homicides] in decades. Homicides were also down in Chicago, Washington, New Orleans, Boston, Baltimore, and Newark, N.J., as they were in several other Virginia cities." Carrie Johnson, *Drugs Guns Apathy . . . Where Toll Went Down, Residents Got Involved*, RICH. TIMES-DISPATCH, Jan. 3, 1998, at A1.

been dubbed "one of the nation's murder capitals."<sup>152</sup> Drug dealers from other major markets began to perceive it as a place to expand their business because there was relatively "little organized crime or gangs."<sup>153</sup> Also, the city's location on Interstate 95 facilitated transportation to and from major drug distribution centers such as Miami and New York.<sup>154</sup> These factors, combined with aggressive policing in larger cities, drove drug dealers to seek new markets in Richmond and other mid-sized cities.<sup>155</sup> Therefore, "[a]ny entrepreneur with a gun"<sup>156</sup> saw Richmond as a "wide-open drug market."<sup>157</sup> This bred the competition that was beginning to wane in larger cities, but escalated violent crime in Richmond.<sup>158</sup> "In established drug rings, dealers aren't likely to kill their customers because it's bad for business . . . [b]ut in Richmond, the situation is more volatile."<sup>159</sup> Learned D. Barry, a Deputy Commonwealth Attorney, described the change in Richmond's criminal climate: "When I first started back in 1978, there were about 55 murders a year and the average person was shot once or twice. . . . Now there are up to 140 murders a year, and the corpses are riddled with bullets."<sup>160</sup>

Faced with this dilemma, law enforcement officials saw tougher federal sentencing as an answer.<sup>161</sup> Captain William Robertson of the City of Richmond Police Department explained that, "it is like buying a car: we're going to the place we feel we can get the best deal. We shop around."<sup>162</sup> State sentences tend to be lower, in part because legislatures and sentencing commissions face intense local pressure to keep the costs of

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152. Mark Holmberg, *City Slaying Level Lowest in a Decade: Henrico Is Off to Its Worst*, RICH. TIMES-DISPATCH, Mar. 8, 1998, at B1.

153. Johnson, *supra* note 151, at A1 (quoting Assistant United States Attorney James B. Comey).

154. *See id.*

155. *See id.*

156. *Id.*

157. *Id.*

158. *See id.* (quoting Deputy Commonwealth Attorney Learned D. Barry).

159. *Id.* (paraphrasing Dr. Jay Albanese of Virginia Commonwealth University's Criminal Justice Department).

160. *Id.*

161. Interview with Captain William Robertson, Officer in Charge of Detective Division, City of Richmond Police Department (March 13, 1998) [hereinafter *Robertson Interview*].

162. *Id.*

justice down.<sup>163</sup> Because stricter sentencing yields a larger and more costly prison population, legislatures like Virginia's often cannot "fund" new stricter sentences.<sup>164</sup> Therefore, local law officials welcomed federal intervention.<sup>165</sup>

This specific threat noted by experts and law enforcement officials,<sup>166</sup> not a generalized public mood, is an example of what may constitute grounds for federal involvement based on demonstrated state failure. It is likely that nearly all communities believe their crime rates are too high, but the above facts indicate that the traditional tools used by states and localities to combat crime were not effective in Richmond. Accordingly, the United States Attorney's Office in Richmond sought to intervene by promising federal prosecution to all convicted felons caught with a firearm.

The project's high-profile presence in the community has had some positive effect. According to anecdotal accounts: "When the police jump out at drug corners, dealers are dropping their weapons before they run instead of running with them because they don't want to get caught with guns."<sup>167</sup> The project is fully privately funded, primarily by community merchants as well as in-kind donations by media and other local organizations.<sup>168</sup> Statistically, the project appears successful. The rate at which criminals carry guns has decreased by more than fifty percent.<sup>169</sup> Thus, through targeted, cooperative efforts, local and

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163. See *id.*

164. This is in part due to the fact that the Virginia Constitution prohibits the state from incurring debt that would create a budget deficit. See VA. CONST., art. X, § 9; see also Frank Green, *Corrections Has Grown Inmate Population Has Grown Faster*, RICH. TIMES-DISPATCH, July 12, 1997, at A1 ("Getting tough on criminals was good politics during the 1993 gubernatorial campaign. By 1997, it turned the Virginia Department of Corrections into the state's biggest agency.").

165. Captain Robertson noted that Commonwealth Attorney David Hick's office was "overloading" the state courts with cases, and accordingly, state judges and prosecutors saw Project Exile as needed relief. See *Robertson Interview*, *supra* note 161.

166. See *id.*; see also *supra* text accompanying note 152.

167. Johnson, *supra* note 151, at A1 (quoting Assistant United States Attorney David Schiller).

168. See *Schiller Materials*, *supra* note 146.

169. See *id.* The numbers on the city's murder rate remain mixed. Reports in 1998 suggest that in Richmond the rate will be much lower than in years past. See Mark Holmberg, *City Slaying Level Lowest in a Decade Henrico Is Off to Its Worst Start*, RICH. TIMES-DISPATCH, Mar. 8, 1998, at B1. However, 1997's rates kept the city high on the list of those with the highest rates in the country: "There were 140 homicides

federal law enforcement agencies partnered with private community members and achieved some impact in an area that was of special concern to Richmond residents. This approach appears to be a useful and efficient use of overlapping state and federal jurisdiction to leverage better results.

Programs such as Project Exile still have flaws and are not the answer to every crime wave. Indeed, local leaders in Richmond still voice some concern that the impact has not fully reached violent crime.<sup>170</sup> Also, the project relies heavily on a potentially flawed premise, that prison is a solution to crime. "Exiling" people convicted of crimes does have an impact, but it may not ultimately be the best long-term solution for a given community.

Of course any increases in incarceration have some effect through incapacitation, and incapacitation of a large enough fraction of the population will necessarily bring about some crime reduction (as would imprisoning all males between the crime prone ages of 15-24). [However, the] dominant expert view is that further increases in sentence length will, at best, bring about modest reductions in crime, while measures not being pursued hold more promise.<sup>171</sup>

Therefore, programs such as Project Exile run the risk of being a substitute for more long-term measures of crime prevention such as commitments to job and education programs.<sup>172</sup> Indeed, because any government program is paid for out of a limited budget, building another prison to house the "exiled" necessarily means that another public project will go unfunded.<sup>173</sup>

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in Richmond in 1997, up from 119 in 1995 and 112 in 1996." Johnson, *supra* note 151, at A1.

170. City Councilman James L. Banks, Jr., chairman of the public safety committee explains, "we just haven't found the right combination [of law enforcement programs] to reduce the murder problem here in Richmond." Johnson, *supra* note 151, at A1.

171. Sara Sun Beale, *What's Law Got to Do with It? The Political, Social, Psychological And Other Non-legal Factors Influencing The Development of (Federal) Criminal Law*, 1 BUFF. CRIM. L. REV. 23, 26 (1997).

172. "[T]o reduce street crime, [we must reduce] poverty by investing in children, youth, families, and communities." Coramae Richey Mann, *We Don't Need More Wars*, 31 VAL. U. L. REV. 565, 575 (1997) (quoting THE REAL WAR ON CRIME 215 (Steven R. Donziger et al. eds., 1996)).

173. Though Project Exile is privately funded, increased costs of trials and incar-

Furthermore, resorting to federal prosecution may exacerbate the problem of docket crowding. In theory, this should be mitigated by the screen represented by the demonstrated state failure principle. But in those districts where the threshold is met, the recipient federal court will no doubt feel the increased burden: "There is an increasing tendency to look to the federal judicial structure to solve a great many of society's problems. . . . ' This, in turn, taxes the efficacy of the entire system."<sup>174</sup> For this reason, following the state failure model is necessary to avoid even further pressure on the federal system except in areas where additional resources are most needed.<sup>175</sup>

Before moving on to other criteria by which to examine the need for federal law enforcement resources, it is important to note that Project Exile is not a justification for more federal legislation; rather, it is a model for intelligently using tools already in existence.<sup>176</sup> The apparent early success of the project did depend on the prior existence of federal laws. But what makes the project unique is its constructive use of those laws. By combining local police presence, federal prosecutory resources and penalties, and a strong public awareness campaign, the United States Attorney's Office has avoided the hurdles presented by the overlap of federal and state criminal authority<sup>177</sup> and produced an effective program to achieve a greater sum than the federal and state parts comprise. Thus, what has been achieved is not due to legislative action, but rather creative and cooperative enforcement by members of the executive

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ceration are nonetheless left to the public sector.

174. Wiser, *supra* note 127, at A1 (quoting United States District Court Judge Robert E. Payne).

175. It must be acknowledged that Project Exile prosecutions are the type of drug and gun cases that this article criticizes as responsible for the majority of the increase in federal court prosecutions. *See supra* text accompanying notes 102-10. However, in the context of a demonstrated state failure, the federal court should be seen less as a system in distress and more as an appropriate tool to augment state law enforcement efforts.

176. *See Robertson Interview, supra* note 161. Captain Robertson expressed his personal opinion that while he wished some federal laws did not exist, "if they're there, we'll use them." *Id.* He explained that the local police never encountered an area of crime not already addressed by federal law. *See id.*

177. These hurdles include securing funding, avoiding "turf consciousness" among various levels of law enforcement agencies, coordinating with the court, United States Marshals, and prison personnel, and obtaining the commitment of investigative agencies to pursue cases. *See Shiller Materials, supra* note 146.

branch. Accordingly, there is a need not only for legislative acumen, but also creative and thoughtful execution of the laws created. Where both exist, federalization schemes are likely to be more successful and draw less criticism.

### C. *Other Criteria*

This article has focused primarily on federal laws that mimic pre-existing state laws. There are, however, situations in which federal interests justify national legislation for reasons other than creating a duplicative system of tougher sentences. Federal law will often exist in the absence of similar state legislation, because states have no unique interest to protect. Therefore, in order to address those instances, other criteria must be considered in determining the threshold for federal intervention.<sup>178</sup>

First, federal interests are obviously strong "where the federal sovereign is directly involved."<sup>179</sup> This occurs where the offense is committed against the sovereign itself or directly implicates the sovereign's property. Therefore, crimes such as treason or crimes in which federal property is damaged or destroyed should obviously be subject to federal prosecution.<sup>180</sup>

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178. Professor Geraldine Szott Moohr identifies similar criteria to those that follow in the text:

The Federal Judicial Conference to Congress, the policy-making division of the federal judiciary, has recommended that Congress voluntarily narrow its authority by passing criminal legislation only when a "paramount" federal interest justifies a federal enforcement effort. It identified five categories of crimes that may reflect such an interest: (1) offenses against the federal government or its programs; (2) criminal activity with substantial multi-state aspects; (3) criminal activity involving complex commercial or institutional enterprises most effectively prosecuted with federal resources and expertise; (4) serious, high-level or widespread state or local government corruption; and (5) conduct that threatens individual civil rights.

Geraldine Szott Moohr, *The High Cost of Federalizing Crime*, FULTON COUNTY DAILY REP., Mar. 6, 1998, at 6.

Still, the above categories would arguably not apply to an area of demonstrated state failure where there is no other interest than the public interest in safety and law enforcement traditionally advanced by the states. Thus, the state failure scheme advanced earlier would be more permissive.

179. Beale, *supra* note 19, at 1296.

180. See, e.g., 10 U.S.C. § 104 (repealed 1943) (criminalizing acts giving aid to an enemy of the United States).

Second, "where efficiency based considerations favor federal prosecution because of the interstate or international character of the offense, or economies of scale,"<sup>181</sup> federal criminal legislation is appropriate. Therefore, "where the conduct threatens to overwhelm the local authorities,"<sup>182</sup> because of substantial multi-state aspects, federal resources play an important role in protecting citizens. One example, Section 242 of Title 18 of the United States Code,<sup>183</sup> addressed the activities of the Ku Klux Klan following the Civil War and criminalized violations of civil rights.<sup>184</sup> Where states could not or would not enforce the common law because of widespread corruption and racial prejudice, a federal law was created to provide a remedy.<sup>185</sup>

Third, federal legislation is important "where uniformity is [especially] important, as in the context of antitrust and securities regulation."<sup>186</sup> In diffuse and complex areas of law such as those regulating vast capital markets, individual states lack the ability to effectively regulate crimes committed in connection with such commercial activities. Accordingly, federal securities laws<sup>187</sup> provide a comprehensive regulatory and enforcement scheme that benefits the regulated by providing uniformity as it protects the public.

While these criteria demonstrate the important interests that are implicated by any federalization scheme, they still do not end the analysis. For example, they do not define exactly when federal agencies have a distinct law enforcement advantage over state agencies. Thus, while many local officials take advantage of extensions of federal jurisdiction in order to trigger stricter sentencing systems, this alone may not justify more federal legislation.<sup>188</sup> Tougher penalties are the subject of much de-

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181. Beale, *supra* note 19, at 1296.

182. *Id.*

183. 18 U.S.C. § 242 (1994) (punishing the deprivation of civil rights under the color of law with fines and/or prison time).

184. See Andrew J. Simons, Note, *Being Secure in One's Person: Does Sexual Assault Violate a Constitutionally Protected Right?*, 38 B.C.L. REV. 1011, 1033 (1997).

185. See Reginald Leamon Robinson, *Race, Myth and Narrative in the Social Construction of the Black Self*, 40 HOW. L.J. 1, 99 (1996).

186. Beale, *supra* note 19, at 1296.

187. See, e.g., Securities Exchange Act of 1934, 15 U.S.C. § 78a (1994).

188. See *supra* note 175 and accompanying text.



bate,<sup>189</sup> and to create laws in order to take advantage of such penalties may base new laws on a faulty premise.

The Project Exile model serves as an important experiment in this area. Its success lies in its "whole government" approach.<sup>190</sup> By selecting areas of failure and addressing those areas with a consistent and cooperative enforcement scheme, law enforcement officials achieve new efficiency at lower costs to the system. New federal legislation alone, without the coordination of the executive and judicial branches, will not be sufficient to replicate the success demonstrated so far by Project Exile.

## VI. CONCLUSION

The recent statistics are good news, regardless of their cause. Innovative and creative programs like Project Exile seem to be making a difference and are encouraging examples of new approaches to solving old problems. But the fact remains that there will always be crime. It is a part of the human condition. Accordingly, the public debate on crime will continue as policy makers seek better ways to address the problem.

In step with the expansion of modern federal jurisdiction, Congress will continue to keep the nation's crime problem on its agenda. Because of the crucial role that media exposure plays in winning elections, lawmakers can stake out campaign territory by highlighting new threats and proposing new laws. Politicians amass more political currency by publicizing immediate responses tailored to specific media events, such as the Pamela Basu tragedy, than by seeking more comprehensive long-term solutions. Imposing longer sentences may appeal to some, but those sentences do nothing to prevent the conditions that breed crime. Thus, reactionary policies such as these only create a patchwork of last ditch efforts to punish without regard to prevention or rehabilitation.

There is no silver bullet to fighting crime; neither state legislatures nor Congress can solve the problem with any one crime

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189. See *supra* note 170 and accompanying text.

190. See *supra* notes 130-31 and accompanying text.

bill or sustained war on crime. That is what is demonstrated when reactive, media-friendly legislation targets a problem that momentarily galvanized so many, only to precipitate a number of new issues and unforeseen consequences. A better approach is the more comprehensive approach. Instead of passing new laws, policy makers should pursue new ways to involve all three branches of government to more effectively use the tools already in place. Community building programs such as "midnight basketball"<sup>191</sup> should be promoted for their crime prevention value instead of attacked as "soft on crime," "big government" programs.<sup>192</sup>

To this end, the demonstrated state failure model provides a useful tool in evaluating federal involvement in local law enforcement. The federal government is a valuable resource which should be available where the states cannot or will not address a particular problem. In implementing programs according to this principle, however, goals should be set according to the demonstrated failure on the state's part. Thus, where there is no failure in enforcement, such as in Pamela Basu's case,<sup>193</sup> there should be a presumption against federal involvement. Any failure in the Basu case was not in the prosecution, but in the prevention of that crime. Accordingly, it may be in the area of

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191. "Midnight Basketball" was the popular name given to a proposal in the 1994 Crime Bill. In these prevention programs, towns would open their recreation facilities to young men during late night hours. In order to participate in the late night games, the youths would be required to meet certain standards such as attendance in school or education workshops, and to meet a code of conduct. In some programs, if a youth got in trouble with the law, he was expelled from the league. These programs received significant support from law enforcement officials. One town reported a 60% reduction in drug related crime after the midnight sports league was formed.

Jennifer M. O'Connor & Lucinda K. Treat, Note, *Getting Smart About Getting Tough: Juvenile Justice and The Possibility of Progressive Reform*, 33 AM. CRIM. L. REV. 1299, 1344 (1996) (citing Richard A. Mendel, *Prevention or Pork: A Hard-Headed Look at Youth-Oriented Anti-Crime Programs*, AM. YOUTH POL'Y F. (1995)).

192. Opponents of such programs accused supporters "of diverting needed prison construction monies to 'increase the self-esteem of young criminals and to pay for midnight basketball leagues. . . ." [O]pponents thus hoped to encourage the public to link the bill to old political mythologies about 'welfare queens' and other frauds." Harry A. Chernoff et al., *The Politics of Crime*, 33 HARV. J. ON LEGIS. 527, 563-64 (1996).

193. See *supra* note 73, and accompanying text.

crime prevention that the federal government's resources are most appropriately spent.

There are other issues that remain unaddressed by this comment but deserve mention. Managing a court's docket is done on an ad hoc basis, and there are probably as many approaches as there are courts and clerks. One judge may perceive justice better served by speeding through as many cases as possible, while another may see the attention given to some cases worth the delay of others. And when there is adequate court time, one judge may maintain a faster pace in the interest of uniformity, while another may seek a different, more time consuming ideal. Ultimately, the public has competing interests, and a careful balancing of those interests by officers of all three branches of government is vitally important.

Finally, as suggested earlier, it is imperative to note that the solution to any community's crime problem cannot ultimately come from either states or the federal government.

The only thing the police and the courts can do is bail out the boat. The only ones that can stop the leak are families and schools. It is difficult for ordinary citizens to understand the impact of good schools or a loving family, but the effects are really far-reaching.<sup>194</sup>

The best approach is to recognize that crime is not a problem to be solved, like an unbalanced budget; rather it is a condition to be prevented or, once manifested, treated.

*Charles D. Bonner\**

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194. Carrie Johnson, *Drugs + Guns + Apathy . . . Where Toll Went Down, Residents Got Involved*, RICH. TIMES-DISPATCH, January 3, 1998, at A1 (quoting David Baugh, a criminal defense attorney and former Assistant United States Attorney.)

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