

# The Changing Boundaries Between Federal and Local Law Enforcement

*by Daniel C. Richman*

This chapter addresses the development of Federal criminal law over the last century, from a small group of statutes protecting direct Federal interests to a vast body of law that has effectively eliminated the distinction between Federal crime and the conduct traditionally prosecuted by State and local authorities. Although the overlap between these hitherto separate spheres now seems virtually complete, the chapter argues that any account based only on substantive law would be misleading because it fails to consider potent political and institutional limitations on Federal powers. The relatively small size of the Federal enforcement apparatus appears to reflect Congress' belief that the precise boundaries of responsibility should be set not through substantive Federal legislation but through explicit or tacit negotiation among enforcement agencies. This negotiation process is in part shaped by the decentralized nature of Federal prosecutorial authority, which tends to put members of the local power structure into gatekeeper positions, but perhaps even more shaped by informational resources available only to State and local authorities. After examining these restraints, the chapter concludes by discussing the consequences of a system in which the boundaries between Federal prosecutions and State and local prosecutions are set by the enforcers themselves and not by Congress.

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**A**t the beginning of the 20th century, had one asked a knowledgeable observer to explain the relationship between the Federal law enforcement system and the administration of criminal justice by State and local authorities, he could quickly sketch out some clear boundaries: Federal enforcement agencies, such as they were, protected the basic interests of the Federal Government. The Secret Service fought counterfeiters and, after the assassination of President McKinley, protected the President. Post Office agents guarded the mails and targeted those who would misuse them. U.S. Marshals protected court officials and performed sundry other tasks at the behest of the relatively new Department of Justice (DOJ) (established in 1870) and local U.S. Attorney's Offices. Other agencies looked to Federal revenue collection interests and patrolled federally controlled territory. And—save for occasional emergencies—that was about it. Everything else—ranging from street crime to large-scale financial frauds—not only fell within the province of State and local authorities, but was an exclusive province.

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Flash forward to the beginning of the 21st century. Some things are not that different. The Federal enforcement bureaucracy is still quite small, at least when compared with State and local authorities. In 1996, for example, there were only 74,493 Federal officers, compared with 663,535 full-time State and local officers (36,813 in New York City alone) (Maguire and Pastore 1998, 39; Reaves 1998). But explaining the boundary that separates Federal enforcement concerns from State and local is a daunting task indeed. The more one knows, the harder it gets. Federal agents still seek out counterfeiters. But they also target violent gangs and gun-toting felons of all sorts, work drug cases against street sellers as

well as international smugglers, investigate corruption and abuse of authority at every level of government, prosecute insider trading, and pursue terrorists. Until recently, about the only area of criminal enforcement that seemed immune from Federal activity was domestic violence. Then came the Violence Against Women Act of 1994, which allowed for the Federal prosecution of “[a] person who travels across a State line . . . with the intent to injure, harass, or intimidate that person’s spouse or intimate partner, and who, in the course of or as a result of such travel, intentionally commits a crime of violence and thereby causes bodily injury to such spouse or intimate partner.”

If there is a boundary clearly separating Federal from State and local criminal enforcement concerns in 2000, it is one not amenable to any categorical description. That does not mean, however, that there is no such boundary—or, to be

more precise, *boundaries*, since patterns of enforcement differ across the country. The thesis of this essay is that what has most changed during the 20th century is not the existence vel non of a distinction between Federal and State criminal justice concerns but the process by which such lines are defined. After sketching (with a rather broad brush) the story of the change from legislative initiative to executive discretion, I will explore the consequences and critiques of this institutional shift.

One might quibble with just about every generalization in the piece, many of which are quite impressionistic. The hope, however, is that its broad thematic focus will challenge readers to engage in a critical debate that, for better or worse, is now more a matter of public policy than constitutionality.

## **The Growth of Federal Criminal Jurisdiction**

The story of the changing boundary between Federal criminal enforcement and State and local enforcement during the past century is, in part, one of substantive law. The pace at which Congress has declared various activities already illegal under State law to be Federal crimes has increased at a spectacular rate since 1900. Indeed, “[m]ore than 40% of the Federal criminal provisions enacted since the Civil War have been enacted since 1970” (Task Force on the Federalization of Criminal Law 1998, 7). The conceptual roots of this legislative frenzy, however, might be found in early 20th-century developments.

Mindful of the Constitution’s failure to give the Federal Government general police powers, Congress, for most of the 19th century, limited itself to targeting activity that injured or interfered with the Federal Government itself, its property, or its programs. “Except in those areas where federal jurisdiction was exclusive (the District of Columbia and the federal territories) federal law did not reach crimes against individuals, . . . such as murder, rape, arson, robbery, and fraud.” These “were the exclusive concern of the states” (Beale 1996, 39–40). Nonetheless, after the Civil War, Congress looked somewhat beyond direct Federal interests to the general welfare of citizens, passing criminal civil rights provisions as part of Reconstruction (see Civil Rights Act of April 9, 1866; Enforcement Act of May 31, 1870; Ku Klux Klan Act of April 20, 1871),<sup>1</sup> and prohibiting the use of the United States mails to promote illegal lotteries (Act of July 27, 1868).<sup>2</sup> The lottery law was the precursor of a more sweeping mail fraud statute in 1872, which targeted any “scheme or artifice to defraud” effected through the use of the mails (Post Office Act of 1872).

Although the U.S. Supreme Court significantly limited the scope of the civil rights statutes (*United States v. Harris*, 106 U.S. 629 [1883]; *United States v. Cruikshank*, 92 U.S. 542 [1875]; Lawrence 1993, 2113), it joined with Congress to expand the reach of the 1872 mail fraud provision and its successors. Thus, in 1896, when a defendant claimed that the statute, as amended in 1889, reached only what would have involved “false pretenses” under the common law (and thus did not extend to mere promises as to the future), the Court broadly rejected the argument. The statute, it held, “includes everything designed to defraud

by representations as to the past or present, or suggestions and promises as to the future” (*Durland v. United States*, 161 U.S. 306, 313 [1896]). Far from bridling at this vast expansion of Federal criminal jurisdiction, which now reached a broad range of criminal activity hitherto in the exclusive province of the States, Congress responded in 1909 by specifically ratifying the Court’s decision (*Offenses Against the Postal Service* 1909).

While the potential scope of the mail fraud statute was enormous (allowing it to become one of the most flexible tools in the modern Federal prosecutorial arsenal) (Rakoff 1980), the provision did not necessarily mark a huge departure from the limited notions of Federal power that prevailed in the 19th century. The postal establishment, after all, was a Federal instrumentality by virtue of an explicit constitutional grant (U.S. Constitution, art. 1, sec. 8), and one might naturally expect that the Federal Government bore some responsibility for misuses of

this interstate network for fraudulent purposes (Brickey 1995, 1135, 1140). Even when the desire to prevent obstruction of the mails was asserted as an excuse for Federal intervention in turn-of-the-century labor wars (Lukas 1998, 149, 311), at least the fiction of a limited Federal role was maintained. With the beginning of the 20th century, however, came a new focus on inappropriate uses not just of an interstate Federal instrumentality but of interstate commerce in general.

Recognizing the challenge that Americans’ increasing mobility presented to State enforcement efforts, which were limited by the territorial basis of each State’s jurisdiction and the limited nature of State enforcement assets, Congress responded with Federal criminal statutes that targeted the crossing of State lines for particular illegal purposes. Some of these statutes, like the 1919 Dyer Act (National Motor Vehicle Theft Act 1919), which prohibited the transporta-

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tion of a stolen motor vehicle across a State line, were clearly economic in their concerns. But many had a decidedly moral focus, like the 1910 White Slave Traffic Act (also known as the Mann Act), which prohibited the transportation of a woman over State lines “for the purpose of prostitution or debauchery, or for any other immoral purpose” (Langum 1994); the 1913 provision, which made it a Federal offense to bring liquor into a dry State (Webb-Kenyon Act 1913); and the 1914 Harrison Narcotic Drug Act (Quinn and McLaughlin 1973), which established a comprehensive regulatory scheme for narcotic drugs, backed with criminal sanctions.

The passage of these statutes marked an important transition phase in the evolution of Federal criminal law. Congress was no longer concerned simply with the protection and misuse of Federal assets. Instead, Federal legislators showed that they were as committed as their State brethren to placing government power at the service of the moral crusades of the day, and as susceptible as their brethren to the political rewards of moral condemnation through criminalization. But these new statutes were ostensibly quite limited in form, showing no general desire to encroach into areas of traditional State concern. If local enforcers could not pursue malefactors over State lines, and evil could not be contained within such lines, what could be more natural than giving the Federal Government, with its constitutional authority to regulate interstate commerce, a gap-filling role? This indeed was the Supreme Court’s reasoning, as it found these statutes to be constitutional exercises of Congress’ powers under the Commerce Clause (*Brooks v. United States*, 267 U.S. 432 [1925] [upholding Dyer Act]; *Hoke v. United States*, 227 U.S. 308 [1913] [upholding Mann Act]).

The readiness of Congress to enlist Federal criminal statutes in the service of national moral crusades reached an early high point in 1919, with the ratification of the 18th amendment and the passage of the Volstead Act (National Prohibition Act 1919). However, while Prohibition put Federal enforcement agents on the front lines, attacking bootleggers and moonshiners where local police could not, or simply would not, go (Boudin 1943, 261, 273–274), the overlap between State penal laws and Federal criminal law remained quite limited, a function of comparatively well-circumscribed legislative initiatives. This would soon change.

Between the 1920s and the late 1960s, a number of developments occurred that vastly changed prevailing understandings about what the sphere of Federal authority ought to be. Some of these were waves of concern over criminal activity that seemed beyond the capabilities of local enforcers. White slavers, highway gangsters, big-city racketeers—the menace varied over time. But each galvanized the media, citizen groups, and ultimately legislators to call for Federal action (Potter 1998). Not only did each have interstate dimensions that

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made State processes insufficient to combat it, but there were also fears that local enforcers were not as keen to proceed even where they could. Fears that immigrants were playing a disproportionate role in some of these criminal threats made Federal intervention seem particularly natural, given the Federal Government's plenary power over immigration.

There were more specific outrages as well, like the kidnaping of Charles Lindbergh's son in March 1932. The aviator's prominence (and the fact that this was not the first celebrity abduction of the era) immediately made the crime a matter of national concern. One paper called it "a challenge to the whole order of the nation" (Powers 1987, 175). President Hoover responded tepidly. He asked the director of DOJ's small "Bureau of Investigation," J. Edgar Hoover, to coordinate Federal assistance, but his administration stressed that "it was not in favor of using the case as an excuse for extending Federal authority in the area of law enforcement" (Powers 1987, 175). "Organized crime," the Attorney General believed, was primarily a

local problem (Cummings and McFarland 1937, 478). Congress thought differently. Only a Federal kidnaping statute, one congressman argued, would avoid the problem of "brave officers stopped at State line because of red tape [or] professional jealousy." A statute was passed in May, a week after the body of the baby was found (Potter 1998, 112).

Perceptions of national crime problems, and congressional receptivity to ameliorative measures, occurred against a broader backdrop of expanding political views of the Federal Government's role in our constitutional system, and of expanding doctrinal understandings of how far Congress' Commerce Clause powers could go. Indeed, the distinction between what was local and what was of Federal concern often seemed to collapse under pressure from New Deal programs. Thus, when a farmer complained that the Federal Government could not constitutionally regulate how much wheat he harvested for his own use on his small farm, the Supreme Court upheld the regulation, recognizing the aggregate effect that all such activities might have on commerce (*Wickard v. Filburn*, 317 U.S. 111 [1942]). Further doctrinal pressure on the Commerce Clause later came in the 1960s, when it was used as a basis for civil rights legislation. If, as the Supreme Court soon held (*Katzenbach v. McClung*, 379 U.S. 294 [1964]), the commerce power could be used to prohibit racial dis-

crimination at local restaurants—based on the theories that discrimination discouraged travel by African-Americans and affected interstate purchases of restaurant supplies—that same power could also support any number of forays against criminal activity with equal, if not greater, economic effects. By 1971, the Court would have no difficulty upholding a Federal loansharking statute that allowed the prosecution of even the most localized extortionate credit transactions (*Perez v. United States*, 402 U.S. 146 [1971]). Citing the civil rights cases, it found a constitutionally adequate connection between the “class of activities regulated” and interstate commerce (*Perez v. United States*, 402 U.S. 153–154 [1971]).

The combination of the political demand for Federal criminal intervention and the erosion of constitutional limitations on such enactments proved a potent one, leading to a steady progression of statutes targeting criminal behavior that had long been the exclusive province of State and local enforcers. Between January and June 1934, 105 bills were introduced in Congress that were “designed to close the gaps in existing Federal laws and render more difficult the activities of predatory criminal gangs of the [“Machine Gun”] Kelly and Dillinger types” (U.S. Senate 1934). Many of these bills passed in 1934, including the National Stolen Property Act (barring the transportation of stolen property in interstate commerce), the National Firearms Act, the Fugitive Felon Act (prohibiting interstate flight to avoid prosecution for enumerated violent felonies), and the Federal Bank Robbery Act (provisions making it a Federal crime to rob a national bank). That same year, Congress also passed the Anti-Racketeering Act of 1934,<sup>3</sup> which allowed Federal prosecution of the urban gangsters thought to have a stranglehold on various industries.

Once legislators began to think of Federal criminal jurisdiction not as protecting certain discrete areas of particular Federal concern but as supplementing local enforcement efforts—supporting local exertions, and compensating for local inadequacies or corruption—Congress found more and more occasions for Federal intervention. One hallmark of this intervention came to be broadly drafted statutes that laid the groundwork for the elimination of all conceptual boundaries between Federal and State criminal law. Thus, the 1946 Hobbs Act, intended to cure certain perceived deficiencies in the Anti-Racketeering Act of 1934, broadly targeted any effort that “obstructs, delays, or affects commerce . . . by robbery or extortion,” with “extortion” defined as “the obtaining of property by another, with his consent, induced by wrongful use of actual or threatened force, violence or fear, or under color of official right.” This provision allowed Federal prosecution of the extortionate rings preying on urban businessmen. But its open language—and judicial deference to the plain meaning of such language (*United States v. Culbert*, 435 U.S. 371 [1978]; Kahan 1996, 469, 480–481)—has also allowed its use against corrupt Federal, State,

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and local officials (Hardy 1995, 409), and even robbers of grocery stores (*United States v. Farmer*, 73 F.3d 836 [8th Cir. 1996]) and restaurants (*United States v. Bolton*, 68 F.3d 396 [10th Cir. 1995]).

A new wave of legislation came in the 1960s and early 1970s, in response to fears that State and local authorities were not up to the task of fighting organized crime, whose tentacles had become a favorite topic of congressional inquiries (Marion 1994, 28). Perhaps the most sweeping measure passed during this period was the Travel Act, which allowed for Federal prosecution of those who traveled in interstate or foreign commerce, or used “any facility in interstate or foreign commerce, including the mail, with intent to (1) distribute the proceeds of any unlawful activity; or (2) commit any crime of violence to further any unlawful activity; or (3) otherwise promote, manage, establish, carry on, . . . any unlawful activity.” “Unlawful activity,” for purposes of the Act, included narcotics, prostitution, extortion,

or bribery offenses “in violation of the laws of the State in which they are committed or of the United States” (Travel Act 1961). Given that virtually any criminal scheme involving prostitution, bribery, or extortion will inevitably require the minimal travel or use of the mails that the statute demands, the Travel Act explicitly allowed Federal intervention into a broad class of cases hitherto pursued only by State and local authorities. The Supreme Court was untroubled, though. It noted that the provision “reflect[ed] a clear and deliberate intent on the part of Congress to alter the federal-state balance in order to reinforce state law enforcement” (*Perrin v. United States*, 444 U.S. 37, 50 [1979]). But because the Act demanded the showing of an interstate nexus, it easily passed constitutional muster. Another weapon given to Federal prosecutors in this area was the Racketeer Influenced and Corrupt Organizations (“RICO”) Act of 1970, which, according to the Court, Congress passed “knowing that it would alter somewhat the role of the federal government in the war against organized crime and that the alteration would entail prosecutions involving acts of racketeering that are also crimes under state law” (*United States v. Turkette*, 452 U.S. 576, 587 [1981]). Under RICO, the requisite commerce nexus may come not only from a criminal act itself but from the motives and associations of the person committing the act. Thus, what would otherwise be a State court murder, over which there was no Federal jurisdiction, could now be prosecuted as a Federal RICO violation, with the murder charged as

part of a “pattern of racketeering,” committed by someone trying to advance or maintain his position in some legal or illegal enterprise “engaged in, or the activities of which affect interstate or foreign commerce.”

During this period, any limits the Supreme Court put on the expansion of Federal criminal jurisdiction tended to be more of form than of substance. Thus, when interpreting 1968 legislation making it illegal for a convicted felon to possess a firearm, the Court read a demand for “some interstate commerce nexus” into the statute, noting that “Congress has traditionally been reluctant to define as a federal crime conduct readily denounced as criminal by the States” (*United States v. Bass*, 404 U.S. 336, 349 [1971]). The Court soon made clear, however, that it would not take much for the prosecution to prove this nexus. All Congress had required, the Court decided in a subsequent case, was that a firearm “have [sic] been, at some time, in interstate commerce” (*Scarborough v. United States*, 431 U.S. 563, 575 [1977]). Because just about every gun has traveled in commerce at some point, the element has become a mere formality in most trials (Richman 1997, 939, 944 n. 14; Clymer 1997, 643, 663–667).

Although the criminal statutes on the books by the mid-1970s thus went far in the direction of eliminating the conceptual distinction between Federal and State crimes, the last quarter century has been marked not by a diminution of congressional interest in this area, but by, if anything, an increase (Task Force on the Federalization of Criminal Law 1998, 8). Spurred by the need to show themselves “tough” on crime, and secure in the knowledge that the executive branch, not the legislative, takes the political heat for inappropriate prosecutions, Congress has engaged in an orgy of criminal lawmaking, the primary purpose of which often seems merely symbolic. (Beckett 1997, 31–43; Windlesham 1992, 182; Richman 1999, 757, 771–772). Even crimes zealously pursued by local authorities have led to calls for Federal legislation. After a widely publicized Maryland case in which the victim of an auto theft was dragged to her death, for example, Congress passed a Federal carjacking statute in 1992 (18 U.S.C. § 2119; Richman 1999, 773). The brutal murder of an African-American by alleged racists led to the introduction of Federal hate crime legislation in 1998, even though State authorities had already charged the perpetrators with capital murder (Camia 1998; Hohler 1998; Jacobs and Potter 1998). And the murder of a gay college student sparked calls for the extension of hate crime legislation to crimes based on sexual orientation, gender, and disability (Brooke 1998; Associated Press 1999).

By one estimate, 1,000 bills dealing with criminal statutes were introduced in the 105th Congress by the end of July 1998 (Task Force on the Federalization of Criminal Law 1998, 11). This number, of course, includes legislation in, for

instance, the narcotics area, where, for better or worse, the need for Federal intervention has generally been presumed. But the recent focus on evils like hate crimes and domestic violence has moved Federal criminal law far into the last bastion of exclusive State jurisdiction—noneconomically motivated violent crime. There still is some criminal activity hard to reach under Federal law. Murders or sex crimes that are not part of some broader pattern of racketeering and do not involve any interstate travel or the use of the mails or any facility in interstate commerce may escape Federal prosecution. The absence of jurisdictional overlap in these cases, however, seems almost an anomaly, a vestige of long-abandoned understandings about spheres of authority.

In 1995, after decades of acquiescence in the erosion of the Federal-State divide, the Supreme Court appeared to balk. In *United States v. Lopez* (514 U.S. 549 [1995]), the Court, by a narrow majority, held that Congress had exceeded its Commerce Clause powers when it enacted the Gun-Free School Zones Act of 1990, which made it a Federal offense “for any individual knowingly to possess a firearm” in a school zone. For all the attention given to this apparent volte-face (Fried 1995, 13, 34–45; Moulton 1999, 849) and to Chief Justice Rehnquist’s assertion of the need to preserve the “distinction between what is truly national and what is truly local,” however, *Lopez* may well prove little more than a speed bump in the road toward the virtually complete federalization of criminal law.<sup>4</sup> After all, once the statute was revised to require a jury to find that a defendant’s gun had, at some point, moved in interstate commerce—an element that would nearly always be satisfied—its constitutionality appeared unassailable under well-settled precedents.

Responsibility for the effective elimination of the boundary between Federal and State substantive law does not, of course, rest only with the legislative and judicial branches. The statutes discussed here would not have become law absent presidential signature, and administration support generally has been far greater than that. Moreover, DOJ prosecutors have at times been spectacularly creative in devising legal theories to extend the range of congressional enactments. The legislators who enacted the Federal mail fraud statute, for example, probably did not imagine that the provision would be used to prosecute a limitless variety of breaches of fiduciary duty, including official corruption (charged as defrauding the public of the “intangible right” to good government) and insider securities trading (charged as the misappropriation of confidential information) (Coffee 1988, 121; Williams 1990, 137). Such prosecutorial initiatives have done much to inject Federal authority into traditionally local spheres (Ruff 1977, 1171).

Whatever the causes, this much is clear: As we begin the new century, the distinction between Federal and State law is effectively dead, *at least as a matter*

*of substantive law.* Federal criminal statutes may look a little different from State penal law. There will be mailing or wire elements, or demands that some interstate nexus be demonstrated. But if a Federal prosecutor would like to bring Federal charges against someone who has violated a State penal law, odds are that there will be a Federal statute that can be used. And if a Federal agency wants to investigate some apparently antisocial conduct, it will probably be able to cite a potential Federal violation as a basis for its inquiry.

## **Negotiated Boundaries**

Does the beginning of the new century herald the end of the boundary between Federal and State criminal enforcement that was so clear at the beginning of the past century? If one were to focus only on substantive Federal law, the overlap between the two systems would indeed seem virtually complete. An account based solely on substantive law would, however, be quite misleading, for although the statutory and constitutional constraints on Federal “intrusions” may be slight, the political and institutional limitations are very real, and quite powerful. Their nature makes it more difficult to define the boundary they create—indeed, boundaries can vary greatly across jurisdictions and over time—but they are boundaries just the same.

The principal constraint on the Federal enforcement bureaucracy is its size. To be sure, this bureaucracy has grown significantly over time, with enforcement agencies created or subdivided to address new legislative concerns. With the passage of the Mann Act, for example, came the appointment of the Commissioner for the Suppression of the White Slave Trade, with a large staff (Cummings and McFarland 1937, 381–382). To enforce Prohibition, Congress established the Bureau of Prohibition, initially staffed by 1,550 agents (Potter 1998, 13). An ever-increasing number of assignments spurred the growth of what soon became known as the Federal Bureau of Investigation (FBI), from a handful of agents in 1908 to a force of 10,389 by 1996 (Reaves 1998). Federal gun-control initiatives helped spark the creation, in 1972, of the Bureau of Alcohol, Tobacco and Firearms (ATF), carved out from the Internal Revenue Service. And Federal efforts to stem narcotics trafficking and use led to the creation, first, of a Treasury Department Bureau of Narcotics in 1930, and, ultimately, the DOJ’s Drug Enforcement Administration, which had nearly 3,000 agents by 1996.

For all this growth, however, the Federal enforcement apparatus is still quite small, both when compared with the network of State and local agencies and when compared with the number of crimes committed that potentially could be charged federally. This resource disparity ought not to be viewed as some

species of unfunded mandate. Rather, it reflects Congress' belief that, whatever the potential scope of enforcement activity authorized by its substantive law-making, primary responsibility for fighting crime still remains with the States. It also appears to reflect Congress' belief that the precise boundaries of Federal and State responsibility should be set, not through substantive Federal legislation, but through explicit or tacit negotiation among enforcement agencies.

This is not to say that Congress' role in this negotiation process is limited to setting it in motion by creating a gap between Federal jurisdiction and Federal resources. Bound to State officials by common constituencies, and often by political party (*Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 [1985]; Kramer 1994, 1485), Federal legislators can do much to promote coordination between Federal enforcers and their State and local counterparts. Sometimes legislators will intervene directly to prevent Federal enforcers from intruding into territory that State authorities have staked out. The Lindbergh abduction may have galvanized Congress into passing Federal kidnaping legislation, but when Federal agents from J. Edgar Hoover's Bureau of Investigation appeared to be unduly injecting themselves into the inquiry, both New Jersey senators complained to the Attorney General. Federal activity in the case virtually ceased soon thereafter (Potter 1998, 114–115). This pattern has continued. Even as they have assiduously expanded Federal enforcement authority in the past half-century, legislators have frequently used budget and oversight hearings to prod Federal agencies into cooperating with local authorities (Wilson 1978, 196–197; Kramer 1994, 1545; Hsu 1999).

Legislators can influence the negotiation of Federal-State boundaries not just through direct intervention but by exercising substantial control over who the Federal negotiators will be. Here is where the decentralized nature of authority in DOJ plays a critical role. The huge majority of Federal prosecutions are brought not by the Department's litigating units in Washington but by the 94 U.S. Attorney's Offices scattered around the country. These offices (to varying degrees) have considerable independence from Washington, an independence that Congress has done much to protect in recent years (Richman 1999, 806–810).

Although, as a formal matter, the U.S. Attorneys are appointed by the President and are subordinate to the Attorney General, one or more members of the congressional delegation representing each district generally play a substantial role in the selection process (Eisenstein 1978, 35–53; Bell and Meador 1993, 247). Appointees, usually drawn from the local power structure, will likely be quite responsive to local concerns and to the interests of local enforcement authorities (Richman 1999, 785). Although U.S. Attorneys do not have hierarchical

control over the Federal agencies that usually initiate criminal investigations, they do have gatekeeping power. Their control over access to Federal court—and to certain investigative measures like wiretaps and grand jury subpoena—gives them a powerful voice in the setting of Federal enforcement priorities.

For all these institutional arrangements, however, perhaps the main reason why Federal enforcers either stay out of the core State enforcement areas like violent crime or venture into them only with the acquiescence or approval of State authorities is that they generally will lack the informational resources to pursue offenses in these areas without State assistance. When going after organized criminal groups, like Mafia families or drug-trafficking networks, Federal enforcers can develop their own informants and work their way up (Wilson 1978, 61–88). Federal agents can similarly develop information sources in certain areas of special Federal concern, like the securities markets, diplomatic communities, or Federal contracting communities. These will also be areas in which citizens will be prone to bring their complaints to Federal authorities. When agents seek to investigate “more episodic criminal activity,” however, like murders, rapes, and street robberies, they generally must rely on help from local police departments, “the only entities whose tentacles reach every street corner” (Richman 1999, 786). Federal carjacking legislation may offend some traditional notions of the Federal-State boundary, but the FBI, which formed a special carjacking unit in 1992 (*New York Times* 1992), probably will not pursue a particular carjacker, or target carjacking generally, without help from the cops who know the local bad guys and the community. Even somewhat more organized targets like street gangs are generally too loose-knit to be taken down by the Bureau without extensive local cooperation (Mydens 1992).

What, then, does this “negotiated” boundary, which cannot be found in statute books, look like? In some respects, it still reflects the traditional notions of Federal jurisdiction that Congress often seems to ignore in its substantive law-making. Federal enforcers still take primary responsibility for Federal program fraud, egregious Federal regulatory violations, counterfeiting, international drug smuggling, national security offenses, and other such crimes. Informants and complainants know to go to Federal agencies first in these cases, and Federal agencies know that they may be held politically responsible for failing to pursue such matters vigorously. Beyond this sphere, in the areas traditionally policed by the States, the line between what goes federally and what is left “stateside” will generally be a function of several factors.

While Federal enforcers in the field will not necessarily notice the creation of a new criminal offense, they will respond to an administration’s national enforcement initiatives. In recent years, many of these initiatives have reflected the

public's (and Congress') concern with violent crime. Thus, in April 1991, with much fanfare, Attorney General Thornburgh announced "Project Triggerlock," a plan to use Federal firearms statutes—particularly the one making it a crime for a convicted felon to have a gun—to target violent offenders around the country. To this end, Federal prosecutors were advised to screen all local police force arrests of felons who had been armed when apprehended (Richman 1997, 985–996). The Clinton administration has continued to stake out this territory with its Anti-Violent Crime Initiative, announced in 1994, whose goal—inevitable in the present climate, but revolutionary when viewed in a broader historical context—was flat out to "reduc[e] violent crime in America" (U.S. DOJ, Office of the Attorney General 1999, I–1). The administration's organizational goals have been equally ambitious. Under this initiative, a former official recently explained:

[E]ach U.S. attorney, in coordination with every law enforcement agency at every level, is responsible for identifying the crime problems in the district and developing a strategy for bringing all tools and resources to bear on those problems. (Fois 1999, 28)

Although the priorities of Federal enforcement agencies will, of course, be affected by the agenda set by an administration's political leadership, agencies can have their own agendas as well. Sorting out the two is difficult when looking at recent Federal moves into traditional local territory because of the considerable congruence between administration and agency goals. When, in 1992, the FBI redeployed 300 of its agents from foreign counterintelligence activities to units focusing on violent crimes, particularly by street gangs, was it acceding to Attorney General William P. Barr's priorities or was it trying to show its continued vitality in the wake of the Cold War's end (Johnston 1992a, 1992b)? Probably both. And it is similarly hard to determine the degree to which ATF's recent focus on violent street criminals and the extraordinary extent of that agency's cooperation with local authorities should be seen as efforts to gain political protection from gun lobby attacks (Vizzard 1997, 89).

The decentralization of Federal prosecutorial authority means that programs will be developed at the local level as well. When Rudolph Giuliani was U.S. Attorney in Manhattan, he spearheaded a "Federal Day" initiative: One day a week, in a designated area, New York City police officers would bring their drug arrests to Federal prosecutors (Labaton 1989), thus, as an appellate court complained, converting "garden-variety state law drug offenses into federal offenses" (*United States v. Aguilar*, 779 F.2d 123, 125 [2d Cir. 1985]). More recently, the focus has been on violent crime. In the "Boston Gun Project," Federal prosecutors have worked with Federal and local authorities to get some of the worst offenders off the streets (Kennedy 1997, 449–484). In New York

City, Federal prosecutors have worked with the police to target violent gangs for Federal racketeering prosecutions (Glazer 1999, 573, 601–602; Jones et al. 1999, 657). And in Richmond, Virginia, “Operation Exile” has been using Federal gun laws to reduce street violence. A committee of representatives from the U.S. Attorney’s Office, the Commonwealth attorney’s office, the Richmond Police, and ATF now meet regularly to decide whether particular cases should be taken federally or not (Johnson 1999).

Pressure for Federal involvement in particular cases or classes of cases traditionally handled locally will also come from the local authorities themselves. State enforcers are well aware that their Federal counterparts can often devote more resources to a case—buy money, electronic surveillance, witness protection programs, and prosecutorial support for investigations—and that Federal prosecutions generally result in higher sentences, particularly in violent crime cases (Clymer 1997, 668–675; Jeffries and Gleeson 1995, 1095; Richman 1999, 783). Without the political obligations of State authorities to maintain order within a territorial jurisdiction and to prosecute every provable serious offense, Federal agencies are largely free to invest strategically in the cases they do take. And local officials will often be able to tap this strategic reserve (U.S. General Accounting Office 1996, 2–3, 6).<sup>5</sup> Explaining how his agency decided whether to take a case federally or stateside, the head of the Richmond police detective division noted: “[I]t’s like buying a car: we’re going to the place we feel we can get the best deal. We shop around” (Bonner 1998, 905, 930).

It may seem somewhat anomalous to describe the product of all these forces as a “boundary.” Yet in every jurisdiction, enforcers of all stripes have a pretty good idea of what kind of cases should go federally, and what should go stateside—a division of labor that can vary over time. Bank robberies, for example, were once the quintessential Federal case, high priorities for the FBI’s war on crime in the mid-1930s (Potter 1998, 139). By the early 1980s, however, State and local police were handling a large proportion of bank robberies without any FBI involvement, and many more with FBI collaboration (Geller and Morris 1992, 231, 240).

The story of the relationships between Federal agencies and State and local authorities has of course not been one of consistent harmony and collaboration. And there has been significant variation across Federal agencies in their readiness to coordinate with their State and local counterparts. The politically

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beleaguered ATF, for example, was far quicker to court support from local enforcers with assistance and shared credit than the self-confident FBI, which, in the 1950s and 1960s, took the position that it could not work closely with local departments that it might have to investigate (Vizzard 1997, 89; Geller and Morris 1992, 247 n. 8, 262). More recently, however, even the FBI has worked hard to establish “a more trusting and respectful relationship” with non-Federal agencies (Geller and Morris 1992, 263).

One does not want to be Panglossian here. There is friction from time to time. These are the turf wars that make for such great news stories. Given the degree of statutory overlap between the State and Federal systems, and the absence of any formal division of authority, however, what is remarkable is not the occurrence of such disputes but their relative infrequency. Indeed, the bitterness usually reflects one or both sides’ belief that some *modus vivendi* has been violated. Outsiders may not always know what this arrangement is, as it appears in no statutory code or manual, but it exists just the same. And enforcers are generally comfortable with it (Geller and Morris 1992, 312–313; Moohr 1997, 1127, 1130; Brickey 1995, 1165–1166 n. 70).<sup>6</sup>

One observer recently declared that, “piece by piece,” the Clinton administration and Congress are building “a robust national police system,” with the FBI “at the center.” “For many years,” he wrote:

[F]ederal law enforcement police power was spread among several competing agencies. Now, important assets of the nation’s local, state and federal law enforcement agencies are being combined with those of the intelligence community and parts of the military—creating an integrated system whose powers of investigation, intelligence collection, and electronic surveillance will be unprecedented. In the future, few crime-fighting tasks will be too small for some FBI involvement and none will be too large. (McGee 1997)

Although this description is a bit overstated, it highlights the degree of coordination that we have come to expect from enforcement agencies at all levels as we enter the new century.

## **The Costs of Negotiated Boundaries**

What, then, could be wrong with this arrangement? Why is it that the Chief Justice of the United States (Rehnquist 1998, 57–58; 1992, 1, 3), the Judicial Conference of the United States (1995, 21–28), a prominent American Bar Association committee (Task Force on the Federalization of Criminal Law

1998), numerous scholars (Ashdown 1996, 789; Beale 1996; Brickey 1995; Clymer 1997), and even some legislators (Leahy 1999, 202) have decried the “overfederalization” of criminal law? Is it out of an attachment to 19th-century notions of federalism or to a doctrinal belief that Commerce Clause power has some limits? Have they failed to appreciate that boundaries, however diverse and negotiated, still divide State from Federal spheres? These theories have some explanatory power.<sup>7</sup> Yet even someone with no *a priori* vision of what is “really” a Federal crime could be fairly dissatisfied with the current scheme for a number of reasons.

That a State’s enforcers are largely satisfied with the allocation of Federal and State authority in the criminal area does not necessarily mean that the interests of that State’s citizens have been advanced. Sometimes, it is hard to tell. When, for example, a local police force, instead of using State forfeiture procedures that benefit the State’s general treasury, turns seized assets over to Federal authorities because Federal “equitable sharing” provisions reward the police force directly, should we rejoice in this interagency cooperation or condemn the force’s self-interested circumvention of State law (Rasmussen and Benson 1994, 132–139; Blumenson and Nilsen 1998, 106–108)? And what are we to make of cases that State enforcers refer for Federal prosecution because Federal rules of evidence allow the admission of evidence that some State rule would exclude? Why should State officials be free to nullify State legislators’ decision to establish supraconstitutional barriers to conviction (Jones et al. 1999, 673)?

If, given the choice, a State’s citizenry would adopt the substance of a particular Federal rule, the ability of State enforcement authorities to freely circumvent the State rule will not offend the electorate, but will inappropriately permit State legislators to avoid facing the political costs of their enactments (or inertia). If, on the other hand, those enactments actually reflect the citizenry’s preferences, then State enforcement officials ought not have the freedom to nullify them. Either way, a system of low-visibility negotiated boundaries diminishes the accountability of the system’s actors. Similarly, although responsibility for street crime and most other traditionally local offenses has not wholly shifted to the relatively small Federal enforcement bureaucracy and never will, the possibility of Federal intervention will often allow State enforcers to evade accountability for failing to prosecute a particular case or class of cases (Friedman 1997, 317, 394–397; Richman 1999, 783–784).<sup>8</sup> The pressure on State governments to develop capabilities for ferreting out and prosecuting instances of local corruption, for example, has probably been substantially diminished by the readiness of Federal enforcers to pursue these cases.

These questions become even harder once one recognizes that a State's enforcement community is not monolithic either. The local police department that brings a high-profile murder or kidnaping case to the U.S. Attorney's Office to take advantage of more lenient evidentiary rules may have much to gain and little to lose. Federal prosecutors, welcoming such cases, will take pains to ensure that the police, and perhaps the mayor, receive full credit for their investigative success. But the local district attorney's office, which otherwise would have gotten the case, may feel quite aggrieved. Even if a local prosecutor is brought in to take part in the proceedings as a "Special Assistant U.S. Attorney," the Federal venue will generally ensure that the Federal prosecutors receive top billing. As a rule, then, local police agencies are probably going to be keener on Federal intervention than local prosecutors. And their readiness to "go Federal" will give the police new leverage in their dealings with the local prosecutor, changing the terms of what traditionally was a bilateral monopoly. The possibility of Federal intervention may therefore tend to reduce the degree to which local prosecutors—who generally are elected officials—can constrain appointed police officials. Those officials will still be politically accountable, generally through the mayor who appointed them. But a degree of accountability will have been lost, particularly if the mayor's mandate does not significantly rest on his on his criminal justice policies.

Another problem with a system in which effective boundaries are negotiated by enforcers, instead of set by statute, is that enforcers are less apt to internalize the costs that their arrangements impose on the Federal court system. Noting the comparatively small size of the Federal judiciary, critics of creeping criminal federalization have argued that "the increasing criminal caseload threatens to impair the quality of justice meted out in criminal cases and significantly impairs Federal judges' ability to perform their core constitutional functions in civil cases" (Beale 1995, 979, 983; Brickey 1995, 1168–1169). At first blush, these critics can be faulted for assuming that fewer Federal cases would be brought if Federal statutory jurisdiction were curtailed. Conceivably, Federal enforcers would respond by filling the same amount of court time by bringing more interstate auto theft or federally insured bank embezzlement cases, or by bringing more sophisticated white-collar cases (Little 1995, 1029, 1046).<sup>9</sup> The critics may well be right to assume, however, that in the absence of legislatively popular forays into the violent crime area, Federal agencies would be funded at lower levels.

The freedom of enforcers to decide, as part of a broader program or on an ad hoc basis, when a case that would ordinarily get prosecuted in State court should go Federal has also led to significant horizontal inequities among defendants. Some might find it hard to say that a defendant who is charged in

Federal court with a Federal crime, convicted, and sentenced accordingly has a fair grievance merely because a similar offender prosecuted in State court received a lighter sentence. After all, there is probably a third offender who, because of resource constraints, has not been prosecuted by anyone. His existence hardly challenges the fairness of either proceeding. We never get to meet this third offender, however. And the stark contrast between the sentences of the first two defendants, particularly when enforcers made the forum selection decision with little or no administrative direction or judicial oversight, raises troubling questions about the fairness of the system (Clymer 1997; Beale 1995, 996). Fairness questions have also arisen when overlapping jurisdiction (coupled with “dual sovereignty” double jeopardy doctrine) has allowed Federal enforcers to bring charges against a defendant previously acquitted in a State case based on the same conduct (Richman 1996, 1181, 1190).

## **Toward New Boundaries?**

The recent history of Federal activity in areas of traditional State criminal enforcement has not been one only of expanding criminal jurisdiction. Congress has also used its spending powers to make inroads into State lawmaking processes, albeit indirectly, by conditioning funding grants on State adoption of particular penal policies.

The idea of Federal grants to State and local law enforcement authorities is, of course, not particularly new. In the early 1970s, Congress provided funds through the Law Enforcement Assistance Administration, and such funding continued even after that agency went out of business in 1982 (Omnibus Crime Control and Safe Streets Act of 1968; Marion 1994, 166–167). And such programs have multiplied. The Violent Crime Control and Law Enforcement Act of 1994 (Crime Act) (Beale 1995, 1009), for example, passed with the strong support of the Clinton administration, earmarked monies to put more local police on the streets and to fund community-based justice programs.

Increasingly, however, such aid has come with strings attached. In order to advance a policy of “truth in sentencing,” the 1994 Crime Act offered grants to States to construct, expand, or operate prisons that house violent offenders on the condition that a State require “that persons convicted of violent crimes serve not less than 85 percent of the sentence imposed,” or on other evidence of the severity of State sentences imposed on violent offenders (Truth in Sentencing Incentive Grants 1994). Megan’s Law, passed in 1996, conditions Federal grants on a State’s establishment of systems for notifying a community that a convicted sex offender plans to locate there on release from prison. And juvenile justice legislation proposed in 1997—yet to be enacted—would offer

*Given the contingency of Federal interests, the primary goal ought to be a deliberative process in which politically accountable actors establish the boundaries of Federal-State interaction.*

Federal grants as a means of spurring States to adopt laws or policies that would ensure, among other things, that juveniles over 15 (14 in the Senate version) who commit serious violent crimes could be prosecuted as adults (U.S. House 1997; U.S. Senate 1997).

At first glance, explicit legislative efforts to alter the balance between State and Federal authority in the criminal area seem more troubling than the negotiation of boundaries that has occurred among enforcement officials in the shared space created by expanded Federal criminal jurisdiction. The problem is not one of constitutional doctrine. Although the Supreme Court, citing the 10th amendment, has condemned

Federal efforts to “commandeer” State officials (*Printz v. United States*, 117 S. Ct. 2365, 2384 [1997]), it has interpreted the Spending Clause to allow Congress considerable freedom to impose legislative changes on the States, so long as those changes are framed as qualifications for needed grants (*New York v. United States*, 505 U.S. 144, 186–88 [1992]; *South Dakota v. Dole*, 483 U.S. 203 [1987]). Congress is thus on far safer constitutional ground when it acts under the Spending Clause than when it exercises its Commerce Clause powers. But the extent of the Federal imposition still seems severe. Under political and financial pressure to accept Federal funds, States do not merely have to sit down with Federal authorities. They actually have to change their laws (if they have not already passed such provisions), trading away one of the most fundamental aspects of sovereignty—the power to structure one’s own penal system—for the proverbial “mess of porridge.”

To be sure, the money offered is probably not large enough to buy off States outright. The funds dangled by the 1994 Crime Act, for instance, probably do not offset the costs in correctional spending that the Act’s sentencing reforms will likely occasion (Reitz 1996, 118). But the fact remains that these Federal statutes have been explicitly framed to put intense political pressure on States in an area where their legislative sovereignty has hitherto been treated as virtually sacred. And a recent survey of State officials by the U.S. General Accounting Office shows the effects of such pressure. In fiscal 1997, 27 States received Federal truth-in-sentencing grants, having passed sentencing legislation satisfying the requirements of the 1994 Crime Act. In 11 of these States, according to officials, the availability of Federal grants had played a role, “although not necessarily a major or decisive one,” in the passage of the requisite legislation. In four States, the Federal monies were said to have played a

“key” role (U.S. General Accounting Office 1998). Surely, one can argue, these incentive grants mark a new high water mark for Federal interference.

One can turn this point on its head, however. How does one define a “Federal interest” after all? To be sure, the Federal Government has traditionally left violent crime to State processes. Yet there is a considerable degree of historical contingency to this story, and it is not at all clear (to me, at least) that violent crime is any less worthy of Federal attention than, say, credit card fraud, bank robberies, even counterfeiting. “[O]ne person’s concept of a ‘strong federal interest’ might well be another person’s idea of a ‘trivial local crime’” (Little 1995, 1074).

Given the contingency of Federal interests, the primary goal ought to be a deliberative process in which politically accountable actors establish the boundaries of Federal-State interaction. Whatever one’s views of the merits of the 1994 truth-in-sentencing legislation, consideration of that provision did require representatives to confront this boundary issue, and the legislation’s passage clearly memorialized Congress’ choice.<sup>10</sup> In contrast, the steady expansion of Federal criminal jurisdiction has frequently occurred without substantial consideration of this issue, with legislators sweeping issues of boundary drawing under the rug by vaguely alluding to the need for broad prosecutorial discretion.

Sometimes Federal enforcers have bridled at these expansions of their powers. The current FBI Director, Louis Freeh, for example, successfully opposed an amendment to the 1994 Crime Act that would have made virtually every State crime committed with a gun into a Federal offense (Brickey 1995, 1169 n. 183). Generally, though, the executive branch has been quite willing to accept these broad grants of authority. As two Clinton administration officials explained:

[L]aw enforcement agencies are generally better situated than Congress to apprise the investigative demands of particular cases and, more generally, the circumstances in which federal prosecution is appropriate. . . . The Constitution authorizes Congress to act, and we have suggested that it should act, even though it intends the jurisdiction authorized to be exercised in only a small percentage of cases. The exercise of prosecutorial discretion, then, becomes the most important and effective brake on the federalization of crime. (Gorelick and Litman 1995, 967, 972–973)

Under this framework, the officials noted, “[I]t falls to the Department, in cooperation with state and local counterparts, to target for prosecution only those few cases in which federal prosecution is the most effective way to bring criminal justice resources to bear on our nation’s law enforcement problems” (Gorelick and Litman 1995, 978).

*To the extent that the public fails to appreciate the limits of Federal resources, legislators may also find themselves under increasing pressure from Federal enforcement agencies. The more that legislators seek political gain through substantive criminal lawmaking, the greater the risk that their constituents will expect prosecutions to be brought under the new statutes.*

Realistically, it is inevitable that Federal enforcers will exercise enormous discretion. Legislative specificity has high opportunity costs in the criminal area, and, as affirmative matter, there is broad support for delegating enforcers the flexibility to respond to regional diversity and the myriad forms of criminal conduct (Lynch 1998, 2117, 2138; Richman 1999, 810). But some sort of balance between delegation and accountability needs to be struck, and, in recent years, all too little thought has been given to accountability. When Federal-State boundary issues are negotiated by enforcers from the involved jurisdictions, the resulting arrangements are not only of far lower visibility than legislative enactments, but they are also prone to self-dealing by the enforcers. State agencies are well positioned to check Federal initiatives that they deem inappropriately intrusive. But if State enforcers' approval or acquiescence stems from a desire to circumvent State limits on their authority, or to avoid responsibilities imposed on them by State law, the negotiation process becomes a kind of political shell game.

Federal negotiators can have their own self-serving motives as well. Some are personal. Prosecutors with local political ambitions may seek to enhance their

name recognition by going after the grisly murders that seem to dominate tabloid coverage of the criminal justice system. Those seeking mere financial gain may look for the best vehicles for displaying their talents to potential future clients in the private sector. And prosecutors may simply feel the visceral allure of violent cases to break the monotony of a white-collar diet.

Federal enforcers can also be spurred by a desire to advance their own agency's interests (and thereby indirectly advance their own). An agency's targeting decisions may be influenced by the expressed preferences of key figures in the appropriation process, or a belief that tabloid headlines can translate into appropriation dollars. A politically weak agency may avoid pursuing cases against classes of defendants with the wherewithal to make their cries of "foul" heard in the political process.<sup>11</sup>

It may well be that the particular equilibrium between Federal and State criminal authority that now exists is exactly the right one from the perspective of

citizens as well as enforcers. The challenge for Congress in the 21st century, however, is to make more of an effort to determine whether this is so and to move the process of boundary setting back into the substantive lawmaking sphere. There, citizens might hear more about the deficiencies and needs of their local police forces, prosecutors, and legislators. If no such problems are identified, congressional silence in this regard might expose the emptiness of the Federal gesture.

Why would Congress ever take up the reins and have these debates? Why would legislators ever want to take on more responsibility for articulating the appropriate Federal role in law enforcement? If the analysis is based solely on self-interest, they do not seem to have any pressing reason to do so, as yet. But perhaps there may be some grounds for cautious optimism. At the very least, efforts to educate the public on the limits of Federal enforcement resources and the responsibilities of State and local enforcers will help reduce the actual or perceived political gains that legislators obtain by proposing and passing new criminal statutes. Much ink has been spilled to this end, but the project is worthwhile.

Evidence that recent critiques have had some effect on Congress can be found in recent appropriations legislation that, while proposing new Federal hate crime provisions, recognizes the need for more transparency, and perhaps even more accountability, in Federal enforcement decisions. The 1999 legislation (U.S. House 1999; U.S. Senate 1999) (later vetoed by the President) mandates that any prosecution under these provisions proceed only upon certification by a high-ranking DOJ official that he or his designee:

has consulted with State or local law enforcement officials regarding the prosecution and determined that—

- (i) the State does not have jurisdiction or refuses to assume jurisdiction;
- (ii) the State has requested that the Federal Government assume jurisdiction; or
- (iii) actions by State and local law enforcement officials have or are likely to leave demonstratively unindicted the Federal interest in eradicating bias-motivated violence.

To be sure, measures like this still provide ample room for enforcer manipulation, and leave open the question of who should speak for the “State” in such matters. But they are a move in the right direction.

To the extent that the public fails to appreciate the limits of Federal resources, legislators may also find themselves under increasing pressure from Federal enforcement agencies. The more that legislators seek political gain through substantive criminal lawmaking, the greater the risk that their constituents will expect prosecutions to be brought under the new statutes. So far, these expectations appear quite limited. When a carjacking occurs, or the use of a gun by a prior felon, or a domestic violence crime with some interstate nexus, there generally will not be an immediate outcry for Federal involvement. Assumptions that State and local enforcers bear primary responsibility for street crimes are quite robust and do not seem likely to change over time. Public perceptions of what is appropriately “Federal” can evolve, however. One has only to look at the frequency, since the Rodney King beating trial, with which abuse-of-force allegations against local police officers have been accompanied by calls for Federal intervention. Federal enforcement agencies, as a general matter, are more insulated from political pressure than their State and local counterparts. But they are not immune. And the more Federal criminal statutes are perceived as imposing responsibility, instead of merely conferring authority, the harder Federal enforcers will strive to ensure that such responsibilities are more narrowly tailored to their capabilities and preferences. Under this admittedly sanguine analysis, the recent legislative trend might, over time, be self-correcting.

## Notes

1. These statutes are the predecessors of current criminal civil rights provisions. See 18 U.S.C. §§ 241–242.
2. The constitutionality of this Act was upheld in *Ex parte Jackson* (96 U.S. 727 [1877]).
3. The Anti-Racketeering Act of 1934 was created to “protect trade and commerce against interference by violence, threats, coercion, or intimidation.”
4. The Supreme Court will shed light on this matter in *United States v. Morrison*, 120 S. Ct. 11 (1999), granting *certiorari* in *Brzonkala v. Virginia Polytechnic Institute and State University*, 169 F. 3d 820 (4th Cir. 1999) (constitutionality of Violence Against Women Act’s civil provision), and *Jones v. United States*, 120 S. Ct. 494 (1999), granting *certiorari* in *United States v. Jones*, 178 F. 3d 479 (7th Cir. 1999) (application of Federal arson statute to arson of private residence).
5. Local law enforcement officers report that the chief benefits of Federal involvement are overtime pay, staff resources, office space, wiretaps, equipment, money for informants and drug/gun purchases, and Federal prosecution of cases.

6. Geller and Morris discuss finding those in the system content with current Federal-State division of policing authority, while Moohr finds that when speaking in a collective voice, State officials will periodically express concern about the extent of Federal intrusion.

7. “The federalization phenomenon is inconsistent with the traditional notion that prevention of crime and law enforcement in this country are basically state functions” (Task Force on the Federalization of Criminal Law 1998, 2).

8. Accountability is diminished when citizens cannot easily determine which level of government is responsible for a particular regulatory decision (*New York v. United States*, 505 U.S. 144, 169 [1992]).

9. Little suggests that recent judicial workload complaints may really reflect a “substantive bias against drug and gun cases,” and not docket size per se.

10. “While this [spending] approach does not identify the line between the issues that should be left to the state and those that should be subject to a uniform national policy, it disentangles these issues from the separate question of the appropriate jurisdiction of the federal courts” (Beale 1995, 1010).

11. William H. Webster (1999) notes the Criminal Investigation Division’s recent focus on narcotics and organized crime cases, at the expense of tax enforcement.

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