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by
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The authors state: "One way or another, federal statutes reach most major malefactions and many minor ones, and there is no realistic prospect of reversing that trend."[1] To the extent that this is a positive statement, I agree with it. However, to the extent that this is a normative statement, I believe this state of affairs to be both unfortunate and to have rather far-reaching implications not addressed by the authors.

The authors take for granted the nation's large and generously funded federal law enforcement apparatus—the United States Attorneys, Federal Bureau of Investigation, Customs Service, and so forth. The authors assume that a system of federal courts, separate from state tribunals, will always exist and be available for the adjudication of certain criminal cases, most of which could also be brought in state courts. Yet neither the federal law enforcement apparatus nor the lower federal courts (*i.e.*, everything under the United States Supreme Court) is a necessary feature of government under our Constitution. The United States Constitution established neither (although Article I expressly grants Congress the power to create "tribunals inferior to the Supreme Court") nor does federalism require either one.

There is no reason why such laws as Congress sees fit to enact could not be enforced through the state courts. This includes conduct that Congress declares to be criminal. Such conduct could be investigated by state and local police or law enforcement agencies and prosecuted by state prosecutors in state courts. Federal criminal law could be just another of those unfunded mandates that Congress imposes on the states and about which we have heard so much lately. Alternatively, Congress could provide that some federal criminal statutes are enforceable solely in state courts reserving federal criminal jurisdiction for others. This could be, but generally it is not. Unfortunately, the authors do not supply us the "why not."

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1. John C. Jeffries, Jr., & Hon. John Gleeson, *The Federalization of Organized Crime: Advantages of Federal Prosecution*, *in* this Symposium Issue.

The authors completely fail to discuss why these federal institutions exist and, more importantly, why they should exist. Instead, the authors focus on the result of creating a dual enforcement and adjudicatory mechanism: some cases will be easier to prosecute in one forum or the other; some cases will not.

The authors eschew any attempt at justifying a separate federal criminal jurisdiction generally or for the specific assignment they would give to federal law enforcement and judiciary: a battle against something they call organized crime. Nowhere in their Article do the authors offer any theory or even a hint of one by which a federal crime could be distinguished from a nonfederal crime. Indeed, it appears that the obliteration of any such distinction is central to their thesis that federal prosecutors ought to stand by as kind of an auxiliary law enforcement squad to step in whenever particularly complex cases arise, which are most likely in the authors' view to be ones involving organized crime.

For the authors, the most important constraint on federal prosecutors is not some principle of jurisprudence, but the resources available to them. In view of the inescapable fact that resources for this governmental endeavor, as all others, are not inexhaustible (thankfully, in my view), the allocation of prosecutorial resources becomes for the authors an issue of costs and benefits: prosecutors should have jurisdiction where their resources produce the greatest yields, presumably measured by convictions.

Because federal prosecutors do a better job in prosecuting organized criminals, say the authors, this should be the assignment of these prosecutors. Three reasons are given. First, federal evidentiary rules permit conviction on the basis of uncorroborated accomplice testimony. This rule, the authors contend, converts criminal cases in federal court into a credibility contest between the federal prosecutor and the defendants, who are of course generally unsavory characters and thus virtually certain to lose such a contest.

Second, federal prosecutors possess greater ability to control and direct grand juries than state prosecutors. Although the authors do not clearly spell out why federal prosecutors are better at this than their state counterparts, the more expansive territorial reach of federal law seems reason enough not to quibble with this assertion.

Third, the Sentencing Guidelines do a better job of empowering federal prosecutors to set the agenda in plea bargaining and obtain a greater degree of cooperation from criminal associates than do state sentencing laws.

If these three features of federal criminal practice are advantages of a federal forum, and indeed from a prosecutors' perspective they would appear to be, they would seem to apply to any kind of crime—

organized or disorganized. Therefore, it is difficult to understand why the type of jurisdiction, rather than the gravity of the crime, should decide their use. But the authors do not analyze which types of crime impose the greatest societal costs nor do the authors consider the respective benefits to society of eradication of these crimes or, more properly, the efficacy of enforcement and prosecutorial effort directed to each. At best, the authors' allocative argument is incomplete. However, in my view, it is worse. Furthermore, the argument hinges on a predicate that I find doubtful.

The phrase "organized crime" may sound more ominous than "crime" used by itself, but this may owe as much to Hollywood and the popular press as reality. The authors, who would enlist the federal courts in a crusade against something they label as organized crime, do so without even telling us what they mean by the phrase.

Plainly, the difference between organized crime and other crime is not simply a matter of planning and hierarchy. Conspiracies are organized, but are plainly not what the authors appear to mean by organized crime. At one point in their Article, the authors refer to "enterprise crime." Maybe this is not synonymous with what the authors mean by organized crime, maybe it was just a fallback to the definition of racketeering under the RICO statute, but it nonetheless well describes a distinction that I believe can be drawn between types of crimes and seems to fit the authors' thesis.

The distinction arises out of the fact that some criminal laws create an incentive for their own disobedience; others do not. The former typically are enacted for the purpose of uplifting the social or economic condition of society or certain of its members. The latter possess no such ambitions. Laws against robbery which are a crime of the second type do not create the economic incentive to steal. That incentive preexists the creation of the crime and stems from the possession of a valued article by someone other than the potential robber. On the other hand, at least as much of the incentive to traffic in narcotics is a product of the laws against that activity as it is of the desire of users for the prohibited substances. The incentive added by declaring trafficking in narcotics to be criminal comes from driving out of the market those sellers too squeamish (or wise) to break the law, thus increasing the price and profits available to those who lack such reservations.

Enterprise or organized criminals are those entrepreneurs willing to respond to those law-created incentives by stepping forward when the laws' ambitions afford opportunity and by furnishing what people want but the law says they should not have: narcotics, sex for hire, goods or technology that our legislators or bureaucrats have determined we should not have without imposition of substantial duties or

not at all, children that authorities determine should not be adopted, games of chance that the community does not countenance, or protection by means beyond the bounds of the law. Such criminal activity differs from other criminal activity in that it is motivated at least in part, sometimes substantially, by criminalization of the conduct itself rather than by preexisting circumstances.

The most profitable of these activities currently, of course, is the narcotics trade. It is true that so-called organized crime figures do commit law violations of the second type; the authors prominently mention gangland murder, an evocative activity to say the least, but one that is plainly a sideline or tertiary function of the main activities of the organizations the authors mention and seldom a profitable activity.

Organized or enterprise criminals for the most part devote themselves to conducting an arbitrage between the desire of the community to improve itself through law making and the unwillingness or inability of individuals to conform their conduct to the community's lofty aspirations. This takes planning, skill, and capital beyond the capabilities and reach of most people inclined to break the law.

The Founders were quite familiar with the phenomenon. Smuggling is one of the four crimes expressly mentioned in the Constitution and is itself an example of a crime created to uplift the community by, among other goals, protecting against infectious diseases, generating customs revenues, or sheltering the incomes of domestic producers.

Incentives to commit the second type of crime do not increase with the severity of the punishment provided for such crime or the resources devoted to its detection and prosecution. The opposite is true with the first type. Indeed, the greater the disparity between the community's aspirations professed through the severity of punishment for such crime and the resources devoted to its detection and prosecution, on the one hand, and the willingness of individuals to abide by these laws, on the other, the greater will be the intensity of the effort required to fight crime of that type. A nation with an ambitious agenda of social and economic improvement through law and regulation must inevitably accompany that program with one of vigorous criminal law enforcement; they are inseparable partners.

Now I do not want to go down in history as the first (and only?) federal judge to say something nice about organized crime. I am no fan of it. But organized or enterprise crime is not without a beneficial feature. When the community's desire for uplift through law and the realities of mankind diverge beyond a certain degree, organized crime cannot be stopped no matter how extensive the law enforcement effort. This was true with Prohibition, the so-called Noble Experiment. The rum runners and bootleggers of the early part of this century ex-

posed the utter unworkability of laws designed to wean Americans from a substance that, for a great many, was terribly destructive.

Although we tend now to snicker at the quaintness of the political and social ambitions that gave rise to Prohibition and the temperance movement, they were motivated by the highest hopes and best of intentions and addressed a serious problem of widespread alcoholism in the United States. In due course, it became clear that these good intentions could not rescue the effort from the utter unworkability of achieving these goals through the criminal laws. This reality became undeniable and so obvious that the nation shifted to a more realistic (if still highly imperfect) approach to regulating liquor distribution.

In my opinion, the same situation applies today to narcotics. Today's drug traffickers are proving the same point with respect to what federal law labels "controlled substances." This does not mean that the narcotics laws are the product of anything other than the best of intentions and deep concern for those who ruin their own and other lives with drugs. It also does not mean that dope peddlers are an admirable or public spirited group; for the most part, they are pretty despicable. Still further, this does not mean that it is wise to make narcotics as freely available as other plainly harmful substances, such as cigarettes and liquor, for example. But the fact that our present laws of narcotics prohibition provide livelihood to such repugnant elements of our society is a principal reason for a new approach. If the authors really wanted to cut organized crime off at the pockets, they could do so far more effectively by advocating repeal of narcotics prohibition than by their proposal to devote federal criminal jurisdiction to prosecuting organized crime whose largest source of revenue is narcotics trafficking.

Because so much of the profit in crimes whose incentives are produced by the crime itself is within our control, society, in my view, has less to fear from organized crime than it does from what one might call its opposite: disorganized crime. By this term, I mean unpredictable and random violence against persons and property, both petty and grave, that is produced not by controllable incentives but responds to individual and social pathologies wholly beyond our understanding. Such crime rips the social fabric more severely than the more or less predictable and confined activities of so-called organized or enterprise criminals. Disorganized or nonenterprise crime extracts a terrible toll from society. This is the crime that, for example, prompts people who have no interest in firearms for sport or recreation to maintain personal arsenals or to worry because they do not do so, keeps people at home at night away from the activities that make community life enjoyable, makes people fearful of helping a stranger in need of assistance, and even causes people to live in fear in their own homes behind locks, alarms, and with guard dogs.

Because in its petty manifestations it is so frequent, nonenterprise or disorganized crime may somehow seem less awesome than organized or enterprise crime and hence less suited for the unquestionably more majestic confines of federal courts. This perception, implicit in our authors' thesis, is widely shared and has determined that the battle against disorganized crime is largely being fought by state and local law enforcement authorities and prosecutors in state, not federal, courts. The contribution of federal law enforcement agencies and courts to the effort to fight this type of crime has thus been minuscule. This may be unfortunate, because it is in this battle that the resources now devoted to federal law enforcement and adjudication could pay big dividends, the resources of state law enforcement authorities and courts being stretched so thin.

If it is true, as our authors tell us, that no type of crime is off limits to federal authorities and courts, why should not federal efforts be devoted to the area of greatest need? Alternatively, if it can be shown that the resources that Congress devotes to federal law enforcement agencies and courts might well be more effectively spent at the state and local level, can there be any principled objection to such diversion? The greatest enforcement needs, after all, would seem to arise from the crimes that most commonly affect most people. These are not those committed by organized criminals. Given their premise, can the authors suggest any reason that the more muscular law enforcement authorities and well-endowed judiciary of the federal government should not be assigned the task of fighting that kind of crime?

My point in this commentary is not to debate the merits of defining any particular conduct as criminal or not (although some of my views on this are quite obvious), but simply to make two points. First, if the authors' objective is to battle organized or enterprise crime, measures to alter the incentives for such crime need to be considered along with enforcement measures and, in my opinion, are likely often to be far more effective. Second, if the authors' objective is to justify the existence of an elite cadre of federal law enforcers and judges able to step in when the battle against crime at the state level gets tough, the authors have failed to establish that federal institutions are better.

Without a principle based on constitutional text or understanding to distinguish the respective responsibilities of state and federal institutions, there is no basis for allocating these responsibilities but administrative convenience and efficacy. On these criteria, federal law enforcers, prosecutors, and judges cannot, in my view, hold a candle to their state counterparts and certainly the authors have not established the contrary.

Whether accomplice testimony is allowed or not, or the severity of the sentencing laws, for example, are trifling differences between state and federal practice that cannot guide us in deciding a momentous issue of constitutional responsibility. If mechanical features of federal criminal procedure are appropriate to certain types of criminal prosecutions, such procedural rules can be transported to state courts and applied by state authorities in prosecutions for those types of crime no less than federal authorities in federal courts.

Attempting to distinguish the proper functions of federal law enforcers and courts from those of the states on the basis of their procedures and comparative advantages ultimately cannot escape the conclusion that if this is all there is to it, there might as well be no distinction whatsoever and, if there is none, why do we need two sets of such institutions? The authors leave us without an answer.

This discussion is being conducted in an academic setting where provocative notions can and should be aired. I do not, of course, endorse so-called organized crime, and I do not expect that federal criminal jurisdiction will be abolished or even necessarily that it should. But any discussion of federalization of crime should not take the existence of federal criminal law enforcement and adjudication for granted. The Founders were not oblivious to the depredations of crime; they knew well what organized or enterprise crime was all about. Although the authors have not made the case for it, there may be a basis for contending that federal law enforcers and judges have a special role with respect to organized crime or, perhaps more accurately, some aspects of it. Yet the Founders created a federal government without mandating a judiciary or enforcement apparatus separate from those of the states. After all, the states are bound to abide by federal law as the supreme law of the land, so separate federal law enforcement agencies and courts are unnecessary adjuncts of federal policy.

Inquiry into whether a separate federal judiciary and law enforcement apparatus has a role distinctly different from that of its counterpart state institutions should not begin with their respective procedural rules, for that inquiry leads nowhere. The inquiry should begin with the principles found in our Constitution. One source may be the role of federal law foreseen by the Founders. The record may be sparse and I do not suggest that we need be confined by a literal interpretation of that record any more than we are so limited when making other constitutional inquiries. But it is here, in our constitutional inheritance and traditions, that any principled distinction may be found, if one is to be located. It is regrettable that our authors did not make this the starting point of their inquiry.

One point of caution should be emphasized, however. In a country as large and diverse as the United States, views on what activities should be regarded as criminal and the relative importance to attach to them will differ greatly. As we make these choices at ever more embracing levels, from family or group to village to city to county to state and finally to national government, achievement of a consensus on these matters becomes increasingly difficult. Without a broad consensus among the people to whom the laws apply, enforcement becomes impossible.

Because of the greater difficulty in achieving and maintaining this consensus at the national level than at other levels, the kind of conduct that can effectively be criminalized is not, as the authors suggest, necessarily the more complex and sophisticated. Indeed, it may work just the other way; at least sometimes, it may be more difficult to maintain consensus as to complex and sophisticated crimes than the simple and straightforward ones.

While, of course, I do not rule out the possibility that the federal government's resources should be devoted to at least some criminal law enforcement and adjudication, the authors have not given us enough to define what that role should be. The mechanical features of criminal law enforcement and adjudication stressed by the authors do not, in my view, supply that definition.