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Comment: The Folly of Overfederalization

by
SANFORD H. KADISH*

Professor Blakey argues that federalization is an arid and unuseful abstraction that distracts attention from the salient issue of how most effectively to deal with the problem of crime in the United States.¹ He prefers a factual and pragmatic assessment of what needs to be done to meet the challenge of crime without needless preoccupation with issues of federalism. I agree with his defense of pragmatism, but his dismissal of federalism seems to me a bit overdone.

Federalism, after all, is one of the salient principles on which the Republic was founded. Its virtues are well known: a closer and more direct identification of individual citizens with their government, greater control by them of the policies to be furthered, and the national benefits of variation and experimentation. These early recognized virtues continue to be recognized down to the present; witness the Republican Party's "Contract With America." In saying this I don't mean to put federalism on a pedestal, only to protest Professor Blakey's dismissal of it as an arid and unuseful abstraction. It is by no means everything, but it is certainly something.

I think most would agree that whatever the virtues of federalism, they would apply to criminal legislation and enforcement. It is curious, though, that crime is the one area of traditional state and local concern where even strongly federally oriented politicians often support national intervention. Why should that be? Of course, there's a vital national interest in the reduction of crime. But is the national interest any greater than that in the health of the population, the effects of impoverishment, or welfare? In these areas, the same politicians pushing for increased federal criminal legislation turn into ardent federalists. That seems to me a paradox. But I will not pursue it here. Instead, I want to suggest reasons for wondering whether, to the contrary, crime may be one of the areas where the case for na-

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1. G. Robert Blakey, *Federal Criminal Law: The Need, Not for Revised Constitutional Statutes, But the Exercise of Responsible Prosecutive Discretion*, in this Symposium Issue.

tional assertion of authority has less rather than greater justification—and on pragmatic grounds.

No one can doubt Congress's virtual plenary authority over criminal matters as a consequence of the Supreme Court's expansive interpretation of the Commerce Clause. In the argument before the Supreme Court in the recent case of *United States v. Lopez*,² it fell to the Solicitor General to defend the constitutionality of the 1990 Gun-Free School Zones Act, which makes it a federal crime to carry a gun within a thousand feet of a school. Seeking reversal of the Fifth Circuit, which could not quite see what Congress was doing meddling with security measures in local schools, the Solicitor General invoked the well-settled doctrine that anything which impacts interstate commerce is within the commerce power. That seemed to startle some of the Justices. Justice Ginsburg was moved to ask, apparently in the spirit of a *reductio ad absurdum*, whether under this theory all violent crime in America could not be claimed by the national authority. The Solicitor General forthrightly replied in the affirmative, and under the existing precedents he was quite right.³ But the question to be faced here is not congressional power but its wise exercise.⁴

For most of American history, law enforcement has primarily been a state and local matter. It is still pretty much that way. Only a small percentage of prisoners, police officers, criminal courts, and prosecutors are federal. But recent years have witnessed a considerable expansion of federal authority, particularly in the last decade, with the increasing effect of turning traditional state offenses into federal ones, raising some serious cause for concern.

Drug crimes have been for some time the biggest worry on this score, and I will say something about drugs at the end. But let me first call attention to some recent examples of what strike me as creeping and foolish federal overcriminalization. How it happens is familiar enough from watching the enactment of state criminal laws. Some dramatic crimes or series of crimes are given conspicuous media coverage, producing what is perceived, and often is, widespread public anxiety. Seeking to make political hay, some legislator proposes a new law to make this or that a major felony or to raise the penalty or otherwise tighten the screws. Since other legislators know well that no one can lose voter popularity for seeming to be tough on crime, the legislation sails through in a breeze. That the chances of the legisla-

2. 2 F.3d 1342 (5th Cir. 1993), *aff'd*, No. 93-1260, 1995 U.S. LEXIS 3039 (U.S., Apr. 26, 1995).

3. Lyle Denniston, *Going Overboard for a Federal Gun Law*, AM. LAW., Jan./Feb. 1995, at 94.

4. In these reflections I have benefited greatly from an opportunity to read in manuscript form Frank Zimring & Gordon Hawkins, *Toward a Principled Basis for Federal Criminal Legislation*, THE ANNALS (forthcoming 1995).

tion working to reduce crime are exceedingly low, and in some cases the chances of it doing harm are very high, scarcely seems to be a relevant issue.

Now this process seems to be taking place in Congress as well. An example is the Gun-Free School Zones Act I mentioned. Another is the 1994 provision of federal penalties for armed carjacking. Bills proposed, but not yet successful, raise further examples. Take the bill proposed in 1991 and again in 1993 making it a federal crime to commit any state crime with a firearm that crossed state lines.⁵ Because virtually all firearms cross state lines, the proposal would federalize all crimes committed with guns, thereby giving Congress legislative authority over most violent crimes in America. Another 1991 proposal⁶ would criminalize many kinds of domestic violence cases, potentially involving federal courts in a flood of domestic relations disputes.

What's wrong with this? First, it tends to subvert the values of a federal system to which I referred. The problem is not the lack of constitutional authority nor the absence of a national interest in keeping children from carrying guns to school, in deterring the criminal use of guns generally, in suppressing violence against women, and so on. There is such an interest, of course. But the fact that deplorable conduct is widespread in the United States, and in that sense constitutes a national problem, hardly warrants making that conduct a federal crime when it is already adequately covered by state law. If it were otherwise, we might have a federal criminal law almost entirely duplicative of state criminal codes, and one that would preempt the state law wherever Congress chose. The second thing wrong with overfederalization of crime is that it is a wasteful duplication of resources where federal resources are desperately needed for other functions. And finally, the legislative product tends to be no better than the process that produced it—the process of congressmen and women following the politically profitable example of state legislators in buying popularity with essentially bogus anticrime laws. It leads to federalizing street-type crimes—guns at school, domestic violence, etc.—whose enforcement requires the kind of on-site policing that the federal criminal system has never been any good at. And it leads to the enactment of laws that cater to public clamor by falsely offering severity as a cure—“Three Strikes and You're Out,” high mandatory minimums, extensions of capital punishment, and sentencing policies that drive conscientious federal judges to distraction.

5. Violent Crime Control Act of 1991, S. 1241, 102nd Cong., 1st Sess. § 1213; Violent Crime Control and Law Enforcement Act of 1993, H.R. 3355, 103rd Cong., 1st Sess. § 2405.

6. Violence Against Women Act of 1991, S. 15, 102nd Cong., 1st Sess.

Of course, this is not to say that there are no areas where federal criminal law is appropriate, only that the fact that certain crimes are committed everywhere in the country does not warrant the enactment of federal criminal laws to deal with them. What more should be required? Professors Zimring and Hawkins have proposed several possible justifications for federal crime:⁷ (i) where the federal interest is stronger and more direct than the interest of the states; for example, where the national government has a proprietary interest, as with counterfeiting, tax evasion, assault on a federal officer, espionage, national security legislation, etc.; (ii) where federal agencies enjoy a distinct comparative advantage in detecting, gathering evidence, and prosecuting, as in the case of organized crime; or (iii) where state and local law enforcement prove to be demonstrably inadequate to control some objectionable conduct. These may need adding to or further refining, but at least they are a start at limiting and rationalizing the pattern of congressional overcriminalization. Surely, the kind of new federal crimes of which I gave examples—carjacking, domestic violence, guns in schools—would scarcely pass muster under such criteria.

By and large there has been little opposition to the spread of federal criminal jurisdiction. Encouraging exceptions have been federal judiciary and bar spokespersons, whose principal concerns have been the diversion of national resources from the administration of civil justice. Chief Justice Rehnquist⁸ and Robert Raven, former President of the American Bar Association,⁹ have made eloquent statements of the baleful consequences of this spread, apparent in the seventy percent increase in criminal filings between 1980 and 1992 compared with a thirty-four percent increase in civil filings.¹⁰ These consequences were vividly portrayed by Chief Judge Judith Keep of the Southern District of California, who has noted, according to Mr. Raven, that her district tries fewer than fifty of the one thousand civil cases filed each year and spends more than seventy percent of its time on routine drug and gun cases. Judge Keep concludes that as a result her court is "sinking in a mire of criminal cases" that has turned it largely into a "police court" where judges are under "constant pressure to keep cases mov-

7. See Zimring & Hawkins, *supra* note 4.

8. Hon. William H. Rehnquist, *1991 Year-End Report on the Federal Judiciary*, 102nd Cong., 2nd Sess., 138 CONG. REC. S443-01 (daily ed. Jan. 27, 1992).

9. Robert Raven, *Federal Courts as Police Courts: Federalism Revisited*, Fifth Circuit Judicial Conference (May 13, 1993). An earlier version of this address appears in Robert Raven, *Don't Wage War on Crime in Federal Courts*, THE RECORDER, Aug. 11, 1992, at 8.

10. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, 1981 STATISTICAL ABSTRACT OF THE UNITED STATES 186 tbl. 324; BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, 1993 STATISTICAL ABSTRACT OF THE UNITED STATES 206 tbls. 331, 333.

ing as fast as possible." And Chief Justice Rehnquist told Congress in a recent report that "[w]e must decide whether we want the federal courts to spend the majority of their time hearing general criminal cases or whether we want the federal courts to occupy their traditional role as a forum for civil disputes on nationally important issues such as commerce, constitutional questions, civil rights and civil liberties."¹¹

So, to sum up, the costs of the further spread of federal criminal law are substantial: not only is there the threat of the breakdown of our federal civil justice system to which our judicial and bar leaders have called attention, but also the needless compromise of the virtues of federalism, the waste of resources with duplicating systems doing much the same thing, and finally, the net increase and nationalization of knee-jerk legislation.

I must conclude these comments with a word about drugs, for to talk about overfederalization without mentioning drugs is like talking about Hamlet without the Prince or to use a more pertinent image like narrating a melodrama without its arch villain. This is because drug control laws constitute perhaps the most sustained expansion of federal criminal jurisdiction in our history. Federal drug filings rose three hundred percent between 1980 and 1993.¹² They constituted nearly forty percent of all federal felony filings in 1992.¹³ Another telling statistic is that in 1993 close to sixty percent of all federal prisoners were being held for drug offenses.¹⁴ The cost in dollars and cents as well as in the kinds of costs I've talked about are exceedingly high. The question I want to leave you with is this: Have the results of the decades-long war on drugs been worth it? It is always possible things would have been worse without the federal legislation, but it takes a lot of imagination to see how. There is indeed a comparative advantage enjoyed by federal authority over certain aspects of drug control—for example, importation and interstate shipments of drugs. But the bulk of federal cases are not of that sort, but of the ordinary drug-related street crimes in the cities of this country. Surely our prevailing drug control policies need rethinking. There is no easy answer. But it is not at all difficult to see that withdrawal of federal policing of the countless drug-related crimes committed on the streets of our cities would make sense from every relevant perspective while we struggle to find a way out of the wilderness of our drug problems.

11. Raven, *Federal Courts*, *supra* note 9.

12. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, 1981 STATISTICAL ABSTRACT OF THE UNITED STATES 186 tbl. 324; BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, 1993 STATISTICAL ABSTRACT OF THE UNITED STATES 206 tbl. 333.

13. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, 1993 SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 499-503, tbls. 5.28, 5.29.

14. *Id.* at 630 tbl. 6.67.

