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THE FEDERAL ROLE IN CRIMINAL LAW

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CONCLUSION

In light of the foregoing, I submit that we should reexamine the use of the commerce, commerce-prohibiting, spending, and taxing powers to fix national conceptions of the good beyond commercial transactions and beyond the health, safety, and welfare of workers. No doubt these federal powers should still be available to assist the states where the states are disabled from acting by lack of power or by corruption. But even here, it is advisable that federal assistance be measured by the need that necessitates federal action. The measure of such need and its duration, for example, may make sunset laws (laws that terminate after a set period of years) advisable for such assistance.

I submit that we need to reexamine the federalization of state criminal law in order to determine whether the legislation seeks to enact a national conception of what is socially and ethically good beyond the conceptions reflected in liberty provisions of the Constitution and constitutional amendments and, if so, whether the legislation is proper federal assistance subject to an appropriate sunset.

If we do not undertake this reexamination, then we will as a nation lose a conception of the good that is widely shared, the value of community and individual autonomy.

The Federal Role in Dealing with Violent Street Crime: Principles, Questions, and Cautions

By PHILIP B. HEYMANN and MARK H. MOORE

ABSTRACT: Long-established principles of federalism have limited federal action against violent crime. An important question is whether those principles ought now to be relaxed. We distinguish two roles for the federal government: direct operations and financial assistance. Regarding direct operations, the natural division of labor among federal, state, and local enforcement agencies should be maintained, and federal enforcement agencies should be diverted to the fight against street crime only on an emergency, backup basis and only while the emergency exists. Regarding financial assistance, traditional principles of federalism that favor local decisions over national decisions should apply unless some important federal interest—such as the protection of individual rights; the encouragement of innovation and learning; or the protection of one state against the actions of others—is engaged. If such an interest is engaged, that interest ought to be reflected in federal restrictions on how the money can be used. When we apply these principles to recent federal legislation, we conclude that the nation's interest in experimenting with the potential of community policing justifies a federal categorical grant program, while the effort to encourage states to stiffen their sentencing requirements does not.

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Given public concerns about crime, particularly violent rime, it is tempting for national as vell as local political leaders to curry avor by pledging aggressive action to ombat it. But striking such a stance problematic for national political aders for one simple reason: it is ard for them to reach any important vers of crime policy. The front line the nation's response to crime, the olice, are overwhelmingly local encies. True, they operate under ws created at the state and local vel, but they are largely financed d directed by local governments. osecutors, jails, and courts are st often the creatures of county vernments. Correctional facilities generally state financed and op- ted, but often with the support of ally supported jails and alterna- es to incarceration. And, when one s out to preventive activities, one ls a bewildering array of publicly nced programs provided by non- it and governmental agencies. Tra- nally, then, national politicians e been able to jawbone about crime have done little else.

n response, over the last three ades, elected federal officials have hed for more effective influence the nation's response to crime. have done so not only through traditional means of focusing ic concern on the problem, keep- ational-level statistics on the ex- and nature of the problem, and ding training and technical as- nce to state and local officials. have also been increasingly pre- to shape the overall level and of local efforts through federal cial assistance. Most problem- atic of all, they have also moved to widen federal criminal jurisdiction and to engage federal enforcement agencies in operational roles to deal directly with the problems of violent street crime.

The question for this article is how citizens ought to view these developments. On the one hand, given the scope and urgency of the crime problem, it is hard not to be grateful for help from any quarter. Both the financial and operational power of the federal government are formidable aids to any national effort to deal with crime. On the other hand, it is easy to feel some misgivings about the breaking down of a traditional ordering of governmental institutions that kept the primary responsibility for dealing with violent street crime (with a few notable exceptions) in the hands of state and local officials.

The task is to remind ourselves of why we wanted to keep the federal government out of law enforcement with respect to street crimes in the first place and to think which of those reasons remain valid in today's context. Our basic assumption is that federal engagement in the control of violent street crime should be guided by principles that reflect the basic principles of federalism: that, for the most part, governments that are smaller and closer to the people will make better judgments about what is publicly valuable to do than governments that are larger and more remote, and that the decisions of the former should be left undisturbed unless issues of fundamental rights, coordination across states, or opportunities for social learning are engaged. Should such issues be engaged, federal roles may sometimes be appropriate. In our view, these principles continue to counsel a sharply limited role for the federal government in responding to violent street crime. If, however, political reality requires the federal government to be given a role, the role should emphasize financial rather than operational assistance.

EVOLVING FEDERAL ROLES IN CONTROLLING STREET CRIME: A QUICK HISTORICAL REVIEW

Kathleen Brickey, in her article in this volume and elsewhere, has provided an excellent review of the development of the federal criminal law.[1] Her account starts with the ambivalence of the Founding Fathers toward any federal criminal jurisdiction, and their explicit hostility to the creation of any national police force to enforce a federal criminal law. She observes that what federal criminal statutes emerged had mostly to do with helping the federal government to conduct its particular functions in a federalist system: namely, to defend the national government against treason, to collect federal tax revenues, to maintain a national currency, to protect its own property, and to maintain order in the jurisdictions for which it was responsible.[2]

She also points to two major trends that tended to expand the federal criminal law into wider domains. One was a growing recognition that with increased mobility and wider communications, criminal offenders could more easily escape the boundaries of local jurisdictions.[3] The second was the episodic engagement of the federal government in dealing with the regulation of "criminogenic commodities": notably, alcohol during the Prohibition era, and drugs as a consequence of the crusade against heroin in the late 1960s and early 1970s, and the war against cocaine in the 1980s.[4] If it was true that depression-era bank robbers could escape capture by crossing state lines, and bootleggers could resist local prosecution by corrupting local officials, then it was clearly up to the federal government to do something to protect the American population from these evils.

In these events are the origins of a rationale for a federal role in operational enforcement: not only to protect distinctly federal interests but also to deal with crimes affecting the population that only a federal government could or would handle effectively, namely, the criminal enterprises that operate across state or national boundaries, that can only be penetrated through the use of sustained and sophisticated investigative techniques, or that are too close to local police and political figures for local prosecutors to target without hitting colleagues.

An account of the development of the federal criminal law provides an important backdrop for discussion of the federal role in crime policy. It

1. Kathleen F. Brickey, "The Commerce Clause and Federalized Crime: A Tale of Two Thieves," this issue of *The Annals* of the American Academy of Political and Social Science; idem, "Criminal Mischief: The Federalization of American Criminal Law," *Hastings Law Journal*, 46(4):1135-74 (Apr. 1995).

2. Brickey, "Criminal Mischief," pp. 1138-39.

3. Ibid., pp. 1141-45.

4. Mark H. Moore, "Criminogenic Commodities," in *Crime and Public Policy*, ed. James Q. Wilson (San Francisco: ICS, 1983), pp. 125-44.

however, be supplemented by
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s of the development of the fed-
le in national crime policy. A
olely on criminal law would,
mple, miss the role that three
al crime commissions played
ping national conceptions of
ne problem: how it ought to be
ed, understood, and responded
lso misses the increasingly im-
t role that the federal govern-
as played in financially as well
rationally supporting local
control efforts. In addition, it
all the interesting ways in
federal enforcement agencies,
l to enforce the developing
al law, would find ways to aid
w enforcement even without
horization of a specific federal
al law. These trends have been
larly important since the late

uenced by today's hysteria
rime and drugs, it is easy to
hat we went through a similar
only twenty years ago. Our
n then about "crime in the
" was mixed with fear of the
political demonstrations op-
the Vietnam war and support-
il rights for black Americans,
read drug use among Amer-
uths, and riots—euphemisti-
escribed as "civil unrest"—in
f our major cities. Yet, beneath
litical turmoil, there was, in
th a dramatic increase in the
level of violent crime and a
esome heroin epidemic that
to fuel that increase. In fact,
crime rates reached a peak in
e 1960s and early 1970s that was only slightly below the historical peak reached in the late 1920s and early 1930s and that is still above our current level of violence.[5]

The nation's political leaders responded to these trends by creating three influential national commissions in a relatively short period of time: the President's Commission on Law Enforcement and the Administration of Justice (established in 1965; completed in 1967); the National Advisory Commission on Civil Disorders, also called the Kerner Commission (established in 1967; completed in 1968); and the National Commission on the Causes and Prevention of Violence, also known as the Eisenhower Commission (established in 1968; completed in 1969). These commissions helped to make violence, crime, and drugs national issues and therefore seemingly appropriate targets of federal action.

At the time they were published, however, inhibitions about engaging the federal government operationally in the war against drugs and crime remained strong. As a result, the felt urgency for federal action took a different form: the Law Enforcement Assistance Administration (LEAA) was established to channel federal financial support to state and local criminal justice systems. The financial power of the federal government, rather than its legal authority or distinctive enforcement capabilities, would be utilized to deal with the nation's crime problem. Over the next 10-15 years, the federal government pumped billions of dollars to state and local criminal justice agencies.[6]

5. Albert J. Reiss, Jr. and Jeffrey A. Roth, eds., *Understanding and Preventing Violence* (Washington, DC: NAS Press, 1993), pp. 51, 64.

To a great degree, this federal money was understood to be nothing more than direct financial support to states and localities: an effort by the federal government to increase the scale and capabilities of local agencies. But LEAA also sought to use federal funds to catalyze the development and stimulate the broad dissemination of innovative programs and practices that would increase the efficiency and effectiveness, perhaps even the justice, of state and local operations. States were required to establish state planning agencies to receive and administer the federal funds. These planning agencies, in turn, were encouraged to coordinate planning across the many operational agencies involved in the criminal justice system. The operational agencies were also encouraged to initiate innovative projects, test them in practice, and disseminate them widely when they worked. In LEAA, then, a different kind of federal role in dealing with crime was established, one that emphasized financial support and the encouragement of innovative methods. This, too, remains a powerful idea of the kind of role that the federal government might play in helping the nation deal with crime.

It is useful to end this quick overview of the development of the federal role in helping the nation respond to crime by observing that, starting in the 1980s, the federal role in financing state and local efforts was de-emphasized in favor of reasserting a direct federal operational role in dealing with crime. LEAA was declared a failure, its name changed, its authorization narrowed, its appropriations slashed, and its bureaucratic status reduced—the public equivalent of a corporate bankruptcy. At the same time, the Attorney General's Task Force on Violent Crime showed extraordinary ingenuity in finding ways that the limited federal criminal jurisdiction could be combined with the growing scale and power of federal law enforcement agencies such as the U.S. Marshals, the Drug Enforcement Administration, the Immigration and Naturalization Service, and the FBI in the U.S. Department of Justice, and the Customs Service, the Bureau of Alcohol, Tobacco and Firearms, and the Internal Revenue Service in the U.S. Department of the Treasury, to offer effective support to local agencies dealing with ordinary street crimes.[7]

As the nation faces today's crisis, then, it has several different traditions to guide it in determining the appropriate federal role. There is the traditional, conservative view, which seeks to restrain the federal role in dealing with ordinary street crime. There is the somewhat more aggressive stance that encourages the federal government to play a role in financing, coordinating, and encouraging innovation in local criminal justice agencies. Finally, there is the most aggressive stance, which sanc-

6. For an excellent analysis of LEAA, see Malcolm M. Feely and Austin D. Scott, *The Policy Dilemma: Federal Crime Policy and the Law Enforcement Assistance Administration, 1968-78* (Minneapolis: University of Minnesota Press, 1980).

7. *Attorney General's Task Force on Violent Crime: Final Report* (Washington, DC: Department of Justice, 1981).

ons an active federal operational
sponse to violent crime relying on
deral agencies. The question the
ation faces is which of these ideas,
what combination of these ideas,
ake sense in our current circum-
ance, while keeping in mind that
r current circumstance may be
mporary and that what we do now
ay set important precedents that
ange the shape of the future.

FEDERAL OPERATIONAL ROLES: A THEORY OF FEDERAL JURISDICTION

We have one set of law enforce-
nt organizations, federal law en-
cement, that is relatively small
enjoys some unusual advantages.
jurisdiction is not limited within
United States; its investigative
nts are relatively well paid and
hly trained. It is accustomed to
ge investigations over a long pe-
l of time, with all that that in-
ves in terms of cooperation be-
en prosecutors and agents and
eptance of lower caseloads by su-
visors. It has readier access to less
vded courts, more accommodat-
prosecutorial procedures, and
ences that are surer and longer.
could go on.

he other major set of law enforce-
t agencies is local. The man-
er and womanpower of these
icies is greater by more than an
r of magnitude. They have much
familiarity with what goes on in
streets of America, namely, vio-
crime, burglary, and theft. They
a closer relationship, by far,
local communities. They handle
mber of quality-of-life issues and
crimes that make them familiar to and valued by local citizens.

Why principles?

A fundamental question for American law enforcement is whether to separate, by some set of principles, the multifarious activities of each of these sets of law enforcement organizations, the federal and the local. We have always tried to do just that in the United States. Sometimes the reason given concerns the protection of citizens against their own police forces. The fear of a single national police, such as many modern democracies have, has always been deep in the United States. Our preference for tens of thousands of local police forces requires maintaining an additional federal force capable of doing what local forces cannot do, such as handling criminal organizations that are operating in several jurisdictions simultaneously. We also enjoy the incidental advantage of having a federal law enforcement structure that can investigate and prosecute wrongdoings by the local structures.

But there are two additional advantages to a principled allocation of roles. One is that it is far more efficient for each jurisdiction to know for what it is responsible and for what it can be held accountable. The second is that, with a principled division of responsibility, each set of agencies can build specialized capabilities, at least if the allocation of jurisdictions is functional rather than simply geographic.

There is one argument for overlapping jurisdictions. A local jurisdiction may occasionally get overwhelmed by the mere volume of crimes even if they are of the type that the jurisdiction usually handles. The federal government has not frequently played, but could play, the role of providing reinforcements in that situation. In effect, it would be a warehouse for the storage of additional investigators, prosecutors, judges, and correctional officials.

What principles?

If federal criminal jurisdictions should be separated in a principled way from local police and prosecutorial responsibilities, what are the principles that should control? Originally, many argued in terms that reflected the Constitution and its grant of powers to the federal government, suggesting that the federal government should handle things that involved interstate commerce, for example. For two decades, since the time of Attorney General Edward Levi, another, far sounder set of notions has defined federal responsibility. The federal government must protect its own facilities and activities. Beyond that, it should do what local jurisdictions cannot or will not handle reliably. These simple rules have been the controlling principles. There are subcategories and disputed territory in each of the last two categories.

Matters that local law enforcement often cannot handle

What falls within the category of federal responsibility because local law enforcement cannot handle it? The first is obvious. The territorial boundaries of a town, city, county, or state limit its ability to handle crimes that involve, in major ways, other jurisdictions, nor can it negotiate agreements with foreign nations.

Second, the level of public concern about street crime and the pressure and volume of responsibilities in this area have meant, for some time, that local jurisdictions are far less capable than the federal government in handling technically sophisticated or prolonged investigations. Our federal government can allocate more time and people to a single case. It has accountants to handle financial investigations, greater capacities for electronic surveillance and undercover work, and more experience with the background of business and financial crimes from bank and securities frauds to environmental requirements. There is no inherent reason why localities could not develop these capabilities, and some have. But that would take time and money away from the pressing fears of violence, drugs, burglary, and other theft crimes. This division of responsibility has become comfortable and thus relatively settled.

There is one very debatable area within this broad category of what local law enforcement cannot handle. The United States Congress has given federal law enforcement stronger statutes (such as the Racketeer Influenced and Corrupt Organizations and money-laundering statutes), more friendly investigative powers and trial procedures (such as the right to use electronic surveillance with the consent of one party to a conversation and the rule that makes all conspirators responsible for many of the crimes carried out by

ıspiracy), and longer and surer
ences (set by Congress's manda-
minimums or by the Federal
encing Commission). Withhold-
hese from state prosecutors and
police has presumably been a
er of state political choice. Leg-
ive acts could make them avail-
in any state very quickly, for
icating the federal advantages
would not require developing
y new capabilities of the sort
would be required, for example,
ırry out the financial investiga-
s that are now left to the federal
rnment.

ocal prosecutors now borrow
e advantages by asking federal
enforcement to try street crimi-
who are regarded as unusually
gerous or elusive. Thus, as a U.S.
rney, Rudy Giuliani would use
e advantages as well as the less
rded conditions of federal courts
ring cases against drug dealers
narily handled by local prosecu-
when the drug problems seemed
getting out of hand in particular
es. One of the first cases brought
er the new federal three-strikes
(mandating a life sentence with-
parole for three-time felons)
brought against a street crimi-
in Iowa who would simply have
ived a long but less severe sen-
e otherwise.[8]

he same issue arises when fed-
legislation, such as that pro-
d by Senator Alfonse D'Amato,
ates federal jurisdiction over
ies that local police and local dis-
attorneys are far more experi-

enced in handling, such as an ordinary homicide committed with a gun that has been acquired or manufactured in another state. In these cases, what are being used by law enforcement are the friendlier federal procedures and sentences, not the difficult-to-duplicate investigative capabilities.

There are two reasons for rejecting this extension of the principle that the federal government should investigate and prosecute what local law enforcement cannot handle. Perhaps they amount to the same thing. Street crimes are accepted as a local responsibility and state government can readily create the law enforcement advantages enjoyed by the federal government by simply changing the statutes that define crimes, procedures, and sentences. The other side of this coin is that the failure to change these aspects of criminal law represents a state decision to, at best, strike a balance between the prosecution and the defense somewhat differently in the state—a decision that is certainly appropriate for states to make themselves—or, at worst, to freeload on the taxpayers of other states in bearing the substantial costs of, for example, imprisoning a local hoodlum for the next forty years. In either case, the extension of federal jurisdiction to a local matter seems unjustified.

Matters local law enforcement may be reluctant to handle

The other major category of federal responsibility—matters that local law enforcement may not be willing to undertake—includes, prominently,

8. *Criminal Justice Newsletter*, 1 Dec.
, pp. 5-6.

crimes by important local government officials (particularly corruption), crimes by major local industries (particularly environmental crimes), and violations of civil rights or civil liberties carried out or tolerated by the local authorities.

There is, of course, dispute about this category of matters, about whether, in fact, local law enforcement can be relied upon to pursue them vigorously. Many local prosecutors would insist, justifiably in most cases, that they are willing to bring cases against local politicians, the police, and industry. In the same way, federal prosecutors resent the statute that requires an independent counsel to investigate, decide whether to prosecute, and sometimes prosecute high federal officials. In each case, the issue may be more a question of public confidence than any real reticence. But public confidence is also a principled basis for federal involvement in these matters.

Constraining politically demanded exceptions to sound principles of federalism in law enforcement

The wisdom of having principles for dividing federal and local responsibilities for law enforcement is apparent. The fundamental principles that have been used for at least two decades seem sound. What raises questions now is that an activity that is near the center of local responsibility under these principles—dealing with localized urban violence in the form of particularly dangerous individuals or youth gangs—has become a very prominent concern of the American public as a whole through the spread of crack, the doubling of youth homicides, and the national nature of media coverage of dramatic crimes.

That national politicians, legislative and executive, should be responsive to this complex of forces is hardly surprising. All that national politicians can do is provide resource and technical support to local law enforcement and direct federal law enforcement operations at the same causes of widespread fear. The likely and available forms of federal law enforcement action are the use of the federal investigative advantages, described earlier, against individuals or gangs identified by local law enforcement as particularly dangerous.

Why not? The fact that this use of federal capacities against local violence cannot be justified as an application of the principles we have described is not an adequate answer. Certainly, the targets of the investigation have no right to complain that this is not generally federal business. Who can complain and about what?

The victims of crimes that only the federal government can and will investigate can complain that street crime, even at its most serious, can be handled by local law enforcement and their problems cannot. The citizens of the local jurisdiction can complain that if the federal role is more than very temporary, it will inhibit the growth of capacities that the local police should have themselves, for the number of potentially violent teenagers is going to grow sharply over the next decade. The citizens of

other jurisdictions can complain that the locations with federal urban strike forces are shifting their costs of local law enforcement to federal taxpayers. Local taxpayers can complain that accountability has been lost; it is no longer clear who is responsible for the violent crime rate in the jurisdiction.

These complaints are far less powerful if federal law enforcement is playing a temporary role, helping to deal with a law enforcement emergency and not a chronic problem. The criticisms are less valid if the federal government is really bringing highly specialized capabilities to the emergency and not just increased manpower. The arguments are less persuasive if a large part of the federal role is to help local law enforcement develop the needed capacities.

There is, in short, a very strong argument that the federal government should not be using its law enforcement capacities to deal with street crimes, even when the public is gravely concerned about that problem. But, as noted, this may be unrealistic, considering the motivating power of the politics of crime for the president and the Congress. There is an intermediate position, which is as far as responsible federal officials should go. Federal law enforcement resources should be used to deal with problems that everyone wants generally allocated to local law enforcement only when (1) there is an emergency requiring the specialized federal talents and (2) the federal efforts are directed, in large part, to helping local law enforcement develop for itself those missing capabilities.

FEDERAL SUPPORT ROLES: A THEORY OF FEDERAL FINANCIAL AID

What are the general principles for the federal funding of law enforcement that would correspond to the basic principles for federal law enforcement operations? The debate in other contexts about what costs should be borne by the federal government and what by the states or localities is a perennial one in the United States. The primary argument for state or local funding of an activity is that the citizens of that jurisdiction are best able to decide which of a number of beneficial programs they want to fund with a limited budget. Total expenditures of X dollars will create greater benefits for the citizens of the fifty states if each state makes its own allocation decisions and its own taxing decisions than if the national government makes those decisions uniformly for all fifty states. Iowa may want to spend more on schools, less on prisons, and have higher taxes. Arizona may prefer more prisons, fewer schools, and lower taxes.

The arguments against this are out of favor in the 1990s. They are that the federal income tax is more progressive, that citizens of poor states should share in the revenues of wealthier states, and that, as to some matters, local funding will create a prisoner's dilemma where each state will compete to give fewer benefits to the poor and more benefits to new industries even though, if all states could agree, they would prefer to assume a different posture. Moreover, some things that a state might decide not to do would have effects on its neighboring states. A failure to clean up a river has consequences to downstream states; a failure of New Jersey to provide emergency medical services in Newark has consequences for New York. Still another reason for federal funding is that a problem whose causes or benefits are widespread leaves its costs and burdens on one or a few states. This, for example, is a justification for federal funding of the prison costs associated with crimes by illegal aliens. Finally, there are situations where a problem of the commons argues for federal expenditures on research and innovations that would be too costly to be initiated by an individual state (in light of the benefits it could expect) but where nationwide benefits make experimentation at the federal level cost effective.

For now, let us assume that the argument for local funding and local decision deserves a presumption of correctness—one that can be overcome, but the burden should be on the supporter of federal funding.

There is a second question closely related to the issue of which jurisdiction should fund which activities. It is equally important to ask whether there are any limits to the conditions the national government may properly impose when it does fund an activity. As to some matters, such as civil rights, there should be national standards reflecting what it means to be a citizen of the United States. Still, that federal funding is not automatically a good excuse for federal mandates seems obvious. The federal government could, if it wished, raise enough revenues nationally to offer to fund even the most traditionally local of activities on the condition that they be carried out as the federal government wished. In a real sense, federal taxation reduces the amount that is left for state and local taxation, so the result would be to impose federal rules on states and localities without any justification.

Federal mandates as a condition of federal funding must therefore be independently justified as a matter appropriate for federal responsibility. If a condition on the receipt of federal financial aid cannot be justified in this way—that is, even if the federal funding can be justified in one of the ways described earlier, but further specifying exactly how that money will be spent cannot be justified as appropriately federal—the money should be made available as a block-grant program, which imposes relatively few restrictions on the states and localities that receive the money. If a certain condition can be independently justified—for example, a condition forbidding racial or gender discrimination in the distribution of state benefits or a condition requiring state trial of a promising innovation—a categorical grant requiring compliance is entirely appropriate. Indeed, if a mandate can be defended as a legitimate federal concern, it may justify the funding necessary to bring the states along.

The current debate about crime legislation raises these issues sharply. The crime bill passed by the Congress and signed by the president in 1994 provided federal funding to support many anticrime initiatives, ranging from the construction of prisons, through more police on the street, to

e encouragement of a variety of ime prevention initiatives. The most cent mid-term elections threaten to ange much of this. Pursuant to the ntract with America, a bill recently ssed by the House of Repre- ntatives eliminates funding for pre- ntion programs, converts funding the police from a categorical-grant ogram designed to encourage ex- rimentation with community polic- to a block-grant program, and aches new conditions to what tes must do to receive funding to ild prisons.[9] Arguably, these shifts late some of the important princi- s that justify federal financial aid. Consider, first, the decision to con- t the funds for policing to block nts. Principles of federalism clearly ke decisions about such matters as number, pay, and equipping of local ce officers a suitable subject for lo- decision making. There are no ob- us reasons for the federal govern- nt to seek to intervene in these ices except for its acknowledged in stimulating the development dissemination of promising inno- ons. That is why the categorical- nt program designed to encourage munity policing made sense. The eral idea of community policing a promising idea that deserved e explored. Removing the cate- cal-grant feature in support of a nising innovation removes the ification for a federal role.

related question is raised by the sive funding of prisons by the ral government under the pro- d new laws.[10] It could only be justified, in the terms we have described, if states had inadequate incentives to imprison people convicted of violent and other crimes in their courts, perhaps because a state might expect the individual to move to another state to commit further crimes. Absent that very speculative justification, the amount of prison space, like the length of state sentences, which has always been a matter of state decision, should be left to the individual states. Indeed, there is likely to be substantial unfairness in making federal funding available to some states, like Texas, which have already spent extensively on correction facilities—and therefore cannot use the federal funding—and to other states, perhaps like Florida, which have badly scrimped.

In the legislation emerging from the Contract with America, the House of Representatives recognized the need for justification for funding state prisons and found that justification in the conditions it imposed on that funding: less parole ("truth in sentencing") and longer sentences, particularly for violent offenders. If these are truly innovations that the states should be encouraged to try and from which we will all benefit as we learn the consequences of such policies, the funding could be justified consistent with principles of federalism, although they are difficult to defend as a matter of policy.[11] But if they are an attempt to substitute a national judgment for local judgments about the length and form of sentences (with or without parole), they are indefensible. If the restrictions cannot be justified, neither can federal funding, for it is only the innovativeness of the initiatives that justifies federal funding for what is properly regarded as a state responsibility.

CONCLUSION

The federal government has crucial roles to play in law enforcement. Besides protecting its own functions, it must investigate and prosecute the cases that are beyond the capacity of other jurisdictions and the cases that local police and prosecutors may be less than enthusiastic about. Beyond this, the federal government should be the primary source of funding to develop or spread innovations in law enforcement, and there may be other occasions where considerations of fairness justify federal funding of state or local law enforcement efforts.

None of these seem to justify the current enthusiasm of federal officials, legislative and executive, for playing a large role in dealing with street violence or drug dealing. In the absence of such justifications, the federal enthusiasm is likely to do more harm than good, distracting federal efforts from areas where it has a distinct comparative advantage, complicating accountability for areas that have long been considered the responsibility of state and local government, and discouraging the development by those governments of the capacities needed to carry out their responsibilities.

It is far more important for the Federal Bureau of Investigation to be developing new training capacities for Eastern European law enforcement officers, wrestling with the technological problems and opportunities of the twenty-first century, and learning how to handle better the increasing share of investigations that require the cooperation of more than one nation than for the bureau to be looking for ways to assist the far larger and more experienced urban police forces in dealing with violence. It is far more important for the Drug Enforcement Administration to be addressing the immense complications of our drug policies and the structure of drug organizations with roots abroad and American branches than for it to be pursuing drug-dealing gangs in our cities. It is far more important for the federal Office of Justice Programs to be learning what works in the way of policing and prevention programs and encouraging the spread of whatever works than for the federal government to be paying for prison cells and cops.

. H.R. 3, 104th Cong., 1st sess. (1995).
. See generally Kevin R. Reitz, "The Fed- Role in Sentencing Law and Policy," this issue of *The Annals* of the American Academy of Political and Social Science.

11. Under the House bill (H.R. 3), State A, which has always imprisoned violent people for just as long as most other states do and which insists on following its own substantial periods of incarceration with a long period during which the individual can be reincarcerated if he does anything further to show that he is a danger (parole or supervised release), will get nothing. State B, which has maintained but not increased a very long determinate sentence law for a number of years, is ineligible for 50 percent of the $10.5 billion made available for prisons. A third state, C, which has increased its sentence for repeated armed robbery from a foolishly short two years to three years but requires the individual to serve 85 percent of the 36 months in prison (a period far shorter than he would be incarcerated in A or B), receives the federal government's blessing and funding. This is simply absurd.