

NEWS

Police Executives Fight Federalization

FOR IMMEDIATE RELEASE

Date: July 15, 1994

Contact: Martha Plotkin

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"Over 90 percent of all crimes are addressed at the state level," said PERF President and New York City Police Commissioner William Bratton. "Yet Congress continues to bring these crimes into federal agencies' jurisdictions, which only serves to blur investigative authority, forego local expertise, increase the burden on the federal system, and create unrealistic expectations among citizens—all in an attempt to appear tough on crime."

PERF's position paper acknowledges that federalization may be appropriate for incidents that draw on the special expertise of federal agencies or are clearly within federal jurisdiction. PERF members do maintain, however, that there is little value in making most traditionally state and local crimes, such as some gang-related offenses, drug-related drive-by shootings, and virtually every gun-related offense, punishable under federal law.

"This trend in federalization has the unintended consequence of creating the illusion of greater crime control while undermining the effectiveness of an already overburdened criminal justice system," said PERF Executive Director Chuck Wexler.

—MORE—

PERF members believe that the Administration and Congress must make a commitment to stop making every crime pulled from national media headlines a federal crime. For their part, PERF members stand ready to advise the nation's policy makers when local authorities, who are in the best position to assess the unique demands for crime control in their communities, need federal intervention and assistance.

While PERF members do not agree with every aspect of the pending crime bills, such as some of the provisions that inappropriately federalize state and local crimes, they have supported the bills because of the overall benefit to police. For example, PERF has supported the proposed ban on assault weapons; provisions relating to licensed firearms dealers; resources for community policing and some agency training, technology, and personnel; prevention programs; exclusion of the Byrne Formula Grants from any considered cuts made to fund the crime bill; activation of The National Commission to Support Law Enforcement; police scholarships; and police family support.

PERF is a membership organization of progressive law enforcement executives and police professionals dedicated to improving policing practices through research, experimentation, debate, and national leadership.

Police Executive Research Forum Position on Federalization

In the past several years, there has been an explosion of federal legislative proposals that would make typically state and local criminal offenses federal crimes as well. Leading the movement toward federalization are policy makers who believe states need additional federal support to address our nation's crime problems. Their success in conferring concurrent federal jurisdiction over street crimes is reflected in the thousands of existing federal crimes.

PERF members believe that policy makers are trying to be "tough on crime" when they push for increased federalization of traditionally state and local crimes. Yet lawmakers are ignoring the possible long-term impact of making such state and local crimes as some gang-related offenses, drug-related drive-by shootings, and virtually every gun-related offense punishable under federal law. PERF staff and members believe there is little value in making most traditionally state or local offenses federal crimes. Not every crime problem requires a federal remedy. While some Members of Congress, the U.S. Attorney General, and the Supreme Court Chief Justice have warned that increased federalization may overload the federal system, they are not being heeded in the rush to federalize crimes that may be best left to the states.

In determining the consequences of remaining on the federalization path, one must consider some of the following problems often experienced with federalization. They include uncertainty about investigative authority, omission of local expertise, additional burdens on the federal system without commensurate resources, promotion of disparate sentencing, and creation of expectations that will further disillusion victims and the electorate if federal laws cannot be enforced or are not applied. Federalization may also undermine efforts to better coordinate local, state, and federal enforcement efforts. Federalization also diverts federal authorities from what they do best and puts more distance between law enforcers and local community residents—in direct conflict with community policing objectives. While it may be appropriate to increase the number of federal crimes that involve interstate activities or that draw on the long-standing expertise of federal agencies, it is unrealistic to expect that federal authorities will have the resources and inclination to investigate and prosecute traditionally state and local offenses.

Despite these problems, the trend has not declined, in part because federalization is politically popular. Because relatively little hard research on effective crime control has been conducted or disseminated to laypeople, they are easily convinced that making an offense a federal crime means we are taking a tougher stance against such actions. Most citizens believe that by federalizing crimes, we will somehow rid our communities of violence. Herein lies the greatest danger in federalization: creating the illusion of greater crime control, while undermining an already overburdened criminal justice system.

As police executives, PERF members believe they have a responsibility to continue speaking out on this issue. PERF members stand ready to advise politicians and other policy makers when federalization is needed and when it will only hamper crime-fighting efforts. Policy makers must know that PERF members will support a politician's refusal to make every crime pulled from national headlines a federal offense. PERF members also are committed to assisting our country's leaders in identifying what type of federal assistance is needed, such as support for local community anticrime groups and neighborhood revitalization organizations. In addition, significant federal support for state and local police is needed in the areas of police research, training, new technology, and some additional agency resources.

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July 1994

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Washington promises to help stop crime, but its solutions are as troubling as the problem.

Federal overkill

by Linda Wagar

In Los Angeles County, FBI agents are fighting gang warfare. They are part of President Bush's promise to end the drive-by shootings and violence that have terrorized inner-city neighborhoods.

The idea, while welcomed by local police, is alarming to others who see it as an encroachment by the federal government into state and local crime fighting.

"Local crime problems need local solutions," said Vivian Watts, a consultant with the Advisory Commission on Intergovernmental Relations and a former Virginia state official.

Watts and others say Washington officials should be helping states fight crime — not stepping into the battle themselves.

But Capitol Hill has adopted the attitude: If you want the job done right, do it yourself.

A growing number of bills before Congress open the door for federal officials to fight crimes that once were the exclusive purview of state and local governments.

So brash is federal thinking that U.S. Sen. Alfonse D'Amato of New York attempted last year to pass an amendment to make any crime involving a gun that had crossed state lines a federal offense punishable by death.

"Think about it," said Tom Henderson, congressional liaison for the Conference of Chief Justices. "That's almost every crime committed with a gun."

Although D'Amato's amendment failed, other legislation is still alive. Some view the proposals as attempts by the federal government to force states to abide by laws their legislatures have rejected.

"It's an effort to trump local decisions," said Chief Judge Abner Mikva of the District of Columbia U.S. Circuit Court of Appeals.

Frank Coleman, D'Amato's press secretary, acknowledged that the senator wanted a federal death penalty for gun crimes partly because his own state of New York is one of 13 states without capital punishment.

Until recently federal judges have been the most outspoken against extending federal crimes, fearing a further backlog in court dockets. U.S. Chief Justice William Rehnquist told the federal judiciary in January that Congress should not expand federal court jurisdiction to "intrude into areas of the law that have

traditionally been reserved to the states."

Now other groups are speaking out as well. The American Bar Association, the National District Attorneys Association and the Conference of Chief Justices question the need for some proposed federal laws.

Wyoming Chief Justice Walter Urbigit said federal efforts to solve local problems often do more harm than good. When crimes can be tried in either federal or state courts, no crime is resolved with a single proceeding.

For example, a person cleared of a drug charge in state court can be tried for a second time in federal court and found guilty. Rules of double jeopardy don't apply when the courts represent different levels of government.

State judges also fear that divorce proceedings could drag on for years if U.S. Sen. Joseph Biden's proposed Violence Against Women Act is approved. The bill

"The attitude is that local police aren't as good as federal police and local prisons aren't as good as federal prisons."

allows civil suits in federal and state courts for violent acts against women. Under the proposal, a woman could sue a man for punitive damages if she can prove violence or the threat of violence.

Rehnquist said the Delaware senator's bill could throw a host of domestic issues into federal court. But supporters say it gives women another avenue to fight abuse.

Meanwhile an anti-crime bill before Congress creates more than 50 new federal death penalties. Crimes such as robbing post offices, stealing firearms and murdering local police officers assisting in federal cases would become federal offenses.

Supporters say they are not trying to undermine local authority. They just want to help states get criminals off the street.

Henderson, with the Conference of Chief Justices, said such reasoning is flawed.

"It's part of a general pattern where we are increasingly turning to Congress to solve crimes," Henderson said. "The logic is that we need to do something about crime to show we are serious. We are serious if we pass a national law."

Local and state prosecutors also fear their credibility could be undermined by increased federal involvement in state crimes.

Tom Charron, president of the National District Attorneys Association, said the 8,000 members of his organization don't want U.S. district attorneys to second-guess their decisions. For example, a local prosecutor's case could be damaged if a federal prosecutor announced that he also had looked into the case but found no basis for filing charges.

"There really is no necessity for a blurring or crossing over of the two jurisdictions," said Charron, a district attorney in Marietta, Ga.

Federal resources would be better spent on stopping white-collar crimes, drug cartels and interstate disputes, he said.

Indiana Chief Justice Randall Shepard said eventually the federal court system will become so overburdened

with criminal cases that Congress will be forced to change its strategy.

"It is a matter of priorities," Shepard said. "If you want to put U.S. attorneys and federal district judges at work trying these cases, what is it you want them to do less of? Should there be fewer prosecutions of white-collar or drug-related offenses?"

Some areas already are feeling the effects. It takes an average of three years for a civil case to come to trial in federal court in central Florida because of the backlog in criminal cases. Nationwide, the number of federal

criminal cases has increased 46 percent in the past 10 years.

Mark Scheineson, with the American Bar Association's Washington office, said his organization is opposed to overusing the federal court system because it hurts the quality of justice.

"When the judicial system is overburdened, it affects how your clients are treated," Scheineson said.

In addition, others argue that the dual jurisdiction created by federal bills gives the prosecution an unfair advantage.

"The law enforcement community gains a greater opportunity to pick a court or a judge in which it will have an advantage," Shepard said. "Why should the prosecution get to choose when the defendant doesn't?"

One of the few state organizations to applaud recent congressional proposals is the National Association of Attorneys General. NAAG passed a resolution supporting the Violence Against Women Act in December 1990.

Kansas Attorney General Robert Stephan lobbied for the NAAG resolution, saying spouse abuse is an issue many states have long ignored. Stephan said he doesn't see the need for federal laws in every area, but crimes of national importance warrant congressional action.

Juliene Maska, the victims' rights coordinator in Stephan's office, described as ridiculous arguments that divorce cases would be tied up by a multitude of women charging spouse abuse. "I don't think this bill is going to lead to a lot of frivolous cases," Maska said.

"It is a matter of priorities. If you want to put U.S. attorneys and federal district judges at work trying these cases, what is it you want them to do less of? Should there be fewer prosecutions of white-collar or drug-related offenses?"

In addition, Fran Cleaver, senior deputy attorney general in Pennsylvania, said the federal crime bill gives states more resources to attack crimes by allowing them to enlist the help of the federal government.

A Justice Department official, who asked not to be identified, agreed. He said opponents' arguments that federal courts will become overburdened with new cases ignore the need for a re-evaluation of federal court priorities.

The official said it may be time to question whether standard federal civil cases such as those involving maritime accidents should be given as high a priority as criminal cases "where young kids are being blown away on the streets."

Those opposed to the proposed federal laws say the motivating factor behind them is political survival. Politicians are fulfilling campaign promises with every federal law they pass, some said.

"It is a political activity fueled by conservative Republicans," said Urbigkit. "You are going to balance the budget and reduce taxes. You are going to cure crime."

While others said the philosophy extended far beyond GOP party lines, most agreed that in tough fiscal times the only answer Washington has for fighting crime is passing laws and sending the FBI out to help the locals.

The reality, said Henderson, is that new federal laws are not going to solve the problem. The better answer is to give state and local governments the tools they need to wage their own war.

That could mean expensive changes in some states.

Tampa attorney Bill Wagner served on a committee analyzing the backlog of federal court dockets in central Florida. He said his group discovered that prosecutors were shifting drug cases to federal court after seeing career criminals receive light sentences or early release because of overcrowded state prisons.

The answer, he said, was not to pass more federal crime laws, but to fund the state court system better. It is doubtful whether some federal officials will accept Wagner's advice.

There are those in Washington who view state courts from a time-warped perspective, said Chief Judge Mikva.

They think the prejudices and unprofessionalism that existed in the 1950s — making it impossible for blacks to get a fair trial in some Southern states — still exist.

"And it isn't just the state court system that is perceived as less than qualified," Mikva said. "The attitude is that local police aren't as good as federal police and local prisons aren't as good as federal prisons."

Mikva said one of the most successful prison reform programs was founded on the belief that local government knows best how to solve its problems. In the 1960s, California Gov. Ronald Reagan, unhappy with the cost of housing convicted felons, gave local communities money for each prisoner they kept out of the state system.

The result was successful alternative programs, such as work release and halfway houses.

Watts, with the Advisory Commission on Intergovernmental Relations, said the federal government wants more involvement because it believes the result will be more arrests. But locking up criminals isn't always the best answer.

A better one is to work within the community to stop problems such as gangs, incorporating schools and citizen groups in the process, Watts said. "Changes need to be done by people who know how to work the local system. This is not something the federal government is geared to do," said Watts, the former head of the Virginia public safety cabinet.

State officials who support federal involvement out of the hope that it will provide badly needed resources for fighting serious crime problems are trading autonomy for dollars, said Alan Tarr, a political science professor at Rutgers University. When Washington gets involved, states' rights usually are limited.

Drunken driving is one example. The federal government's answer to curbing drunken driving was to force states to increase their minimum drinking age to 21 or lose federal highway dollars.

"When Washington begins taking over state battles, states are limited in pursuing their own ways of dealing with those problems," said Tarr. "It's a problem that more states should be concerned with." □

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LAW / JUDICIARY

Crossing State Lines: Criminal Law And the Federal Government

In late June 1991, in the heat of a contentious Senate debate on the crime bill, Alfonse M. D'Amato, R-N.Y., rose to offer a potentially historic amendment. The proposal would have turned any crime involving a gun that had been taken across state lines into a federal offense. Because 96 percent of all firearms cross state lines, the amendment would have included most illegal acts committed with a gun.

D'Amato said in defense of his amendment that "the national epidemic of gun-related homicides requires increased federal attention, expanded federal jurisdiction and increased use of federal law enforcement resources."

D'Amato's proposal did not become law — it passed the Senate but was dropped in conference with the House — but the reasoning behind it has been used time and again to justify an expansion of the federal government's role into many areas of law enforcement.

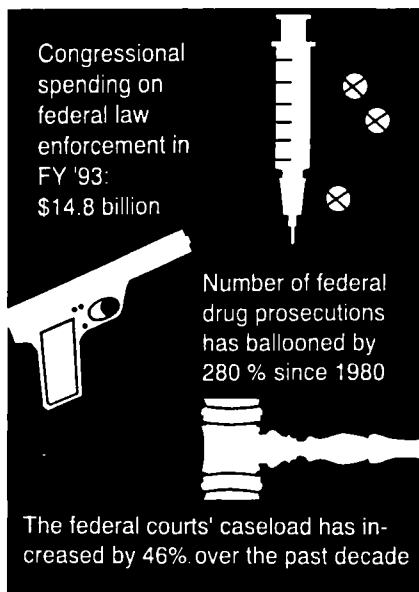
In recent decades, for example, Congress has made federal crimes of drug trafficking, "carjacking," vandalism at biomedical research laboratories and a host of other offenses once handled by states and municipalities.

Supporters of such legislation, including liberals and conservatives, argue that bringing the federal government's extensive resources to bear on localities can help reduce crime. Currently, according to a Senate Republican staffer, "a lot of state systems are clearly overwhelmed ... and people who commit heinous crimes aren't doing jail time."

Advocates both on and off Capitol Hill envision increased federal responsibility as a way to complement state law enforcement.

But some in the legal community say that a broadening of federal criminal jurisdiction is a waste of precious resources. It is, they claim, an unnecessary usurpation of state authority that will overburden an already strained federal court system and downgrade the overall quality of justice.

Critics also say these laws are primarily motivated by political rather



than law enforcement concerns. Members perceive making something illegal as "an inexpensive step that allows them to tout their crime-fighting credentials with the voters. It 'allows them to show that they're tough on crime,'" says Laurie Robinson of the American Bar Association (ABA).

And while the economy will preoccupy the new Congress in the opening months of 1993, experts on and off the Hill feel that the new president — a former state attorney general and governor — will take a keen interest in fighting crime.

Consequently, if Congress and the White House want to move beyond politics, they will have to address the question of whether federalizing criminal law ultimately leads to safer streets and neighborhoods. So far, the evidence is inconclusive: According to figures provided by the Office of Management and Budget, the crime rate dipped slightly during the 1980s as federal law enforcement appropriations increased. But it remains unclear whether these two statistics are directly linked.

Responding to an Epidemic

As Americans grow increasingly frustrated with crime rates that have more than tripled in the last 30 years,

government at every level has scrambled to respond. In the past decade, congressional spending on federal law enforcement has roughly tripled to \$14.8 billion in fiscal 1993.

In October, Congress passed legislation (HR 4542 — PL 102-519) making carjacking a federal crime. Congress also came reasonably close to clearing a major anti-crime package (HR 3371) that would have created new federal offenses for crimes such as the murder of local police officers assisting in federal investigations.

Supporters argue that these laws — 3,000 of them and counting — give the federal government the opportunity to provide states with invaluable help through additional agents, prosecutors and courts.

In addition, federal courts tend to impose longer jail terms, often because of mandatory sentencing guidelines. By bringing a case before the federal bench, in many instances, "you can at least double the sentence a defendant would have received in state court," says Cheryl Epps of the National Association of Criminal Defense Lawyers.

Donald Baldwin, executive director of the National Law Enforcement Council, an information clearinghouse for police organizations, says that an extensive federal criminal code also provides more "consistency" nationwide. Creating a federal offense allows state governments to fashion something close to a national legal standard of procedure and penalties regarding certain crimes, such as drug trafficking. Given the increased mobility of criminals and the decreasing importance of state boundaries, this legal continuity, Baldwin says, "has proven helpful."

Moreover, many states are happy to have the federal government pick up part of the tab for local law enforcement.

The federal government often has targeted law enforcement resources in areas with high crime and drug rates. "In New York City, the mayor and the people in the neighborhoods love this," said an aide to D'Amato. "I mean in some areas, targeted law enforcement has literally turned them around."

By David Masci

Rep. Charles E. Schumer, D-N.Y., who sponsored this year's carjacking legislation, argues that the federal government must assume a greater responsibility for law enforcement. "We have a crisis in crime," he said. "It's like America in the early 1900s, when the states were unable to deal with problems like child labor and the sweatshops and the federal government had to step in."

Schumer and others in both houses are confident that Congress will continue to expand the federal government's role in fighting crime. A likely early effort will be passage of a new version of this year's anti-crime package, which included provisions on gun control and mandatory death sentences. That bill died in the Senate Oct. 2 when Democratic supporters failed to cut off a threatened Republican filibuster. (*Weekly Report*, p. 3167)

Dangers of Federal Involvement

But many opponents of the "federalization" of criminal law think it will do more harm than good. Charles "Bud" Meeks, executive director of the National Sheriffs' Association, feels that by "stepping in," the federal government may be infringing on states' police power.

"By passing statutes in an effort to make [the situation] better, we're getting closer to a federal police state," he said, adding that localities already are doing a "fantastic job with the resources they have." Meeks and others feel that local crime problems require local solutions and that the Founding Fathers recognized this when they wrote the Constitution leaving criminal justice to the states.

Meeks said he feels that if the trend toward greater federal involvement continues, states may begin to shift their resources away from law enforcement in the expectation that Washington will pick up the slack. That would just accelerate the shift from state to federal policing, he says.

And opponents concerned with defendants' rights argue that creating a parallel federal law gives prosecutors an unfair advantage by letting them pick the judge or court — local or federal — most likely to convict.

Impact on Courts

Criticism also comes from those who feel that federalizing crimes will overburden federal courts and lower the quality of justice.

The federal courts' criminal caseload has increased by 46 percent

3,000 Federal Crimes



The U.S. Constitution names one federal crime: treason. Nevertheless, the federal government has long been involved in the war against crime.

The founders envisioned a criminal justice system administered at the state level, with the 10th Amendment reserving to the states all powers that were not specifically granted to the federal government.

But Prohibition in the 1920s and the rise of organized crime accelerated the establishment of an extensive body of federal criminal law.

By the 1960s, crime had become a standard issue in presidential campaigns. And in the years that followed, Congress passed many anti-crime laws.

There are more than 3,000 federal criminal offenses. The following is a list of just a few of Congress' more recent laws, both broadly and narrowly tailored:

- **Anti-Auto Theft (PL 102-519)** — Enacted this year, it made "carjacking" — armed robbery of a vehicle while the driver is present — a federal crime. It imposes a maximum penalty of life in prison when the theft results in death.

- **Animal Research Protection (PL 102-346)** — The law made it a federal crime to vandalize biomedical research laboratories, farms, rodeos and virtually all other facilities that use animals commercially. It set sentences from 10 years to life in prison for injuries that people suffer during attacks on facilities covered under the act.

- **Crimes Against Religions (PL 100-346)** — Cleared in 1988, the statute made it a federal offense to damage or deface religious property or interfere with anyone's free exercise of religion. Penalties included life imprisonment when a death resulted from activities prohibited under the act.

- **Omnibus Drug Initiative Act of 1988 (PL 100-690)** — The act expanded anti-drug laws. It established new federal offenses for child pornography and obscenity. More specifically, it made it illegal for anyone with custody of a child to allow that minor to be used in the creation of pornographic material.

- **Comprehensive Crime Control Act of 1984 (PL 98-473)** — The act made murder-for-hire a federal crime when interstate commerce was involved. It also made murder and assaults federal crimes if they were committed in aid of racketeering activities.

- **Anti-Arson Act of 1982 (PL 97-298)** — This act expanded federal arson law to include all property used in or affected by interstate or foreign commerce. Previous law had allowed federal prosecution only when an explosion had resulted.

- **Drug Abuse Prevention and Control Act of 1970 (PL 91-513)** — The legislation built on earlier laws to expand federal jurisdiction in the war against drugs. It set new penalties for drug trafficking and possession.

- **Omnibus Safe Streets and Crime Control Act of 1968 (PL 90-351)** — The act set extensive restrictions on the distribution, sale and possession of firearms, and prohibited the sale of a handgun to a person under 21 or to someone not living in the dealer's state. It also prohibited the possession of firearms by felons, mental incompetents, illegal aliens and others.

—David Masci

over the last decade. Opponents of federalization say that these increases are forcing the system to dispense criminal justice quickly, leaving less time for careful consideration of each case.

Chief Justice William H. Rehnquist echoed this argument in the 1991 Year-end Report on the Federal Judiciary. Calling the court system a "resource which is both precious and exhaustible," Rehnquist compared the federal bench with "a city in the arid West which is using every bit of its water resources to supply current needs.... In that situation, we must conserve water, not think of building new subdivisions."

But Baldwin says Rehnquist and others are missing the point. "If getting more criminals off the street is clogging up the court system," he says, "then clog it up."

And clearly, the federal government is preparing for more criminals. According to statistics provided by the Bureau of Prisons at the Justice Department, federal prison capacity was expanded by more than 10,000 persons from 1989 to 1991. Currently, the government plans to almost double capacity to more than 85,000 over the next five years.

One landmark piece of legislation in this process is the Drug Abuse Prevention and Control Act of 1970 (PL 91-513), which turned most drug-related crimes into federal offenses. According to Meeks of the sheriffs' association, the 1970 act and related statutes have led prosecutors to try most major drug dealers in federal court.

Consequently, the number of federal drug prosecutions has ballooned by 280 percent since 1980. Some of this increase is tied to a rise in the sale and consumption of illegal narcotics. The rest, opponents say, is attributable to the expansion of federal criminal law.



Suspects lie on the ground while U.S. marshals make a drug raid in Washington in 1989.

As Americans grow increasingly frustrated with crime rates that have more than tripled in the last 30 years, government at every level has scrambled to respond. Congressional spending on federal law enforcement has roughly tripled in the past decade; many states are happy to have federal help in paying for local law enforcement.

Still, more than 95 percent of all criminal prosecutions in America are dealt with at the state and local level. And this figure has not changed much recently, according to Vivian Watts, a consultant with the Advisory Commission on Intergovernmental Relations, which studies the relationships between different levels of government.

But, Watts says, passage of new criminal laws has forced federal courts to shift resources to more common street crime and away from traditional prosecutions, such as cases involving copyright abuse and Social Security fraud.

Opponents of the expanded federal role say that the federal civil justice system also is suffering as a result of the greater number of criminal cases. Robert Raven, a former president of the ABA, pointed out in a recent speech that from 1980 to 1990, the number of federal prosecutors doubled while, during the same period, the number of federal judges increased by only 10 percent. This, according to Raven, has led to more criminal filings and has lengthened the waiting period for federal civil

cases by three months over the last year.

Political Motivations

Finally, critics of greater federal involvement question the motivations of congressional sponsors. They charge that members create new federal laws as a shield against criticism that the government is not doing enough to fight crime.

The ABA's Robinson says Congress is looking for "quick and cost-free solutions." However, she warns, "cost-free" is actually very costly in terms of prosecutors, judges and jails.

But proponents feel federal statutes can be helpful. The D'Amato amendment was not intended as a panacea, a D'Amato aide said, but it and similar provisions "might put some very bad people away for a longer time than in the state system."

As Congress prepares to resume business in 1993, some members likely will push for further federalization of criminal law, separately or as part of a new crime bill. Proposals to bring everything from juvenile justice to homicide into the federal system are likely to be topics of debate. And yes, D'Amato is expected again to offer an amendment making federal offenses of most crimes committed with guns.

In the long term, if the crime rate continues to increase, Congress will almost certainly further expand the federal role in law enforcement.

"When the streets aren't safe, government is failing," Schumer says, adding that "there are many more [areas] where the federal government ought to be involved."

Or as Watts of the intergovernmental relations commission said, "It's very hard for politicians at any level to vote against anti-crime legislation."



Schumer



D'Amato

If President Clinton is serious about cutting federal spending, he should hand a sharp ax to his new Attorney General designate and tell her to start swinging it. Justice is Washington's fastest-growing and most duplicative bureaucracy.

How about a little restructuring?

By Janet Novack



The Justice Department has been a prime instrument for thrusting the federal government ever deeper into the lives of the citizenry.

SINCE 1980 the U.S. Department of Justice's budget has more than quadrupled. In this period, Justice's payroll has swelled from 53,400 to nearly 98,000, growing 4½ times faster than federal civilian payrolls as a whole. Today there are 4,200 local assistant U.S. attorneys, 2½ times as many as in 1980.

As its staffs have grown, so has Justice's role in American society—although the real work Justice does hasn't risen as fast as its staff. This illustrates once again the truth of C. Northcote Parkinson's Law of bureaucracy: Work expands so as to fill the time available for its completion. And Parkinson further observed, as the real or imagined work expands, the bureaucrats ask for more bureaucrats to do it.

The Justice Department has been a prime instrument for thrusting the federal govern-

ment ever deeper into the lives of the citizenry. When the U.S. government was born there were 3 specific federal crimes: treason, counterfeiting and piracy on the high seas. With patriotism in intellectual disrepute, there isn't much work for Justice in the treason line today. Counterfeiting remains a problem but accounts for only about 2% of U.S. prosecutions. Old-fashioned piracy scarcely exists. But Justice is not running out of work. Congress keeps defining new crimes. Today there are not 3 federal crimes but more than 3,000.

Why has Justice grown so explosively?

Because the politicians, frustrated by high taxes and by the deficit, have found a way to grandstand for the voters without increasing visible taxes. Hiring a few thousand new lawyers and sleuths is a lot cheaper than finding tens of



Attorney General designate Janet Reno
Will she carry a sharp enough ax?



Representative
Charles Schumer
(D-N.Y.)

**"This is one
thing people
are willing
to pay for."**

billions of dollars for new programs. But this is not a cheap exercise for society. In a recent article (*Feb. 15*), *FORBES* quoted experts who estimated that every dollar the government spends on regulatory enforcement inflicts about \$20 in compliance costs upon private citizens.

Justice increasingly thrusts itself into American life as the policeman for expanding federal regulation. Many of the new federal crimes Congress has created are actually bastard children of regulation, whether it's in banking, securities trading or the environment, or even the war on drugs. Distributors of certain chemicals risk going to jail if they don't screen their customers to weed out potential illegal drug-makers; car dealers and other merchants now break federal law if they do not report someone paying with large amounts of cash.

Business is even being forced to pay some of the direct costs of Justice's growth. Congress last year ordered that registration fees paid by drugstores, doctors and other legitimate dispensers of controlled substances be quadrupled (to \$66 million a year) to pay for criminal investigations into the illegal diversion of drugs.

Political leverage is what this is all about. Passing new laws makes Congress seem responsive to the wants and fears of the voter. *Seem* responsive. Stealing someone's car at gunpoint was already a serious crime in all 50 states. But after a Washington, D.C. suburban mother was killed in a savage carjacking last September,

Congress made a show of getting tough on crime by making armed carjackings a federal crime. Now carjackings can be prosecuted by U.S. Attorneys, if they choose. So far the feds have prosecuted only about two dozen cases but have made lots of headlines doing it.

Representative Charles Schumer (D-N.Y.), chairman of the House subcommittee on crime and the sponsor of the carjacking bill, is proud of his work: "This is why government was formed, to make people feel safe. This is one thing people are willing to pay for."

Trouble is, they are already paying for it through state and local law enforcement agencies. In 1991 state and local governments spent about \$75 billion on cops, prisons, prosecutors and courts, a sum in no way diminished by increased federal spending.

There is no evidence that adding a federal layer of law enforcement decreases the number of armed carjackings.

Burke Marshall, a noted Yale Law School professor, recently examined the Justice Department for the Clinton transition team. Opines Marshall: "If we're talking about the kind of crime enforcement people are interested in, the money ought to go into building up the local police and enforcement rather than increasing the bureaucracy in the Department of Justice." Despite the near doubling of the Justice payroll in a decade, state and local governments still handle 94% of all prosecutions.



Political leverage is what this is all about. New laws make Congress seem responsive to the wants and fears of the voter.

Far from helping local governments counter crime, the feds have actually cut back their financial support for the locals. In 1976, \$872 million, or 26% of federal justice spending, went to local law enforcement; in 1990, only \$728 million, or 7% of the pot, did. Supreme Court Chief Justice William H. Rehnquist has concluded: "The nation can no longer afford the luxury of state and federal systems which work at cross-purposes or which irrationally duplicate each other's efforts." Clinton has proposed putting more federal money into support for local cops. But this could simply lead to more duplication.

Too often in federal enforcement the name of the game is publicity, not a reduction in the amount of crime. In cases with high publicity value, federal prosecutors sometimes go after a criminal who is already under state indictment or is already in the state pen. In 1991 the U.S. Attorney in Philadelphia tried a 66-year-old man who had already been convicted in state court of running a drug and crime ring and was in the state pen facing a 20-to-40-year term.

Federal prosecutors are also reaching down into the local police blotter and trying all sorts of gun and drug cases. "These are all cases that the locals can try, but the federal prosecutors cherry pick them," complains Newman Flanagan, who retired last year as Boston's district attorney and is now executive director of the National District Attorneys Association.

Yet the Justice Department has been remarkably successful in wrapping its efforts in a noble mantle. Representative Bob Wise (D-W.Va.)

was from January 1989 through 1992 chairman of a House subcommittee that attempted to oversee Justice. "If you criticize Justice," Wise says, "the implication is created that you're undercutting the effort to fight drugs and criminals." The Justice Department, he adds, "is an incredibly deep bureaucratic swamp."

Like any swamp, this one is full of decayed matter. U.S. District Court Judge J.P. Stadtmueller was U.S. Attorney in Milwaukee before he was appointed to the bench in 1987. Judge Stadtmueller says: "Many U.S. Attorneys' offices have 25% to 30% deadwood. If these people were in private law firms, they would have been out on the street a long time ago."

Like any bureaucracy, this one moves inexorably toward entrenching itself. Until the early 1980s assistant U.S. attorneys basically served at the pleasure of the country's 93 U.S. Attorneys, who are appointed by the President. The U.S. Attorneys could fire their assistant attorneys. But thanks to a series of court decisions and a 1990 law passed by Congress, assistant U.S. attorneys now enjoy what amounts to near lifetime job security.

Many Justice Department lawyers have every incentive to seek job security. U.S. Attorneys earn \$113,500, while assistant U.S. attorneys without supervisory responsibilities now earn up to \$87,900 a year—and up to \$94,900 in high-cost cities like New York and Los Angeles. National median earnings for lawyers: \$56,420. Former D.A. Flanagan notes that as Boston D.A. his pay was only \$72,500; he also says his assistants generally earned little more than half



Federal prosecutors are also reaching down into the local police blotter.

Leti Shoggin's Moorlin Camp



Atlantic City attorney Rudolph Westmoreland
A jury acquitted him, but it cost him \$40,000 to defend himself.



With the collapse of the Soviet Union, the FBI can no longer justify so many counter-intelligence agents (the exact number is classified). Will it cut back? Don't be silly.

of what their counterparts in the federal government did, while carrying a heavier caseload.

No surprise then that annual turnover among Justice Department lawyers was just 5% last year, down from 13% in 1980. The federal government's 31,000 criminal investigators (not all in Justice) do nicely, too, averaging \$62,000 a year, including overtime, compared with a median of \$27,500 for all police and detectives.

Are Justice Department lawyers overworked? Some certainly are. But between 1980 and 1991 the number of criminal cases filed per assistant U.S. attorney dropped 40%; civil filings per attorney fell 38%. The number of individuals indicted per assistant attorney has dropped 33%. There's clearly a productivity problem here.

What do these 98,000 Justice employees do? Three-fourths are in what might be termed Justice's wholly owned subsidiaries: the Bureau of Prisons, 24,000; the FBI, 24,000; the Drug Enforcement Administration, 7,100; U.S. Marshals, 3,700; Immigration & Naturalization Service, 11,700.

As for the more troublesome balance, almost 1,400 are at the top in "general administration." Another 13,500 are lawyers and their assistants. Burke Marshall says this about the swelling Justice bureaucracy: "Because of the proliferation of federal crimes, the turf fighting is getting worse."

For example, the Drug Enforcement Administration, Federal Bureau of Investigation and Immigration & Naturalization Service all have some responsibility for waging the war on drugs. The FBI and DEA maintain separate computerized drug intelligence systems, as do numerous agencies throughout the federal government. Wouldn't it be more efficient if they pooled their resources? Yes, according to estimates that DEA informally provided to Congress, about \$100 million a year could be saved by merging systems.

But instead, in 1990 yet another organization—the National Drug Intelligence Center—was layered on top to build a new comprehensive drug trafficking database. When fully operational, it will have 150 employees in Johnstown, Pa., the home of Representative John Murtha (D-Pa.), who pushed funding for it through Congress.

Last year, sensing big bucks in guns, the FBI attempted to gain more jurisdiction over firearms violations—the traditional province of Treasury's Bureau of Alcohol, Tobacco & Firearms—leading to a personal confrontation between then Treasury Secretary Nicholas Brady and then Attorney General William Barr.

With the collapse of the Soviet Union, the FBI can no longer justify so many counterintelligence agents (the exact number is classified). Will it cut back? Don't be silly. So far it has

transferred 385 to fight violent crime and 65 to investigate health care fraud. Now it is enthusiastically pursuing alleged economic spying against the U.S., much of it, it is said, by our allies.

The FBI isn't always the encroacher. The Secret Service, which finds itself with rather too little to do to justify manpower between elections, got friends on the Hill to assign it S&L investigative duty.

In the early 1980s the Reagan Administration actually came close to merging DEA and FBI, and in 1984, 56 separate projects were undertaken to integrate various functions of the two agencies. Only 9 of the 56 projects were completed, the rest dropping into bureaucratic limbo. One successfully merged area was training. But now DEA has gotten \$11 million and is hunting for another \$23 million to build its own training center in Quantico, Va.

With so many federal agencies involved in the war on crime, sometimes they end up not only duplicating but tripping over each other. In one notable case, Jay Stephens, U.S. Attorney for the District of Columbia, had to referee between the DEA and the FBI, which were both trying to trap then Mayor Marion Barry on a drug charge. (Stephens persuaded the DEA to back off.)

The agencies are all so keen to claim credit for drug seizures that the government had to create a special Federal-wide Drug Seizure System to eliminate double counting (FDSS showed 3,034 pounds of heroin seized in 1991, with Treasury's Customs Service claiming credit for 2,960 pounds and DEA insisting it was responsible for 2,455 pounds).

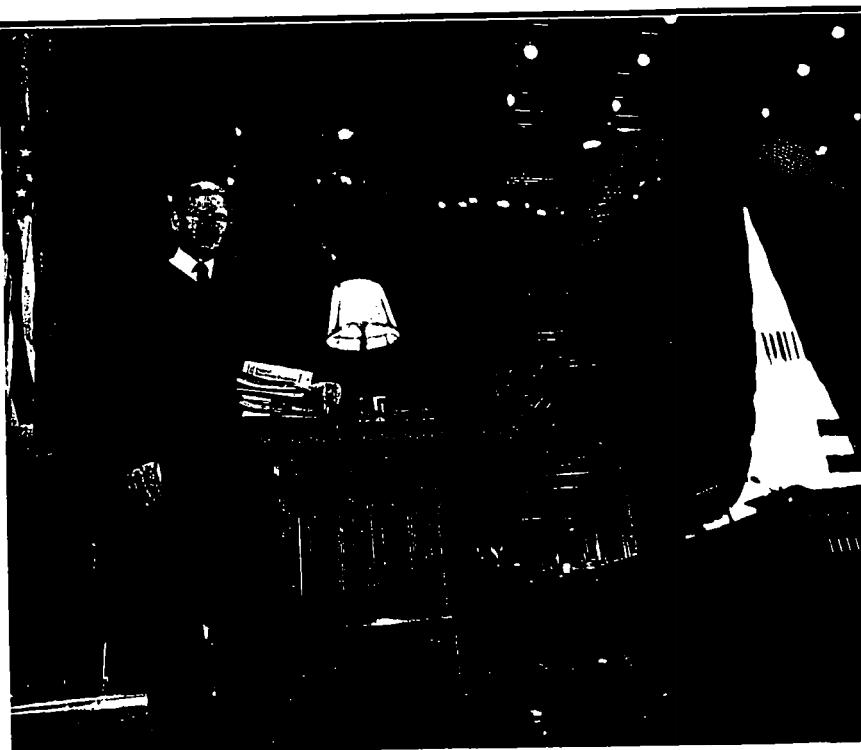
Meanwhile, Congress keeps handing Justice new excuses to demand more money and personnel. Congress attempted to rein in lenient judges by creating strict guidelines for sentencing offenders, and decreeing that convicts must serve at least 85% of their federal sentences for crimes committed after Nov. 1, 1987. Since then, responding to what they saw as a popular demand for a crackdown, the politicians have layered stiff mandatory minimum sentences for certain drug crimes on top of the guidelines.

These tough mandatory sentences have done little to reduce drug traffic, but they have enabled the Justice Department to create new jobs in the prison system to guard convicted two-bit dealers. Since 1986 the Bureau of Prisons has doubled in size, to 24,000 employees. It's expected to grow to 37,000 by 1995.

Harvard University Associate Professor Mark A.R. Kleiman is a respected student of the drug problem. He says the money used building jails and hiring guards could more efficiently be spent for intensive supervised probation or parole with drug-testing for drug-using offenders:

U.S. District
Court Judge
J.P. Stadtmueller
**"Many U.S.
Attorneys' of-
fices have 25% to
30% deadwood."**

Dave Schlowke



"We've got to learn how to control people without paying their room and board bills."

The discovery by our society of any new category of crime is a potential growth area for Justice. In that sense environmental crime has been a godsend. Washington defense attorney Reid Weingarten, who spent ten years as a Justice prosecutor, says: "The attitude among federal prosecutors is that if a truck driver dumps toxic waste into the river, the president of the company goes to jail if he had a lax environmental program."

"The federal government has no business making every piece of dirt dropped on your property a federal crime," complains Paul Kamenar, executive legal director of the Washington Legal Foundation. Kamenar's foundation has taken up the causes of three men—in Florida, Pennsylvania and Maryland—sent to jail for wetlands violations. Warns Kamenar: "Congress is ready to federalize anything they think is a social ill."

The savings and loan mess certainly proved that. No matter that Congress itself bears most of the responsibility for the mess, no matter that many congressmen were deeply implicated, Congress was happy to give Justice the money to seek scapegoats in the disaster (*FORBES*, Sept. 28, 1992). In 1990 and 1991 Congress voted Justice an extra 1,854 attorneys, criminal investigators and support staffers, including 320 new prosecutors in the U.S. Attorneys' offices.

Atlantic City attorney Rudolph Westmoreland was indicted in Milwaukee in 1991 on three counts relating to an alleged conspiracy to

defraud a now defunct S&L. His crime? Prosecutors alleged Westmoreland fibbed on a mortgage application for a four-bedroom Phoenix house when he said he was buying it as a second home. Westmoreland, they asserted, was actually buying the house not for himself but for his brother. (The mortgage in question was paid in full after the brother took title to the house and refinanced it.)

After a three-day trial, a jury acquitted Westmoreland. Cost to Westmoreland to defend himself: \$40,000. Cost to the taxpayers to prosecute him: plenty.

When the thrift mess is cleaned up, what will happen to the S&L prosecutors? Professor Parkinson would know the answer. Already there's talk of how useful they'd be pursuing bankruptcy fraud or other white-collar offenses.

Not satiated with spending taxpayer money, the Justice Department—like the Argentinean army under Perón—builds revenue sources of its own. The army ran its own factories and businesses, some built up with seized assets. Since 1988 Justice has spent more than \$850 million realized from the seizure of cash and assets associated with criminal activities.

Seizures began to be used aggressively in 1978 as a weapon against drug dealers. But since the late 1980s seizures have been used—along with money-laundering charges—against all manner of alleged white-collar criminals. Money laundering has replaced RICO (the Racketeer Influenced & Corrupt Organizations Act) as Justice's favorite weapon for attacking business people. "RICO looks mild by comparison to the



With so many federal agencies involved, they sometimes end up not only duplicating but tripping over each other.

money-laundering statutes. Money laundering is much easier to prove," says Michael Goldsmith, a Brigham Young University Law School professor who is an expert on both laws.

RICO charges, though temptingly broad, turned out to be difficult for prosecutors to prove. Rudolph Giuliani, the publicity-loving former U.S. Attorney in Manhattan, had some momentary glory when he won RICO convictions against executives from Princeton/Newport Partners, for alleged tax violations. But the appeals court later reversed those convictions.

"There's no sense that Justice is concerned about citizens' rights, no matter what kind of crimes they're accused of," says Miami lawyer Talbot D'Alemberte, past president of the American Bar Association and a friend of Attorney General designate Janet Reno.

In *Macbeth* Shakespeare has Banquo say to the witches: "If you can look into the seeds of time, and say which grain will grow and which will not, speak then to me. . . ."

Okay, we will. There are several grains in the Justice Department that promise a lot of growth:

Justice's environmental division in Washington, with 660 staffers, is sure to grow smartly under Clinton, since he has promised even more environmental enforcement. Look, too, for more environmental cases to be initiated in the field by the U.S. Attorneys who dream of the exposure they could get from them on the nightly news.

The Civil Rights division (with 510 employees) and Antitrust (with 460) are almost guaranteed extra business and more growth.

Last year Congress made it a federal offense to fail to pay child support to children in another state. Clinton has endorsed a bill being pushed by key Democrats that would make wife-beating a federal crime, too. More work, lots more, for Justice.

And then there's the Bureau of Prisons. Absent any major revamping of the sometimes illogically harsh mandatory minimum sentences, the prison bureaucracy can do nothing but grow and grow.

Any bets on how big the Justice Department will be three years into the Clinton Administration? 100,000 employees? 110,000? More? ■

If the public would stop believing that the federal government can fix things that are unfixable or too expensive to fix, perhaps government spending could be brought under control.

"Collective lunacy"

By Damon Darlin

PRESIDENT CLINTON stood before Congress, boasting of slashing his White House staff and pledging to cut another 100,000 federal bureaucrats. He urged the hiring of 100,000 local police instead.

Loud applause. It was an empty promise but a politically palatable one. Hiss the bureaucrats. Cheer for the man in blue.

Not so fast, though. Hear out James Q. Wilson, who has spent his entire academic career studying bureaucracies and crime. This University of California, Los Angeles, political scientist has long argued that bureaucrat-bashing misplaces the responsibility for bad government. His brilliant, beautifully written 1989 book *Bureaucracy* argues that it is simplistic to blame bloated and inefficient government on greedy bureaucrats. The political system is the real problem, the author says.

Interviewed by FORBES in his airy home looking out to the Pacific Ocean just north of Malibu, Wilson pointed out that the bureaucrats are simply doing what Congress tells them to do, and that Congress is responding to a public encouraged by politicians to believe in the myth that the federal government can cure all ills and solve all problems. "The result is that everyone is acting rationally and the collective result is monstrous or lunacy," says Wilson.

Take the 1991 federal highway law, which purportedly will rebuild America's transportation system. The text, he says, is ten times as long as the original Eisenhower Administration

law creating the interstate highway system. Under the 1991 law an administrator isn't charged simply with getting a road built. He is charged with protecting the environment, advantaging the supposedly disadvantaged, preserving history and taking care of the disabled. Little wonder that the bureaucracy moves sluggishly and inefficiently.

The resulting frustrations, Wilson says, do not, as often supposed, arise from poor management. "They arise out of governance problems," he wrote in *Bureaucracy*.

Name most any social problem—crime, pollution or poverty—and you'll see what Wilson is talking about. Everything has become a concern for the federal government. It wasn't always thus. As the preceding story shows, there were only 3 federal crimes at the founding of the Republic; today there are more than 3,000. Redistributing income and creating job quotas was no part of the federal government's job.

But in recent years, people have come to believe that the federal government is responsible for everything—from curing AIDS to righting ancient wrongs. "It's the most profound transition that has occurred in American government in my lifetime," says Wilson of this shift in popular beliefs.

Carjacking: Call the FBI. Scarce waterfowl: Bring in a U.S. Attorney. Wilson: "You never hear any debate about the proper role of the federal government except from a few cranky senators.

The Stock Market/Todd M. Halman



The Consequences of Federalizing Criminal Law

Overloaded courts and a dissatisfied public

BY ROGER J. MINER



The power of Congress to define federal crimes has been exercised more and more in recent years to criminalize conduct primarily and traditionally the concern of the several states. This development often is referred to as the federalization, or more properly the nationalization, of criminal law, and is a phenomenon that has had and continues to have some serious consequences worthy of our attention. Before reviewing those consequences, however, it is necessary to examine how and

why the federal government has come to be involved in the prosecution of crimes historically handled at the state level.

In urging ratification of the Constitution, the Framers assured their countrymen that "internal order," as they called it, would be a state responsibility. The Constitution itself refers to only a few specific crimes: counterfeiting; treason; piracies and felonies committed on the high seas; and offenses against the law of nations. The earliest Congresses found authority in these provisions, in their enumerated

powers, and in the Necessary and Proper Clause ("the Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution the [enumerated] Powers. . .") to classify as criminal various types of conduct generally thought to be detrimental to the operations of the central government. Customs offenses, crimes committed within federal enclaves and interference with the federal courts fell within this category of exclusive federal jurisdiction. All other varieties of crimes were defined by state legislatures and prosecuted in state courts.

As the nation expanded and the population increased in the aftermath of the Civil War, new forms of antisocial conduct came to the attention of Congress. In response to the "green cigar" scam (the offer of counterfeit bills at a substantial discount from face value) and other quaint frauds then current, Congress included an antifraud provision in the 1872 codification of the postal laws. Thus was born the notion that the national interest required federal prosecution of any scheme or artifice to defraud as long as the mails were involved. The sponsor of the postal legislation said that the mail fraud provision was necessary "to prevent the frauds which are mostly gotten up in the large cities . . . by thieves, forgers, and rascals generally, for the purpose of deceiving and fleecing the innocent people in the country." *Cong. Globe*, 41st Cong. 3d Sess. 35 (1870) (remarks of Rep. Farnsworth). Although Congress could point to its constitutional power to establish post offices as authority for the legislation, this concept of fraud as a federal crime marked the first serious trenching on state criminal jurisdiction.

Interstate commerce and criminal jurisdiction

At the turn of the century, Congress discovered the Interstate

Commerce Clause as a source of criminal jurisdiction. The Supreme Court approved, and the criminal law never has been the same. The supposed need to protect the channels of interstate commerce led to the enactment of the Lottery Act, prohibiting the interstate transportation of lottery tickets, and the Mann Act, prohibiting the transportation of women across state lines to engage in immoral practices. The latter statute impelled Judge Henry Friendly to ask this rhetorical question in his 1972 lecture on federal jurisdiction: "Why should the federal government care if a Manhattan businessman takes his mistress to sleep with him in Greenwich, Connecticut, although it would not if the love-nest were in Port Chester, N.Y.?" Judge Friendly questioned whether federal criminal prosecutions of this type serve any true federal interest. I question whether such prosecutions constitute a threat to the dual system of government so carefully constructed by the Framers of our Constitution.

Misuse of the channels of commerce has formed an important theoretical underpinning for the ongoing expansion of federal criminal jurisdiction. Under this rubric, Congress has replicated many state criminal statutes, adding only an interstate element: kidnapping, theft, transportation of stolen vehicles, flight to avoid prosecution, sexual exploitation of children, firearms offenses and gambling are some examples. As recently as 1984, a whole new slew of state-type offenses were federalized on the basis of interstate movement. These included the counterfeiting of credit cards and theft of livestock having a value in excess of \$10,000. Yes, cattle rustling is now a federal crime!

Roger J. Miner is a judge of the U.S. Court of Appeals for the Second Circuit. This article is adapted from a speech Judge Miner delivered at the 1988 Attorney General's Conference on the Criminal Justice System: Approaches to Reform.

When the Supreme Court approved congressional regulation of activities affecting commerce, it sanctioned the most expansive basis for criminal intervention in crime control yet invoked. This concept provided the shaky constitutional support necessary for such legislation as the Hobbs Act, which reaches the local crimes of robbery



Misuse of the channels of commerce is the basis for much of the federalization



and extortion, and the Extortionate Credit Transaction Act, which reaches the local crime of loan-sharking. The Drug Abuse Prevention and Control Act, which now generates more than 20 percent of all federal criminal prosecutions, includes a congressional declaration that federal prosecution of interstate drug trafficking is necessary for control of the interstate incidents of trafficking. Here again, the "affecting commerce" concept was called upon as authority for federalizing crimes punishable in all states of the Union. The Racketeer Influenced and Corrupt Organizations Act not only is grounded in the same interpretation of the commerce power but also includes in its definition of racketeering activity a list of specific crimes chargeable under state law. The Travel Act (prohibiting interstate travel in aid of "unlawful activity" variously defined) is another example of a statute involving a wholesale incorporation of state crimes. The list goes on.

The impetus for the expansion of federal criminal law into areas of state and local concern has come

from three directions: from Congress, from federal prosecutors, and from local and state governments themselves. In the case of Congress, it is common practice to identify a problem involving unacceptable conduct in one state or region, classify that conduct as criminal, and define it as a new federal crime, regardless of whether it is already a state crime. This procedure is often unaccompanied by any determination of the willingness or ability of state government to deal with the problem. Federal prosecutors have been known to argue for expansive interpretations of federal criminal legislation in an effort to fill perceived gaps in local criminal prosecution. An example is the use of the mail fraud statute to prosecute local criminal corruption. Unfortunately, the courts often go along with these arguments. Former Chief Justice Burger once opined that, as new types of frauds develop, the mail fraud statute can be used as a stopgap device to deal with the new phenomenon on a temporary basis until specific legislation is enacted. Finally, state and local governments, complaining of a lack of resources, find it convenient to defer to federal prosecution rather than to face up to issues they are actually in a better position to confront. At times, of course, a breakdown in local law enforcement leaves federal intervention as the only alternative.

Important consequences

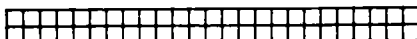
Some of the consequences of the federalization of criminal law are obvious and some are not so obvious, but they all implicate important pragmatic and constitutional problems. The most obvious consequence is the overloading of federal courts resulting from the prosecution of cases lacking in any direct federal interest or involvement. We see such cases every day and can only wonder why they are not prosecuted in the state courts, which are fully equipped to handle them. That a bank is federally in-

sured, for example, does not seem to create a very great federal interest for conferring jurisdiction on federal courts to hear cases involving \$100 bank thefts. Yet there is a statute that confers federal jurisdiction in just such cases. The federal courts should be reserved for such important direct federal interest crimes as capturing or killing carrier pigeons owned by the United States, 18 U.S.C. § 45; interstate transportation of water hyacinths, 18 U.S.C. § 46; false crop reports, 18 U.S.C. § 2072; and false weather reports, 18 U.S.C. § 2074. Between 1983 and 1987, criminal filings in the U.S. district courts increased by 25 percent to 42,000. In some districts, the courts have little time for anything but criminal trials. This detracts from other important work that those courts should perform, including what I consider to be their most important work—the protection of individual civil rights and civil liberties when the states have failed to do so.

Every time Congress rushes to enact a criminal statute to deal with a problem that exists in one state or region there is an undermining of the dual system of government structure erected by the Founders of the Republic. What may be considered serious antisocial conduct in one part of the country may not be considered quite so serious elsewhere. Gambling may be offensive to the citizens of Utah, but not to the citizens of Nevada. The states must be allowed to accommodate such differences and to experiment with innovative approaches to the prosecution of crime. Many states already have charted new courses in the areas of sentencing, plea bargaining, victims' rights and other criminal procedures, as well as in the definition of substantive crimes. State supreme courts have interpreted state constitutions to create in criminal cases rights not guaranteed by the U.S. Constitution.

President Franklin Roosevelt said that a state experiment that fails has little effect on the rest of the nation. It is also true that states can modify

or repeal unworkable methods and approaches much more quickly than can the national government. By contrast, federal legislation affects the entire nation, is cumbersome to change, and often remains on the books long after it loses any value it once may have had. In this regard, I refer you to 18 U.S.C. § 336, which imposes criminal liability upon one



I am afraid of the discretion of federal prosecutors



who issues a check for less than \$1.00, intending it to circulate as money. Since checks for less than \$1.00 are quite rare in today's economy, it safely may be said that this statute has outlived its usefulness.

Federal courts now are bound to sentence according to guidelines established by the Sentencing Commission. Although the constitutionality of the legislation establishing the commission now is beyond comment, I do question the wisdom of turning the federal judiciary into a corps of mechanics required to impose criminal punishment without regard to family considerations or local conditions. All of this is done in the name of eliminating disparity, a goal that is at least questionable. A sentence imposed by a federal court, without individualized consideration, and which would be much different if imposed by a state court, serves neither the needs of the defendant nor his or her community. The excision of conduct detrimental to society must be accomplished by a scalpel rather than a chain saw.

I am afraid of federal prosecu-

tors. I am terrified by federal prosecutors. They have extraordinary discretion in deciding what crimes to prosecute, and that discretion is one of the consequences of the federalization of criminal law. I once was a state prosecutor. State prosecutors are not quite as fearsome as their federal counterparts because their discretion is much more limited. When police agencies or private individuals came to me as district attorney with evidence of crime, I was constrained to prosecute, unless the evidence was so deficient that no case could be made. United States Attorneys labor under no such constraints. How could it be otherwise? Priorities must be assigned. There are only so many federal prosecutors, and they cannot be tied up in prosecuting the interstate transportation of water hyacinths. When I was a federal district judge, I remember visiting a federal prison facility in my district. The warden begged me to persuade the U.S. Attorney to prosecute some cases of assault on prison guards. The U.S. Attorney had declined to prosecute those cases in favor of what he considered more important matters. As federal crimes proliferate, there are more declinations, some of which seem quite arbitrary and capricious to federal law enforcement agencies. When there are many offenders but only a few are chosen to be prosecuted, the public perceives that the process is unfair. Moreover, in making the critical decisions about what types of antisocial conduct are worthy of attention, the prosecutor invades the domain of the legislator, and the separation of powers is blurred.

There is another major consequence of the ongoing expansion of the federal criminal code. I call it "the disappointment of promises unfulfilled." A more harsh description might be "the deception of the public." As Congress passes laws purportedly to solve various problems through the federal criminal justice system, the public often assumes that the law is the solution.

(Continued on page 39)

sponsible for a fraction of their driving performance, it is important to look for other approaches to improve traffic safety. R. Lehman, A. Wolfe, & R. Kay, *A Computer Archive of ASAP Roadside Breath-Testing Surveys, 1970-1974*, Highway Safety Research Institute, Ann Arbor, 1975, NHTSA DOT HS-801 502.

Direct measurement of driving impairment

It would be most consistent with our goals of promoting public safety and developing fair and consistent statutes to directly measure population-compared driving impairment, and to penalize it when appropriate. Until recently, there was no easy way to measure an individual's driving ability shortly after a traffic stop. Microcomputer technology, which has produced computer games resembling driving simulators, such as Atari's *Pole Position*, is currently available. This type of testing would be an excellent starting point for developing appropriate measures of driving impairment. J. Cowan, "The Complex Relationship Between Blood Alcohol Concentration and Impairment," in R. Erwin, ed.: *Defense of Drunk Driving Cases: Criminal and Civil*, 14-36 (1985). The technolo-

gy for developing a reasonably priced, realistic driving simulator for detecting driving impairment is now available. J. Cowan and A. Stein, "Development of a Driving Simulator for Routine Impairment Measurement," Presentation to the National Safety Council Committee on Alcohol and Other Drugs, Orlando (October, 1988). After a series of validation studies with this simulator, a standard operator's performance and a cut-off point for unacceptable driving impairment could be determined, as originally suggested by the Subcommittee on Human Factors of the National Safety Council Committee on Alcohol and Other Drugs.

A testing device for use in a police station could then be developed. This would permit an initial screening of the driving ability of every suspect, including his reaction to simulated emergencies. Failing this screening would constitute the (only) probable cause for an investigation of the reason(s) for this impairment, including a blood alcohol test. Prosecution could then be based on demonstrating both a blood level and driving impairment, along with evidence of observations to confirm the drug effect. This procedure would also help to solve a parallel problem, which is recognized as a major flaw in prosecution for driving under the influence of drugs—the lack of a

demonstrable relationship between any drug blood level and impaired performance. See National Institute on Drug Abuse, "Drug Concentrations and Driving Impairment," 254 *Journal of the American Medical Association* 2618 (1985). The benefits of measuring driving ability with a simulator are potentially much greater than those from focusing solely on alcohol, since the other causes of impairment could then be investigated and modified. Drivers who were impaired because of medical problems, prescription medication, or old age could also be screened out and nonpunitive remedial actions taken. This approach may be particularly appropriate for commercial drivers of trucks, buses, and taxis, who log hundreds of thousands of miles a year.

Although the research necessary to develop a precise and valid measurement of unacceptable driving impairment will take years, work could be started with relatively modest funding.

In the meantime, DWI statutes and their related jury instructions must be revised to comply with both scientific truth and constitutional law. The factfinder should act unbound by any mandatory presumptions or unproven permissive presumptions, upon all the admissible evidence in the individual case.

Federalization

(Continued from page 19)

Obviously, it is not. To illustrate: Everybody knows that most narcotic transactions are punishable under federal law. The ordinary citizen has every right to expect that violations will be prosecuted vigorously. Yet nobody makes it clear that only an infinitesimal number of the 55,000 narcotics arrests made in New York City in one year can be prosecuted federally. The federal resources simply are not there. Congress can convert state crimes into federal crimes forever, but

United States courts and United States prosecutors will never be able to handle more than a tiny portion of the tens of thousands of crimes committed in the nation each year. Great expectations lead to great disappointments, an unfortunate consequence of too much federal criminal law.

It seems almost unnecessary to observe that two laws on the same subject lead to duplication—duplication in investigation, duplication in prosecution and duplication in pun-

ishment. Recently, there was an unseemly competition between state and federal authorities in New York City over who should pursue some cases of municipal corruption. The clash ended in an agreement to divide the work. It is true, of course, that conflicts between state and federal agencies have diminished greatly as the result of the Justice Department's promotion of Law Enforcement Coordinating Committees. This program replaces competition with cooperation among

law enforcement agencies and has been very successful. There really is no need for double punishment, however, and sentences by state and federal courts for the same crimes, although not violative of the constitutional prohibition against double jeopardy, appear to violate its spirit.

Effect on citizen participation

In many important respects, the federalization of criminal law discourages individual involvement and personal participation in the democratic process. Probably the greatest danger to the republic today is the apathy of the citizenry.

For many years, I have told the story of the jury foreman who announces a verdict in these words: "Your Honor, we have decided not to get involved." Involvement, of course, is the key to the success of our form of government. Yet participation is most lacking at the level where it should be the most widespread—the local government level.

The citizenry increasingly has been conditioned to turn to federal law enforcement and to the federal courts as the first line of defense against antisocial conduct. What we are witnessing is an abdication of responsibility for self-government. In the face of municipal corruption,

it is easy to send for the "feds." If narcotics are sold on the street corners of a major city, it is a simple matter to invoke high-profile federal criminal prosecution. When loansharks and racketeers infest a municipality, local law enforcement efforts can be relaxed if federal help is on the way. But, to invite federal authorities to define and prosecute crime involving activities primarily of state and local interest is to concede that state and local government cannot be moved to serve the will of the people, and that the people are willing to forego their form of government. I do not believe that Americans are prepared to make that concession. CJ

Caseweighting

(Continued from page 23)

Budget Presentation, published by the National Legal Aid and Defender Association in 1985. The manual leads a public defender manager through budget preparation by providing step-by-step examples like the following. The hypothetical public defender manager has a caseweighting system, so he is able to pick out which cases he believes are exceptional, such as violent crime and cases disposed by jury trial. He lists these special categories, along with the number of cases in these categories which the office has represented in the past year. Using a calculator, he projects the next year's caseload by multiplying last year's percentages in these special categories by next year's projected totals. The next year's projected totals are arrived at by using an equation to calculate the current rate of increase or decrease in caseload. He may make increases where he believes there will be a change, such as a new prosecutor indicating an interest in decreased pleas and more jury trials. This is translated into a number of additional hours of attorney effort. Using local bar association and law office estimates about the number of billable hours for private

attorneys, he estimates how many new attorneys he will need for the increased hourly workload. If his system is particularly sophisticated, he may be able to estimate the amount of time attorneys spend on different aspects of the case such as legal research, and he may recommend, instead of using expensive attorney hours to research, that the funding source save money by providing public defenders with paralegals or law clerks.

At the budgetary hearing, the public defender would then present his information, showing that a typical case ending with a guilty plea may consume 6.4 attorney hours, whereas a trial consumes almost six times this amount of effort: 38.4 hours. If the county prosecutor has already indicated to the funding sources that plea bargaining will be decreased, the public defender could estimate the number of trials would increase from 10 percent for all felony cases to approximately 30 percent for all felony cases. If that was the case, by calculating projected increases, he could then show the additional public defender manhours needed because of this policy change. The public defender could also indicate

the need for increased levels of support staff.

For additional information on caseweighting and/or the Amicus System, managers can contact the NLADA. That group maintains a list of public defender offices who use the Amicus System and are willing to share information and expertise.

A national standard

Over the years, numerous national caseload standards have been established by the American Bar Association, NLADA National Study Commission of Defense Services, and others. None of these standards, except one, included any numbers. For that reason, they have not been used by public defenders or funding sources. The one standard that has been widely used, and has become the defacto standard for maximum caseload, is the 1973 President's National Advisory Committee on Criminal Justice Standards and Goals. In that report, the maximum caseload for public defenders was established as follows:

The caseload of a public defender office should not exceed the

COMMENT

FEDERAL CRIMINAL JURISDICTION: A CASE
AGAINST MAKING FEDERAL CASES

I. INTRODUCTION

Nearly two centuries ago, Alexander Hamilton, in defense of a proposed constitutional provision for the establishment of lower federal courts, wrote that the "possibility of particular mischiefs" which may be wrought by their creation should not be viewed as a "solid objection" to a system designed "to avoid general mischiefs." Such was Hamilton's conclusion to his paper outlining the "proper extent" and "proper objects" of federal jurisdiction.¹

One "particular mischief" unforeseen by Hamilton is the expansion of federal criminal jurisdiction to encompass prosecutions rightly within the purview of the states.² This expansion, and the concomitant explosion in the number of federal criminal prosecutions, has been decried by legal scholars during the past four decades.³ The

¹ THE FEDERALIST NO. 80, at 534, 541 (A. Hamilton) (J. Cooke ed. 1961). Hamilton's examples of the "proper objects" of federal jurisdiction are embodied in article III, § 2 of the Constitution. Hamilton noted that the states, by virtue of their union, were prohibited from doing certain things, such as imposing duties on imports and printing currency, because these activities would be detrimental to the Union:

No man of sense will believe that such prohibitions would be scrupulously regarded, without some effectual power in the government to restrain or correct the infractions of them. This power must either be a direct negative on the state laws, or an authority in the federal courts, to over-rule such as might be in manifest contravention of the articles of union.

Id. at 535.

Though an ardent advocate of a strong federal government, Hamilton's discussion of the role of federal courts indicates he believed that these tribunals were necessary for the enforcement of matters which necessarily were delegated by the states to the federal government in order to preserve the Union.

² See H. FRIENDLY, *The Minimum Model Today*, in *FEDERAL JURISDICTION: A GENERAL VIEW* (1973); Schwartz, *Federal Criminal Jurisdiction and Prosecutors' Discretion*, 13 *LAW & CONTEMP. PROBS.* 64 (1948).

³ See H. FRIENDLY, *supra* note 2; Schwartz, *supra* note 2. Although 25 years elapsed between the publication of these works, both Professor Schwartz and Judge Friendly recommended restraint by federal prosecutors in determining what types of offenses merit federal attention. Professor Schwartz urged that "the proper employment of the federal court in the criminal field requires the recognition . . . by United States attorneys to turn over to state authorities persons who, by the same conduct, violate local laws as well as national laws intended to be auxiliary to local enforcement." Schwartz, *supra* note 2, at 66.

Judge Friendly questioned whether federal criminal jurisdiction whose "primary basis" is the "use of facilities crossing state lines" is an unreasonable expansion of federal criminal jurisdiction. H. FRIENDLY, *supra* note 2, at 56. He asserted that: "The question whether federal criminal prosecutions have not greatly outreached any true federal interest . . . deserves the most

passage during this time of more federal statutes⁴ which federal prosecutors use to attack local crimes, notably crimes of political corruption, promises that federal prosecutions of cases with little or no federal interest will increase.

This Comment recommends a radical approach designed to limit federal criminal prosecutions to those which have a substantial federal interest by eliminating one important incentive to federal prosecution: the advantage which some federal procedural and substantive rules of law offer to prosecutors in comparison to the rules applied in the courts of many states, including New Jersey.⁵ It is therefore recommended that the application of the procedural and substantive rules of a state be applied to criminal prosecutions brought in federal courts within that state. This would eliminate the prosecutor's incentive to bring essentially state cases in federal courts, and have the effect of returning such prosecutions to their proper forum.⁶ The proposed

serious examination. . . ." *Id.* at 58. "It is thus fair to say that today '[t]here is practically no offense within the purview of local law that does not become a federal crime if some distinctive federal involvement happens to be present'—and the involvement may be exceedingly thin." *Id.* at 57 (quoting Abrams, *Consultant's Report on Jurisdiction*: Chapter 2, in *I WORKING PAPERS OF THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS* 36 (1970)).

⁴ See, e.g., Travel Act, 18 U.S.C. § 1952 (1982) (making interstate travel in furtherance of crime a federal felony); Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961-1963 (1982) (establishing additional penal provisions and more severe punishments for financial infiltration, through pattern of racketeering activity, of legitimate businesses which affect interstate commerce).

⁵ Compare *State v. Hunt*, 91 N.J. 338, 450 A.2d 952 (1982) (prohibiting warrantless seizure by state authorities of individual's telephone toll records) with *Smith v. Maryland*, 442 U.S. 735 (1979) (individual has no legitimate expectation of privacy in telephone numbers he dials) and *State v. Alston*, 88 N.J. 211, 440 A.2d 1311 (1981) (granting standing to challenge search and seizure to those with possessory interest in items seized) with *United States v. Salvucci*, 448 U.S. 83 (1980) (standing to challenge search limited to those with legitimate expectation of privacy in area searched, regardless of ownership of items seized). Compare N.J. Cr. R. 3:13-3(a)(18) (providing pretrial discovery by defendant of signed and unsigned statements of government witnesses or potential witnesses) with 18 U.S.C. § 3500(a) (1982) (prohibiting criminal defendant from obtaining statements or reports of government witnesses until witness has testified on direct examination at trial). See generally *infra* note 10.

⁶ The United States Department of Justice has a policy, established in 1959, which provides that once a state has prosecuted criminal activity, the federal government will refrain from a prosecution based on the same core of facts or conduct unless there is a substantial federal interest in the prosecution. This is known as the "Petite" policy, after the Supreme Court *per curiam* decision recognizing the policy. See *Petite v. United States*, 361 U.S. 529 (1960). Observing that the concept of dual sovereignty permits both state and federal prosecution of the same criminal conduct without violation of the double jeopardy clause, Justice Brennan, joined by Justices Black and Douglas, urged the Court to adopt the policy. *Id.* at 533.

The Justice Department does not always follow its "Petite" policy. See *In re Washington*, 544 F.2d 203 (5th Cir. 1976) (upholding denial of government's post-conviction motion to dismiss indictment, the subject of which had been source of earlier state convictions, for government's bad faith in intentionally violating its own policy), *vacated sub nom. Rinaldi v. United States*, 434 U.S. 22 (1977).

system would operate as the criminal counterpart to the mandate of the United States Supreme Court in *Erie Railroad v. Tompkins*.⁷ In federal prosecutions which have only a tenuous connection to federal law violations, state law would apply.⁸ This would be the case when the elements of a state crime more aptly describe the alleged criminal conduct than do the elements of any federal crime. When the alleged offense is clearly federal, however, federal law would apply.⁹

Several reasons exist to support this concept. One is the inherent unfairness to a defendant who loses the increased protections his state constitution may afford when he is brought into federal court. In recent years, the highest courts of several states, including New Jersey, have relied on their state constitutions in granting greater individual protections,¹⁰ particularly in the area of criminal

⁷ 304 U.S. 64 (1938). The *Erie* decision minimized "forum shopping" by civil litigants by requiring that state law be applied to civil actions brought in federal court through diversity jurisdiction. The Court recognized the inherent unfairness of permitting the outcome of a case to be decided by the forum in which it is heard as being a denial of equal protection. In addition to diversity cases, there are other instances when federal courts look to state law to supply the rule of decision. See, e.g., FED. R. EVID. 501 (privilege governed by principles of common law as interpreted by federal courts in light of reason and experience; in civil proceedings privileges shall be determined according to state law). In *Riley v. City of Chester*, 612 F.2d 708 (3d Cir. 1979), the Third Circuit considered the Pennsylvania newspaper reporter's Shield Law, 42 PA. CONS. STAT. ANN. § 5942 (West Supp. 1983-1984), in determining that reporters have the privilege not to reveal their sources in a civil case brought under federal statutes. Cf. *Branzburg v. Hayes*, 408 U.S. 665 (1972) (first amendment does not permit newspaper reporter to assert privilege before grand jury investigating crime).

⁸ Unlike the *Erie* Doctrine, this approach would require a statutory enactment. Cf. Assimilative Crimes Act, 18 U.S.C. § 13 (1982) (state criminal law applicable to crimes committed on federally-owned reservations within state). The *Erie* Doctrine, judicially adopted, applies to cases clearly arising under state law which are in federal court solely because of diversity jurisdiction.

⁹ One possible method of implementing this proposal could be for the defendant to challenge the federal jurisdiction in a pretrial motion by making a *prima facie* showing that the elements of the allegation against him more closely fit the elements of a state crime. The prosecutor would then have the burden of showing the substantial federal interest which would permit federal law to control. If the prosecutor failed to make such a showing, it could be of substantial advantage to the defendant because he therefore could prevent the escalation of a misdemeanor into a more substantial federal offense. See, e.g., *United States v. Curry*, 681 F.2d 406 (5th Cir. 1982) (defendant convicted of federal felony of mail fraud for filing false campaign report with state election committee, an offense which was misdemeanor under state law); *United States v. McNeive*, 536 F.2d 1245 (8th Cir. 1976) (federal Mail Fraud Act prosecution of city plumbing inspector who accepted five-dollar gratuities from contractor; activity which was misdemeanor under city ordinance); see *infra* notes 40-48 and accompanying text.

Another benefit of this proposal might be dismissal of the case from federal court, without prejudice, when there has been no showing that state or county prosecutors are unwilling or unable to prosecute the case, and their authority has been usurped by federal prosecutors.

¹⁰ See Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 480 (1977); Wefing, *Search and Seizure—New Jersey Supreme Court v. United States Supreme Court*, 7 SETON HALL L. REV. 771 (1976); see also Ziegler, *Constitutional Rights of the*

law.¹¹ At the same time, the Burger Court has contracted or even refused to recognize these rights. A criminal defendant should not be stripped of them, however, simply because he finds himself in federal rather than state court. The disparity in treatment of defendants in the two jurisdictions holds the potentiality for "forum shopping" by state and federal prosecutors working together, and is likely to affect the treatment of the defendant at both trial and sentencing.¹²

Further, the importance of a state court's decision to grant a particular right wanes when a federal prosecutor may simply ignore it.¹³ For example, the Supreme Court of New Jersey, in reliance on the state constitution,¹⁴ recently held that a search warrant is required before law enforcement officials may seize an individual's toll records from the telephone company.¹⁵ The federal courts, on the other hand,

Accused—Developing Dichotomy Between Federal and State Law, 48 PA. B.A.Q. 241 (1977). These articles trace Supreme Court rulings in the area of criminal law through the Warren and Burger Courts and note the reliance which state courts place on state constitutions to expand individual rights. See generally *supra* note 5.

¹¹ See *State v. Hunt*, 91 N.J. 338, 358, 450 A.2d 952, 962 (1982) (Handler, J., concurring); Brennan, *supra* note 10; Wefing, *supra* note 10; *supra* notes 5 & 10.

¹² *Compare State v. Johnson*, 68 N.J. 349, 346 A.2d 66 (1975) (establishing "knowing waiver" test, i.e., one who consents to search must understand he had right to refuse search) with *Schneekloth v. Bustamonte*, 412 U.S. 218 (1973) (establishing "totality of circumstances" test, i.e., consentor need not realize he had right to refuse search if circumstances indicate consent freely given). *Compare State v. Culotta*, 343 So. 2d 917 (La. 1976) (granting standing to challenge search to anyone aggrieved by it) with *United States v. Salvucci*, 448 U.S. 83 (1980) (standing to challenge search limited to those with legitimate expectation of privacy in area searched, regardless of ownership of items seized). *Compare People v. Dishrow*, 16 Cal. 2d 101, 113, 545 P.2d 272, 280, 127 Cal. Rptr. 360, 368 (1976) and *State v. Santiago*, 53 Hawaii 254, 492 P.2d 657 (1971) and *Commonwealth v. Triplett*, 341 A.2d 62, 64 (Pa. 1975) (statements made by defendant in absence of *Miranda* warnings may not be used to impeach defendant's credibility if he takes witness stand at trial) with *Harris v. New York*, 401 U.S. 222, 226 (1971) (statement inadmissible as direct evidence under *Miranda v. Arizona*, 384 U.S. 436 (1966), may be used to impeach defendant's credibility at trial).

Justice Brennan has written approvingly of the increasing use of state constitutions as "guardians of our liberties," and believes it is a "highly significant development for our constitutional jurisprudence and for our concept of federalism." Brennan, *supra* note 10, at 491-95.

¹³ See cases cited *supra* notes 5 & 12; *infra* text accompanying notes 116-36.

¹⁴ Article 1, § 7 states:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no warrant shall issue except upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the papers and things to be seized.

N.J. CONST. art. I, § 7.

Although the words are virtually identical to the fourth amendment, the state supreme court has interpreted them to give broader rights to defendants. See, e.g., cases cited *supra* note 5.

¹⁵ *State v. Hunt*, 91 N.J. 338, 450 A.2d 952 (1982).

do not require the protection of a warrant; federal investigators may seize these records at will, without having made a showing of probable cause to an independent magistrate.¹⁶ The individual is protected from state intrusion into his privacy by the state constitution, but this probably matters little to him when a federal investigatory agency may rummage at will through his personal business. When state and federal prosecutors work together, this state-granted protection has even less meaning, because what the state authorities cannot obtain without a proper showing of probable cause, the federal agency can. Similarly, when state officials seize evidence in a manner which the state court has held to be illegal under the state's constitution, the state officials may simply turn it over to the federal prosecutors, who may use it with impunity.¹⁷ Application of a state's procedural and substantive rules of law, acting as a disincentive to federal prosecutions of what are really state crimes, would also free an already overburdened federal docket¹⁸ for litigants in that forum with a substantial federal claim. Moreover, it would free federal prosecutors to investigate crimes which have a substantial federal interest, and truly require the resources of the federal government.¹⁹

Federal prosecution of cases with only a tenuous or contrived connection to federal law violations is a "particular mischief" anticipated by neither the Framers nor the Congresses which passed some of the federal statutes now used to usurp the authority of state prosecu-

¹⁶ *Smith v. Maryland*, 442 U.S. 735 (1979).

¹⁷ See Ziegler, *supra* note 10. Judge Ziegler calls this phenomenon the "Copper Platter Doctrine." This is a reversal of the Silver Platter Doctrine, which developed before the exclusionary rule was made applicable to the states. Under the Silver Platter Doctrine, federal officers who had illegally seized evidence which was excluded from federal court would turn it over "on a silver platter" to state officials for state prosecutions. The Supreme Court ended this practice in *Elkins v. United States*, 364 U.S. 206 (1960). Judge Ziegler points out that now that many states afford their citizens greater rights under state constitutions, state officials have begun turning over evidence to federal prosecutors which state but not federal law would hold was illegally seized. See, e.g., *United States v. Scolnick*, 392 F.2d 320 (3d Cir. 1968); *infra* notes 114-36 and accompanying text.

¹⁸ The federal civil caseload has increased each year since 1960. The number of filings increased by 17.8% during the one-year period ending March 31, 1983, compared to the previous year, for a total of 233,065. STATISTICAL ANALYSIS & REPORTS DIV., ADMIN. OFFICE OF U.S. COURTS, FEDERAL JUDICIAL WORKLOAD STATISTICS 7 (1983). The number of criminal cases filed in the same period was 34,778, an increase of 8.9% over the previous one-year period. *Id.* at 13.

¹⁹ Professor Schwartz suggested five criteria to determine when federal action is justified: (1) when states are unwilling or unable to act; (2) when the federal jurisdictional aspect of the crime is "an important ingredient of its success"; (3) when a substantial federal interest is protected by use of federal authority; (4) when a criminal operation extends into more than one state; and (5) when it would be more efficient for federal prosecution of a complex case "investigated and developed on the theory of federal prosecution." Schwartz, *supra* note 2, at 73.

tors. Staunch Federalists such as Hamilton might have endorsed the breadth now given to the first clause of article III²⁰ of the Constitution, which grants federal jurisdiction "to all Cases, in Law and Equity, arising under this Constitution, [and] the Laws of the United States."²¹ Many of the Framers would be astounded, however, to see that this clause now encompasses the prosecution in federal court of a small-town politician accused of what is essentially bribery—a crime adequately prohibited by state criminal codes.²² They would be bemused by the sentencing to federal prison of a local political operative whose conviction on mail fraud charges arose from the fraudulent procurement of absentee ballots for a municipal school board election.²³ They might wonder what would have become of the federal prosecution if the ballots had been hand delivered, rather than mailed, to the election board. They might also wonder at the fairness

²⁰ The Act of Feb. 13, 1801, 2 Stat. 89, made federal jurisdiction "almost coextensive with the constitutional authorization." P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 36-37 (2d ed. 1973). It was repealed when the Jeffersonians came to power the following year. *Id.* (referring to Act of Mar. 8, 1802, 2 Stat. 132).

²¹ U.S. CONST. art. III, § 2, cl. 1.

²² See, e.g., *United States v. Jannotti*, 673 F.2d 578, 623-27 (3d Cir.) (Aldisert, J., dissenting), cert. denied, 457 U.S. 1106 (1982); *United States v. Pacente*, 503 F.2d 543 (7th Cir.), cert. denied, 419 U.S. 1048 (1974); see *supra* text accompanying notes 16-19.

The Civil Rights Act of 1964 is an example of a federal law enacted pursuant to the commerce clause which resulted in proscribing conduct with miniscule effects on interstate commerce. Enforcement of that Act resulted in cases such as *Katzenbach v. McClung*, 379 U.S. 294 (1964) (refusal to serve Blacks in public accommodations affects interstate commerce and is violative of Title II of Civil Rights Act), and *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964) (same). Neither the correctness of the results of these decisions nor the authority of Congress to enact legislation pursuant to its commerce power is questioned here. But see *Heart of Atlanta Motel, Inc.*, 379 U.S. at 280-86 (Douglas, J., concurring) (decision based on 14th amendment rather than commerce clause would have "more settling effect" and make unnecessary litigation over whether inn or restaurant is within "commerce" definitions of Act); Letter from Gerald Gunther to the Department of Justice (June 5, 1963), excerpts reprinted in G. GUNTHER, *CASES AND MATERIALS ON CONSTITUTIONAL LAW* 203 (10th ed. 1980) (urging enactment of Civil Rights Act on basis of 14th amendment and asserting use of commerce clause as Act's basis is "strained").

The Court's somewhat strained analyses of the effect on interstate commerce resulting from an inn and a family restaurant's refusal to serve Blacks in the *Heart of Atlanta* and *McClung* cases illustrate how jurisdiction based on the commerce clause can be stretched until it sometimes appears to be a legal fiction. In these cases, however, the Court was using federal authority to protect a substantial federal interest—equality of all people at a time when many states were adamantly refusing to recognize the rights of minorities. See Schwartz, *supra* note 2, at 73.

At issue here is the application of legislation, properly enacted pursuant to the commerce clause, to cases where the effect on interstate commerce is so attenuated as to be ephemeral, no national interest is furthered by the prosecution, and state law will suffice to prosecute the alleged activity.

²³ See *United States v. Cherubini*, No. 82-5780 (D.N.J. Oct. 21, 1982), *aff'd*, slip op. (3d Cir. July 21, 1983), cert. denied, No. 83-844 (U.S. Feb. 21, 1984).

of exposing the defendant to a sentence under the federal statute when the actual state crime carries a much lighter penalty.²⁴

Against this background, it is clear that the integrity of state constitutions and their interpretation by state courts, the inherent unfairness to criminal defendants prosecuted for essentially state-prohibited behavior, and the overburdened and ever-burgeoning federal court docket,²⁵ require the remedy which would be afforded by applying a state's procedural and substantive rules of law in the federal courts within that state's district. This Comment will discuss the history of the two federal statutes which are among the more popular vehicles used by federal prosecutors to stretch their jurisdiction, the Mail Fraud Act²⁶ and the Hobbs Act.²⁷ Cases brought under these statutes will be used to illustrate the unfairness to defendants and the perversion of legislative intent which results when they are used to prosecute state crimes.²⁸

II. THE MAIL FRAUD ACT

The legislative history of the Mail Fraud Act (18 U.S.C. § 1341) is scant, yet indicates that the statute was directed at fraudulent conduct

where the mails were indispensable vehicles for carrying out the fraud.²⁹ The predecessor to section 1341 was section 301 of the Act of June 8, 1872. Its sponsor³⁰ stated that it was designed to "prevent the frauds which are mostly gotten up in the large cities . . . by thieves, forgers, and rascals generally, for the purpose of deceiving and fleecing the innocent people in the country," and sought to proscribe the mailing of circulars from bogus offices in the cities offering get-rich-quick schemes to those who were unable to check whether the offices existed.³¹ These schemes to defraud which the Congress sought to prevent could operate only because of the schemers' use of the mails.³² Early cases brought under the statute involved prosecutions

²⁹ Section 1341, the Mail Fraud Act, reads:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than \$1000 or imprisoned not more than five years, or both.

18 U.S.C. § 1341 (1982).

³⁰ Rep. John Farnsworth (R. Ill.).

³¹ CONG. GLOBE, 41st Cong., 3d Sess. 35 (1870) (remarks of Rep. Farnsworth).

³² Rep. Farnsworth illustrated the type of conduct targeted by his bill:

I have here . . . a large number of specimen circulars and letters . . . sent from various bogus offices in the large cities . . . Some of them are schemes for selling counterfeit money. They send out genuine specimens of fractional currency, and say to their correspondents, "We can sell you so much of this money for so much." . . . [T]hey may, perhaps, send a genuine twenty-five or fifty cent currency note. The person receiving the circular may not be particularly ignorant, but being somewhat greedy, he shows it to some banker or broker, who, of course, pronounces it to be good money. Thereupon, the countryman immediately sends to the address of the agent, in New York, for instance, . . . an order. . . . A box or package is sent to him, . . . which . . . is found to contain waste paper, sawdust, or maybe bogus money. . . . Thus all through the country thousands of innocent and unsophisticated people, knowing nothing about the ways of these city thieves and robbers, are continually fleeced and robbed, and the mails are made use of for the purpose of aiding them in their nefarious designs.

Id.; see also Comment, *The Intangible-Rights Doctrine and Political-Corruption Prosecutions Under the Federal Mail Fraud Statute*, 47 U. CHI. L. REV. 562, 568-69 (1980). The author suggests that federal prosecutors abuse the legislators' purpose in enacting § 1351 by applying it in instances wherein the victims are "defrauded" of intangibles, such as good government, rather than property. *Id.* An amendment to § 301, in 1899, added specific prohibitions against counterfeiting schemes prevalent at the time. The 1909 amendment added a prohibition against "obtaining money or property by means of false or fraudulent pretenses." Act of Mar. 4, 1909, ch. 321, §

²⁴ See *id.*; see also *United States v. Curry*, 681 F.2d 406 (5th Cir. 1982); *United States v. McNeive*, 536 F.2d 1245 (8th Cir. 1976). In *Curry*, federal prosecution was based on the fact that the defendant used the United States mails to submit a false campaign contribution report to the state election committee—a misdemeanor under state law. In *McNeive*, the federal prosecution was based on the fact that a contractor who gave the defendant-plumbing inspector five-dollar gratuities had mailed them to the defendant. *McNeive's* conduct was at most a violation of a city ordinance.

²⁵ Former Federal District Court Judge for the District of New Jersey H. Curtis Meanor recently asserted that "80 per cent, at least, of the criminal cases that come into the federal courts, could just as easily be handled in the state courts. For example, I can't think of a mail fraud case that could not be brought instead under state laws." *The Sunday Star Ledger*, Feb. 27, 1983, at 1, col. 5. The former federal judge believes New Jersey's federal court system is "in danger of collapsing from its own weight of cases as a result of matters which don't belong in these courts. . . ." *Id.* at col. 3.

²⁶ 18 U.S.C. § 1351 (1982).

²⁷ *Id.* § 1951. By no means are these the only statutes abused by federal prosecutors. The Travel Act, *id.* § 1952, is another favored tool. See, e.g., *Rewis v. United States*, 401 U.S. 808 (1971); *United States v. Archer*, 486 F.2d 670 (2d Cir. 1973).

²⁸ The Mail Fraud Act and the Hobbs Act represent two types of federal penal statutes, those which are designed to protect local interests from abuse through use of the facilities of interstate commerce, and those designed to protect the federal interest in interstate commerce itself, respectively. The former type must be narrowly construed. See, e.g., *Jerome v. United States*, 318 U.S. 101, 105 (1943) ("where Congress is creating offenses which duplicate or build upon state law, courts should be reluctant to expand the defined offenses beyond the clear requirements of the terms of the statute"). An argument could be made that, with regard to the latter type of statute, there is no reason not to read them as broadly as the commerce clause permits. What is permissible, however, may not necessarily be in line with congressional intent in enacting these statutes.

consistent with Congress' intent to punish swindlers who used the mails to dupe others.³³

A century later, the Supreme Court observed in *United States v. Maze*³⁴ that the Mail Fraud Act could only encompass mailings that are "sufficiently closely related" to a fraudulent scheme.³⁵ The Court also has noted that the mail fraud statute does not reach all frauds, "but only those limited instances in which the use of the mails is a part of the execution of the fraud, leaving all other cases to be dealt with by appropriate state law."³⁶

Despite these mandates and congressional intent, section 1341 has been used to prosecute cases in which the "rascal" did not aim to fleece anyone in particular out of anything in particular. An expansive view of what could be the object of a fraudulent scheme first arose, for example, in *United States v. States*.³⁷ The prosecution employed a theory of "intangible rights," neither pecuniary nor proprietary, of which a victim may be defrauded, such as the right to good government.³⁸ The defendants in *States*, who were candidates running for local party committee seats, used fictitious names to obtain fraudulent voter registrations, and then used these registrations to obtain absentee ballots.³⁹ They were foiled when an alert postal worker, attempting to deliver the absentee ballots, realized that the "voters" to whom they were being sent did not exist.⁴⁰ The power of the federal government was brought to bear on the perpetrators. Election fraud, however, can be perpetrated without using the mails, and state law prohibits such conduct.⁴¹ The election at issue in *States*

was for seats on local party committees—as "local" an election as there might be. Nevertheless, a coterie of federal employees devoted its time to investigating and prosecuting the election fraud.

The Eighth Circuit upheld the *States* convictions, but at least one judge did so reluctantly, stating:

I cannot believe that it was the original intent of Congress that the Federal Government should take over the prosecution of every state crime involving fraud just because the mails have been used in furtherance of that crime. The facts in this case show that this election fraud was purely a state matter. It should have been prosecuted in state court. The Assistant United States Attorney conceded in oral argument that the case was not the type of mail fraud case covered by written instructions contained in the United States Attorneys' manual. . . . [H]e relieved the state of its duty to police the violation of its local election laws and helped create a precedent which will encourage the same sort of unwarranted federal preemption in the future.⁴²

The Eighth Circuit demonstrated its reluctance to let section 1341 encroach so far into state territory two years after *States* by reversing the conviction in *United States v. McNeive*.⁴³ McNeive, the chief plumbing inspector for the City of St. Louis, was prosecuted under section 1341 because he had accepted five-dollar gratuities from a plumbing contractor each time he issued a permit to the contractor.⁴⁴ McNeive's acceptance of the tips was a violation of an unwritten departmental policy and a city ordinance.⁴⁵ There was no indication, however, that McNeive had extended any special favors to the contractor.⁴⁶ The government contended that his activity had deprived the people of St. Louis of the intangible right to his honest services.⁴⁷ That was the fraud element. The United States Attorney who brought the case apparently believed that the fact that the contractor had mailed the gratuities to McNeive along with his application for permits constituted the second element of section 1341.⁴⁸

the local candidates are on the same ballot as candidates for federal office. *United States v. Carmichael*, 685 F.2d 903 (4th Cir. 1982), cert. denied, 103 S. Ct. 1187 (1983).

⁴² *States*, 488 F.2d at 767 (Ross, J., concurring).

⁴³ 536 F.2d 1245 (8th Cir. 1976).

⁴⁴ *Id.* at 1246.

⁴⁵ *Id.*; ST. LOUIS, MO., REV. CODE § 41.040 (1960 & Supp. 1964) (recodified as § 4.02.010 (1980)). This section prohibits the solicitation or acceptance of any gift of money by city officials for their services. *McNeive*, 536 F.2d at 1246 n.1.

⁴⁶ *McNeive*, 536 F.2d at 1246.

⁴⁷ *Id.* at 1247.

⁴⁸ The court did not discuss that element, having found that McNeive's acceptance of the gratuities had worked no fraud. *Id.*

215, 35 Stat. 1130. It was enacted without debate or comment. See Comment, *supra*, at 566-78 for a thorough review of the legislative history of 18 U.S.C. § 1341.

³³ For example, in *Durland v. United States*, 361 U.S. 306 (1896), an early mail fraud case, the Court upheld the convictions under the statute of a defendant who had mailed circulars soliciting buyers for bonds. The bonds did not mature as promised in the circulars, and the defendant knew they would not. He "was trying to entrap the unwary, and to secure money from them on the faith of a scheme glittering and attractive in form, yet unreal and deceptive in fact, and known to him to be such." *Id.* at 312.

³⁴ 414 U.S. 395, 399-405 (1974).

³⁵ *Id.* at 399.

³⁶ *Kann v. United States*, 323 U.S. 88, 95 (1944).

³⁷ 488 F.2d 761 (8th Cir. 1973), cert. denied, 417 U.S. 909 (1974).

³⁸ *Id.* at 764. One commentator criticized this theory as being unsupported by the statute's legislative history and the meaning of fraud in the 19th century, when the statute was first enacted, concluding that its use "against politically corrupt politicians thus remains contrary to Congress's [sic] original intent." Comment, *supra* note 32, at 587.

³⁹ *States*, 488 F.2d at 763-64.

⁴⁰ *Id.*

⁴¹ Indeed, Congress has recognized that it may intrude in election matters only when a federal election is involved. See, e.g., 42 U.S.C. § 1973i(c) (1976 & Supp. IV 1980). The Fourth

In reversing McNeive's conviction, the Eighth Circuit stated: "Historically, § 1341 provides no foundation for the pervasive view the Government now accords it."⁴⁹ Basing its view on the language and underlying policy of section 1341, the court concluded that McNeive's conduct "was beyond the pale of that statute,"⁵⁰ and refused to accept "that Congress, by enacting the mail fraud statute, contemplated that a situation similar to McNeive's would be classified as a scheme to defraud."⁵¹ Had McNeive been prosecuted under the city ordinance, his conviction probably would have been valid. The cost of McNeive's prosecution would have been borne by the people of St. Louis—those people who were "defrauded" by McNeive's conduct, if indeed anyone was cheated⁵²—and federal dollars and energy would have been conserved for the prosecution of true federal felons.

Another example of federal intrusion into state matters occurred in *United States v. Curry*.⁵³ *Curry* involved the conviction under section 1341 of the head of a political action committee who had filed a false campaign contribution report to the Louisiana state election committee.⁵⁴ The Fifth Circuit reversed Curry's conviction on three counts of mail fraud because the trial court had failed to include in its charge to the jury that good faith is a defense to section 1341.⁵⁵ The circuit court remanded the case, holding that Curry would have violated the statute if he had knowingly mailed false reports to the state committee.⁵⁶

Judge Garwood, although concurring with the majority's decision to reverse the conviction, rejected its contention that if Curry had knowingly mailed false reports, he would have "defrauded" the committee of its right to accurate information.⁵⁷ Judge Garwood also criticized the *States* decision as giving "an excessively broad reading"

⁴⁹ *Id.*

⁵⁰ *Id.* at 1249.

⁵¹ *Id.*

⁵² The court did not believe that anyone had been defrauded, noting that "the tips . . . were clearly not kickbacks and the City of St. Louis . . . suffered no pecuniary detriment. . . ." *Id.* at 1248.

⁵³ 681 F.2d 406 (5th Cir. 1982).

⁵⁴ *Id.* at 408.

⁵⁵ *Id.* at 416.

⁵⁶ *Id.* at 416-17.

⁵⁷ *Id.* at 420 (Garwood, J., concurring). Judge Garwood observed that: "no case has held that the mere denial to the victim of accurate information . . . is of itself sufficient to render the knowingly [sic] making of a false statement a defrauding. There must be contemplated some significant detriment to the victim, or benefit to the perpetrator, *apart* from the deception itself." *Id.* (emphasis in original).

to Fifth Circuit decisions cited therein⁵⁸ to bolster the court's support of *States*' conviction under the intangible rights theory.⁵⁹ Significantly, Judge Garwood pointed out that prosecuting Curry under section 1341 made a felony out of conduct which was at most a misdemeanor under Louisiana law, punishable only by a fine.⁶⁰ Each count of mail fraud, however, exposes the defendant to five years in prison plus a considerably larger fine, not to mention the brand of a felon.⁶¹

Similarly, in New Jersey, a federal prosecution under section 1341 for allegedly fraudulent certifications of absentee ballots which were delivered by mail to the county elections commission would expose the defendant to a five year sentence for each ballot.⁶² Under state law, this is a crime of the fourth degree,⁶³ punishable by disenfranchisement⁶⁴ and a maximum sentence of eighteen months,⁶⁵ with a presumption of a noncustodial sentence.⁶⁶ Although it is important to safeguard the integrity of even minor elections, the punishment should fit the crime. Federal mail fraud prosecutions do not deter election fraud, they merely encourage the hand delivery of absentee ballots.

Further, the government faces the risk of losing cases prosecuted under section 1341 where the fraud clearly occurred but the mailings did not. The United States Attorney's Office came close to losing its case against Robert C. Botti, then-Mayor of Union City, New Jersey, because the bids he was accused of rigging may have been hand delivered.⁶⁷ Although the jury convicted Botti of mail fraud, the trial

⁵⁸ Fifth Circuit decisions cited by the *States* court included: *Abbott v. United States*, 239 F.2d 310 (5th Cir. 1956); *Steiner v. United States*, 134 F.2d 931 (5th Cir.), *cert. denied*, 319 U.S. 774 (1943); *Shushan v. United States*, 117 F.2d 110 (5th Cir.), *cert. denied*, 313 U.S. 574 (1941).

⁵⁹ *Curry*, 681 F.2d at 418 n.1. Judge Garwood's opinion also traced the legislative history of § 1341, and concluded that the intangible rights theory of mail fraud prosecutions is in derogation of Congress' intent.

⁶⁰ *Id.* at 421. The fine is not to exceed \$500, plus 150% of the amount not reported to the committee.

⁶¹ 18 U.S.C. § 1341. Each count exposes the defendant to a \$1000 fine. Professor Schwartz has noted that, because each use of the mail in a single scheme is a separate offense, a court may sentence the defendant to as much as "five years multiplied by the number of different letters which the prosecutor cares to make the subject of separate counts in the indictment." Schwartz, *supra* note 2, at 79-80.

⁶² N.J. STAT. ANN. § 19:57-17 (West Cum. Supp. 1983-1984).

⁶³ *Id.* § 19:57-37.

⁶⁴ *Id.*

⁶⁵ *Id.* § 2C:44-1(f) (West 1982).

⁶⁶ *Id.* § 2C:44-1(e).

⁶⁷ *Botti v. United States*, No. 83-718 (3d Cir. Sept. 22, 1983), *cert. denied*, 52 U.S.L.W. 3422 (U.S. Nov. 29, 1983).

judge stated that he would have dismissed the mail fraud counts.⁶⁸ If Botti had been prosecuted in state court under the New Jersey law requiring competitive bidding,⁶⁹ the manner in which the bids were submitted would have been irrelevant.

III. THE HOBBS ACT

Another federal statute which has been acknowledged as a useful tool for federal prosecution of certain state crimes, bribery and extortion in particular, is the Hobbs Act.⁷⁰ This statute was enacted by Congress in 1945 to thwart "highway robbery" by members of the Teamsters Union.⁷¹ It amended the Anti-Racketeering Act of 1934⁷²

⁶⁸ Judge Meanor, in denying Botti's motion for acquittal, nonetheless stated that "I myself, as a factfinder, would have acquitted Mr. Botti [on the mail fraud counts]." *The Dispatch*, Jan. 25, 1983, at 16, col. 3.

⁶⁹ N.J. STAT. ANN. § 40A:11-1 to -37 (West 1980 & Cum. Supp. 1983-1984) (local Public Contracts Law). Theft by Deception, N.J. STAT. ANN. § 2C:20-4 (West 1982), could also apply.

⁷⁰ The Hobbs Act reads, in pertinent part:

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than \$10,000 or imprisoned not more than twenty years, or both.

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

Hobbs Act, 18 U.S.C. § 1951 (1982) (emphasis added). See Stern, *Prosecutions of Local Political Corruption Under the Hobbs Act: The Unnecessary Distinction Between Bribery and Extortion*, 3 SETON HALL L. REV. 1 (1971), for an approving view of such prosecutions. But see Comment, *Prosecution Under the Hobbs Act and the Expansion of Federal Criminal Jurisdiction*, 60 J. CRIM. L. & CRIMINOLOGY 306 (1975).

Judge Stern, a former federal prosecutor, stated that whether a political official was in reality guilty of either passively accepting bribes or actively extorting payments, he may be prosecuted under the Hobbs Act. This view was adopted by the Third Circuit. *United States v. Kenny*, 462 F.2d 1205 (3d Cir.), cert. denied, 409 U.S. 914 (1972); *United States v. Jannotti*, 673 F.2d 578 (3d Cir.), cert. denied, 457 U.S. 1106 (1982). But see Judge Aldisert's dissent in *United States v. Cerilli*, 603 F.2d 415, 426 (3d Cir. 1979), cert. denied, 444 U.S. 1043 (1980), wherein he denounced the circuit's "revolutionary interpretation of the Hobbs Act" in *Kenny*, and urged the panel to "cure our error by having the full court reexamine the *Kenny* rule. . . ." *Id.* at 426-27 (Aldisert, J., dissenting). The Third Circuit's *Kenny* decision "became the country's landmark case interpreting extortion under the Hobbs Act. . . ." *Id.* at 427 (Aldisert, J., dissenting). The decision resulted in the blurring of the distinction between extortion and bribery. The Third Circuit's "failure to reexamine its rationale has resulted in a perpetuation of erroneous law not only in this circuit but in the First, Second, Fourth, Seventh, Eighth and Tenth Circuits which have followed our lead without setting forth a reasoned elaboration for their conclusions." *Id.* (footnote omitted).

⁷¹ 91 CONG. REC. 11,841 (1945) (remarks of Rep. Cox of Georgia). Congressman Cox said:

and, like that statute, prohibits extortion.⁷³ The Hobbs Act, however, only proscribes extortion which affects or restrains interstate commerce. It is this limitation which distinguishes Hobbs Act violations from the state crime of extortion, and which gave Congress authority to enact the law.⁷⁴

The Hobbs Act had its genesis in the Supreme Court's interpretation of the earlier Act,⁷⁵ which the Court held did not apply to organized labor because its aim was the "elimination of terroristic activities by professional gangsters."⁷⁶ The Court, in *United States v. Local 807, International Brotherhood of Teamsters*⁷⁷ reversed the convictions of twenty-six members of the New York City Teamsters local who had exacted tributes⁷⁸ from out-of-state, nonunionized truck drivers who brought goods into the City.⁷⁹ The Court based its decision on section two of the Act,⁸⁰ which it interpreted to exempt union members. Reaction among many members of Congress was vehement,⁸¹ and the Hobbs Act was proposed to "plug up [the] loopholes"⁸² in the earlier law.

Some congressmen expressed concern that the new bill was unnecessary because all the states had laws against extortion, and the Hobbs Act might be an impermissible preemption of these laws.⁸³

Teamsters Union case, where that Court legitimized highway robbery when committed by a labor goon." *Id.*

⁷² Act of June 18, 1934, ch. 569, §§ 1-6, 48 Stat. 979 (codified as amended at 18 U.S.C. § 1951 (1982)).

⁷³ Extortion, as defined by the Hobbs Act, is "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." 18 U.S.C. § 1951(b)(2) (1982).

⁷⁴ *United States v. Local 807, Int'l Bhd. of Teamsters*, 315 U.S. 521 (1942); see also 91 CONG. REC. 11,848 (1945) (remarks of Rep. Lane).

⁷⁵ See *infra* text accompanying notes 78-80.

⁷⁶ *United States v. Local 807, Int'l Bhd. of Teamsters*, 315 U.S. 521, 530 (1942).

⁷⁷ *Id.* at 521.

⁷⁸ The tribute was payment of one day's wages at union scale by the nonunion drivers to union members, who sometimes assisted in off-loading the trucks, and sometimes did not. *Id.* at 526.

⁷⁹ *Id.* at 525.

⁸⁰ *Id.* at 527. The Court, quoting § 2(a) of the Anti-Racketeering Act, said it "excepts from punishment any person who 'obtains or attempts to obtain, by the use of or attempt to use or threat to use, force, violence, or coercion, . . . the payment of wages by a bona-fide employer to a bona-fide employee.'" *Id.*

⁸¹ See 91 CONG. REC. 11,843-48 (1945).

⁸² *Id.* at 11,848 (remarks of Rep. Lane). "The act of 1934 was directed against gangsters, yet the case brought before the Supreme Court in October 1941 (*United States v. Local 807, Int'l Bhd. of Teamsters*, 315 U.S. 521 (1942)) involved a labor union. . . . H.R. 32 (the Hobbs Act) was inspired by that decision. It seeks to plug up loopholes. . . ." *Id.*

⁸³ See, e.g., *id.* at 11,843 (remarks of Rep. Rooney); *id.* at 11,848 (remarks of Rep. Powell).

Hobbs Act supporters reassured them that the bill was not an excursion into the province of the states, emphasizing the interstate aspects of the facts in *Teamsters*. One congressman remarked:

[T]his proposal applies to interstate commerce only. The Congress has no other jurisdiction. . . . Every State in the Union . . . should enforce its laws. However, if interstate commerce is being interfered [sic] with, and if the farmers and truckers, who take food into New York from surrounding territory and States, must submit to [threats and violence] then it seems clear that it is the obligation of the Congress to furnish national protection in these interstate operations.⁸⁴

The House record clearly delineates the bill's intent: protection of nonunionized farmers and truckers, and elimination of any loophole through which labor unions could escape punishment if they used violence or coercion against nonunion members on the highway.⁸⁵

For the next several years, Hobbs Act prosecutions were in accord with Congress' intent in passing the Act, in that they centered on extortionate demands of labor officials.⁸⁶ In *United States v. Green*,⁸⁷ for example, the defendants, a labor union and an official, were found guilty under the Hobbs Act of extorting money from two employers by forcing them to pay for the services of nonexistent union members.⁸⁸ The district court arrested the judgments of conviction, reasoning that the defendants' activities did not constitute a crime under the Act, and that entering the judgment would extend its jurisdiction beyond constitutional limits.⁸⁹ The Supreme Court reversed, holding that the extortionate labor activity was precisely the type of conduct which Congress had intended to proscribe by the Hobbs Act.⁹⁰

In later cases, however, Hobbs Act prosecutions moved away from extortionate union activity wherein either the threatened work

the States' rights school, do we need Federal legislation?" *Id.* It is apparent from the record, however, that most Hobbs Act opponents saw the bill as anti-labor. *Id.* at 11,843-48.

⁸⁴ 91 CONG. REC. 11,843 (1945) (remarks of Rep. Michener).

⁸⁵ See Comment, *supra* note 70, at 310-11, for a detailed analysis of the legislative history of the Act. The author concludes that Congress' intent was to discourage labor extortion and obstruction of the movement of individuals across state lines for the purpose of marketing their goods, two activities which have direct effects upon commerce. *Id.*

⁸⁶ See, e.g., *Stirone v. United States*, 361 U.S. 212 (1960); *United States v. Green*, 350 U.S. 415 (1956); *United States v. Kramer*, 355 F.2d 891 (7th Cir.), *vacated and remanded in part*, *cert. denied in part*, 384 U.S. 100 (1966); see also cases cited in Comment, *supra* note 70, at 313 n.60.

⁸⁷ 350 U.S. 415 (1956).

⁸⁸ *Id.* at 417.

⁸⁹ *Id.* at 416.

stoppages or the depletion of the victim-employer's assets would affect interstate commerce. The Act was invoked in cases not involving labor threats,⁹¹ and the effect on interstate commerce was presumed, no matter how small the alleged extortion payment nor how attenuated the nexus to interstate commerce.⁹² This type of Hobbs Act prosecution parallels the Mail Fraud Act prosecutions brought in cases like *States* and *Curry*: both involve plumbing the depths of absurdity in the attempt to find a federal nexus. For example, in *United States v. Pacente*,⁹³ a Chicago police officer was convicted of extortion under section 1951 for taking a \$200 bribe from a liquor store owner. The store was located in Chicago, and the proprietor bought his liquor from Chicago distributors who had purchased their merchandise from persons at locations outside Illinois.⁹⁴ The Seventh Circuit upheld the district court's determination that the \$200 bribe depleted the resources of the store owner, who bought from people who bought from people outside the state, and thus affected interstate commerce.⁹⁵

It is not only the virtual presumption of the jurisdictional element of the Hobbs Act which has broadened its reach. Courts also blur the distinction between the separate crimes of extortion,⁹⁶ which the

⁹¹ See, e.g., *United States v. Pearson*, 508 F.2d 595 (5th Cir.) (defendant convicted under Hobbs Act for robbery of hotel), *cert. denied*, 423 U.S. 845 (1975); *United States v. Staszczuk*, 517 F.2d 53 (7th Cir.) (Chicago alderman convicted under Hobbs Act for accepting \$3,000 payment to support municipal zoning change), *cert. denied*, 423 U.S. 837 (1975); *United States v. Augello*, 451 F.2d 1167 (2d Cir. 1971) (defendant convicted under Hobbs Act for demanding \$250 monthly from restaurant owner for "protection"), *cert. denied*, 405 U.S. 1070 (1972); see Comment, *supra* note 70, at 313.

⁹² *United States v. Pearson*, 508 F.2d 595 (5th Cir.) (hotel robbery affects interstate commerce because many guests were from out-of-state), *cert. denied*, 423 U.S. 845 (1975); *United States v. Staszczuk*, 517 F.2d 53 (7th Cir.) (payment to alderman to support zoning change so animal hospital could be built had sufficient potential to affect interstate commerce because, although hospital was never built, if it had been, some furnishings would have come from out-of-state), *cert. denied*, 423 U.S. 837 (1975); *United States v. Augello*, 451 F.2d 1167 (2d Cir. 1971) (monthly "protection" payments of \$250 by New York hamburger drive-in restaurant owner affects interstate commerce because meat purchased in New Jersey), *cert. denied*, 405 U.S. 1070 (1972); see also Comment, *supra* note 70, at 314. The author notes that many courts "simply assumed the effect upon interstate commerce from the depletion of assets alone and not from the projected result of the threat if carried out," and asserts that "the unarticulated probability or potential for effect upon interstate commerce have [sic] become increasingly more speculative in the recent decisions." *Id.* (citing *United States v. Pearson*, 508 F.2d 595 (5th Cir.), *cert. denied*, 423 U.S. 845 (1975); *United States v. Braasch*, 505 F.2d 139 (7th Cir. 1974), *cert. denied*, 421 U.S. 910 (1975); *United States v. Augello*, 451 F.2d 1167 (2d Cir. 1971), *cert. denied*, 405 U.S. 1070 (1972)).

⁹³ 503 F.2d 543 (7th Cir.), *cert. denied*, 419 U.S. 1048 (1974).

⁹⁴ *Id.* at 550-51.

⁹⁵ *Id.* at 551.

⁹⁶ Extortion is "[t]he obtaining of property from another induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." BLACK'S LAW DICTIONARY 575 (4th ed. 1979).

Hobbs Act proscribes, and bribery,⁹⁷ which it does not address. This permits prosecution under the Act whether the defendant has passively accepted a payment or actively threatened a victim for the purpose of extortion.⁹⁸ This was the case in *United States v. Jannotti*,⁹⁹ one of the infamous ABSCAM prosecutions. *Jannotti* resulted from the Federal Bureau of Investigation's (FBI) brief foray¹⁰⁰ into the City of Philadelphia, and provides an example of a Hobbs Act prosecution in which (1) the effect on interstate commerce is so unrealistic as to be ephemeral; and (2) the necessity of the element of coercion to prove extortion is overlooked. Jannotti was a member of the City Council, and his codefendant, Schwartz, was the Council's president.¹⁰¹ The FBI agents, posing as representatives of the now famous and nonexistent "Arab Sheik," told the defendants the "Sheik" was interested in building a hotel in their city.¹⁰² Eventually, the defendants accepted money from the "Sheik's" representatives.¹⁰³

Putting aside the defendants' moral turpitude, the fact remains that, whether or not Jannotti and Schwartz accepted money, the hotel never would nor could have been built. It was for this reason that District Court Judge John P. Fullam dismissed the substantive Hobbs Act counts before trial, "reasoning that there was no possibility that

⁹⁷ Bribery is "[t]he offering, giving, receiving, or soliciting of any thing of value to influence action as an official or in discharge of legal or public duty." *Id.* at 173.

⁹⁸ See *supra* note 70. This phenomenon, the allegedly unnecessary distinction between bribery and extortion, insofar as Hobbs Act prosecutions are concerned, was premised by a former United States Attorney. See Stern, *supra* note 70. It was adopted by the Third Circuit in *United States v. Kenny*, 462 F.2d 1205 (3d Cir.), *cert. denied*, 409 U.S. 914 (1972); see also *United States v. Jannotti*, 673 F.2d 578, 624 (3d Cir.), *cert. denied*, 457 U.S. 1106 (1982); *United States v. Cerilli*, 603 F.2d 415, 426 (3d Cir. 1979), *cert. denied*, 444 U.S. 1043 (1980). In *Cerilli*, Judge Aldisert in dissent urged his colleagues to reconsider this interpretation because the legislative history of the Hobbs Act, whose definition of extortion was based on the New York Penal Code, requires the element of "fear, threat or duress." *Cerilli*, 603 F.2d at 435 (Aldisert, J., dissenting). Judge Aldisert noted that the elimination of this factor denies a Hobbs Act defendant the defense that, if anything was received, it was at the instance of the donor, which is a "logically and jurisprudentially sound" defense. *Id.* "Our tolerance of this prosecutorial legerdemain is an indulgence in jurisprudential anarchy at the expense of basic tenets of criminal law—the presumption of innocence, the government's burden in all prosecutions, and the basic maxim *nullum crimen, nulla poena*." *Id.* at 436 (Aldisert, J., dissenting).

⁹⁹ 673 F.2d 578 (3d Cir.), *cert. denied*, 457 U.S. 1106 (1982).

¹⁰⁰ "The ABSCAM show was to play only 10 days in Philadelphia. The operation had to move to another location if fish were not caught." *Id.* at 617 n.20 (Aldisert, J., dissenting).

¹⁰¹ *Id.* at 580.

¹⁰² *Id.* at 580-88.

¹⁰³ *Id.* at 589. This Comment will focus only on the legal reasoning behind the defendants' convictions for conspiracy to violate the Hobbs Act. Neither the entrapment issue, the merits of ABSCAM itself, nor the defendants' moral fiber in accepting money which was not theirs are at issue here.

the bribe payments could actually have affected commerce."¹⁰⁴ A jury found the defendants guilty of the conspiracy charges.¹⁰⁵

Judge Fullam dismissed the verdict for lack of jurisdiction. He rejected the government's position that because a federal conviction could be premised on the defendants' *perception* that the acts they conspired to do could have had an effect on interstate commerce, that perception also was sufficient to grant federal jurisdiction.¹⁰⁶ Federal jurisdiction, the judge observed, "is not conferred by a defendant's erroneous perceptions." It cannot be conferred by "purely hypothetical potential impacts on commerce which could never occur."¹⁰⁷ Judge Fullam also noted that to permit the convictions to stand "would represent a substantial stretching of the definition of extortion, and a corresponding expansion of federal jurisdiction in derogation of the criminal jurisdiction of state courts."¹⁰⁸

The Third Circuit, sitting *en banc*, reversed, asserting that federal jurisdiction existed because "the defendants agreed to do acts which, had they been attainable, would have affected commerce." The court found that this implicated "a sufficient federal interest."¹⁰⁹ Judge Aldisert, writing in dissent, noted that the majority's reasoning supports "a conclusion that belief by a listener can somehow convert a speaker's fancy into fact . . . [But] [w]ithout a modicum, or at least a scintilla . . . of 'some effect on commerce,' the door to the federal courthouse simply cannot be opened."¹¹⁰

Judge Aldisert hit upon the fatal flaw in the majority's analysis, and, indeed, the type of analysis used in many Hobbs Act conspiracy cases:¹¹¹ the confusion of jurisdictional and substantive law relating to the effect on interstate commerce. While the substantive, or actual, effect *need not* have occurred to successfully prosecute a conspiracy whose end was to have the effect occur, there still must be a realistic possibility that it *could have* occurred in order for the federal interest to be triggered.¹¹² He recognized the central problem which prompted the thesis of this Comment: "Instead of *proving* the conclusion (pres-

¹⁰⁴ *United States v. Jannotti*, 501 F. Supp. 1182, 1184 (E.D. Pa. 1980), *rev'd*, 673 F.2d 578 (3d Cir.), *cert. denied*, 457 U.S. 1106 (1982).

¹⁰⁵ *Id.* at 1183-84.

¹⁰⁶ *Id.* at 1184-85.

¹⁰⁷ *Id.* at 1185.

¹⁰⁸ *Id.*

¹⁰⁹ *Jannotti*, 673 F.2d at 592.

¹¹⁰ *Id.* at 625 (Aldisert, J., dissenting) (emphasis in original).

¹¹¹ See *supra* note 70.

¹¹² *Jannotti*, 673 F.2d at 626 (Aldisert, J., dissenting).

ence of jurisdiction), the [majority's] argument *assumes* it and then argues substantive law. . . ."¹¹³

IV. THE "COPPER PLATTER"¹¹⁴ AND MANUFACTURED JURISDICTION

Hobbs Act prosecutions such as *Pacente* and *Jannotti* and Mail Fraud Act prosecutions such as *States* and *Curry* constitute an expansion of the limits of federal jurisdiction beyond any recognizable federal interest. *States* and *Curry* demonstrate not only how such prosecutions unnecessarily burden federal courts, but also how they prejudice defendants by exposing them to much stiffer penalties merely because they were brought to federal rather than state courts. Perhaps the most cogent reason supporting the extension of the *Erie* Doctrine to certain federal criminal prosecutions, however, is illustrated by what one judge¹¹⁵ has termed the "Copper Platter Doctrine."¹¹⁶ That is the phenomenon whereby state officers who have seized evidence in violation of their state's standards, thereby precluding its use in state courts, turn over that evidence to federal officers for use in federal prosecutions.¹¹⁷

The Copper Platter Doctrine is a reversal of the "Silver Platter Doctrine," which existed before the exclusionary rule¹¹⁸ was made applicable to the states in *Mapp v. Ohio*.¹¹⁹ One year prior to *Mapp*, in *Elkins v. United States*,¹²⁰ the Supreme Court abolished the Silver Platter Doctrine, and no longer permitted federal agents, who had seized evidence illegally and were barred by the rule from using it in a federal prosecution, to turn it over "on a silver platter" to state

¹¹³ *Id.* (emphasis in original).

¹¹⁴ Judge Donald Ziegler of the Pennsylvania Court of Common Pleas gave the name "Copper Platter Doctrine" to the process whereby state law enforcement officers, precluded from using evidence in state courts because it had been illegally seized when measured against the state's standards, merely turn it over to federal officers for use in federal court. The "Copper Platter Doctrine" is the reverse of the "Silver Platter Doctrine," abolished by the Supreme Court in *Elkins v. United States*, 364 U.S. 206 (1960). Ziegler, *supra* note 10.

¹¹⁵ Donald Ziegler, Court of Common Pleas, Allegheny County, Pa.

¹¹⁶ See *supra* note 114.

¹¹⁷ The test of whether the evidence may be used in federal courts is whether the search meets federal constitutional standards, regardless of whether the search was made by state or federal officers. Compare, however, the standard for probable cause to arrest when it is made by state officers but the defendant is prosecuted in federal court. *United States v. Di Re*, 332 U.S. 581 (1948) (standard of probable cause to arrest determined by state law, provided it meets federal standards, when arrest made by state officers).

¹¹⁸ The exclusionary rule, by which illegally seized evidence is barred from use at trial, was mandated for federal prosecutions in *Weeks v. United States*, 232 U.S. 383 (1914).

¹¹⁹ 367 U.S. 643 (1961).

¹²⁰ 364 U.S. 206 (1960).

prosecutors.¹²¹ *Elkins* specifically forbade federal use of evidence seized illegally, according to federal standards, even though federal agents obtained it legally by serving a warrant on the state agents who had committed the illegal seizure.¹²² The *Elkins* Court rested its decision to bar the evidence in federal court on the fact that the state court had deemed the evidence to be illegally seized, observing: "To the victim it matters not whether his constitutional right has been invaded by a federal agent or by a state officer."¹²³ Further, Justice Stewart, writing for the majority, noted that federal admission of the evidence "implicitly invites federal officers to withdraw from [cooperation with state authorities] and at least tacitly [encourages] state officers in the disregard of constitutionally protected freedom."¹²⁴ By eliminating the Silver Platter Doctrine, thus making the fruits of a federally unlawful search inadmissible in both federal and state courts, the *Elkins* Court found that "there can be no inducement to subterfuge and evasion with respect to federal-state cooperation in criminal investigation. Instead, forthright cooperation under constitutional standards will be promoted and fostered."¹²⁵

The *Elkins* Court, although particularly deferential to states which were trying to protect their citizens' constitutional rights,¹²⁶ overlooked the loophole in its holding: evidence seized illegally according to state standards may still be admissible in federal court because *Elkins* goes only to whether the search, if conducted by federal officers, would violate the Federal Constitution. This lacuna did not go unnoticed by dissenting Justice Frankfurter, who noted that state law violations by law enforcement officers were not relevant to the majority's rule. Thus, Justice Frankfurter continued, the *Elkins* holding would have the result of "creat[ing] undesirable conflict with

¹²¹ Interestingly, it was the state court in *Elkins* which determined that the evidence had been seized illegally and dismissed the petitioner's indictment. The federal officials then obtained the evidence by warrant and used it to convict *Elkins* in federal court. *Id.* at 207. But before *Mapp*, state courts were not required to exclude illegally seized evidence, and not all of them did.

¹²² *Id.* at 215.

¹²³ *Id.* (footnote omitted).

¹²⁴ *Id.* at 221-22.

¹²⁵ *Id.* at 222.

¹²⁶ Justice Stewart wrote:

The very essence of a healthy federalism depends upon the avoidance of needless conflict between state and federal courts. Yet when a federal court sitting in an exclusionary state admits evidence lawlessly seized by state agents, it not only frustrates state policy, but frustrates that policy in a particularly inappropriate and ironic way. For by admitting the unlawfully seized evidence the federal court serves to defeat the state's effort to assure obedience to the Federal Constitution.

Id. at 221.

valid and praiseworthy state policies which attempt to protect individuals. . . . [C]omity plays no part at all, and the fruits of illegal law enforcement may well be admitted in federal courts directly contrary to state law,"¹²⁷ because the police action is tested only by the minimum federal standards. Justice Frankfurter was prophetic in anticipating that the silver platter would be replaced with another utensil:

A state officer who disobeys [his state's laws] need only to turn his evidence over to the federal prosecutor, who may freely utilize it under [the *Elkins* decision] in disregard of the disciplinary policy of the State's exclusionary rule. I cannot think why the federal courts should thus encourage state illegalities.¹²⁸

This phenomenon, the "Copper Platter Doctrine," grows more serious as state courts expand individual protections through their interpretations of state constitutions.¹²⁹ One example¹³⁰ of this occurred in *United States v. Scolnick*,¹³¹ in which local police officers, upon arresting the defendant as a burglary suspect, seized from him a key to a safe deposit box.¹³² Police obtained a warrant to search the box, but did not comply with a state law requiring the box's lessee to be notified of the impending search and to be given the opportunity to contest it.¹³³ The police did not find the stolen jewels they sought, but did find \$100,000 in cash, which they reported to the Internal Revenue Service (IRS). The IRS put a lien on the box's contents and sealed it, in effect seizing it.¹³⁴ Scolnick contested the IRS's action in federal court on the basis of the state's search, which the state had conceded was illegal, but the Third Circuit upheld the search and the use of the evidence because "[t]he test is one of federal law."¹³⁵ Judge Freedman, dissenting in *Scolnick*, stated that the fruits of an illegal state search should not be admissible in federal court, just as the fruits of an illegal federal search are forbidden as evidence in state courts.¹³⁶

¹²⁷ *Id.* at 244-45 (Frankfurter, J., dissenting).

¹²⁸ *Id.* at 245-46 (Frankfurter, J., dissenting).

¹²⁹ See Ziegler, *supra* note 10, at 251.

¹³⁰ Another is *United States v. Ullrich*, 580 F.2d 765, 770 n.4 (5th Cir. 1978) (evidence suppressed in state court as fruits of illegal arrest admissible in federal courts).

¹³¹ 392 F.2d 320 (3d Cir. 1968), *cert. denied*, 392 U.S. 931 (1968).

¹³² *Id.* at 322.

¹³³ *Id.* at 325.

¹³⁴ *Id.* at 321.

¹³⁵ *Id.* at 325 (quoting *Elkins*, 364 U.S. at 224) (emphasis in original).

¹³⁶ Judge Freedman wrote:

I see no reason why the policy of the state . . . should not be respected, especially by state officers, sworn to uphold the state's laws. To allow them to violate the statute and produce to a federal prosecutor the information thus obtained for use in a

Somewhat akin to the Copper Platter Doctrine, in that it attempts to create federal court jurisdiction—and the imposition of federal law—in derogation of state authority, is the device known as "manufactured jurisdiction." This "artificial federalization of purely state crimes"¹³⁷ occurs when federal officials induce or supply an act, such as an interstate telephone call, solely to gain federal jurisdiction. An egregious example of manufactured jurisdiction occurred in *United States v. Archer*.¹³⁸ In that case, the United States Attorney's Office for the Southern District of New York, during an investigation into alleged corruption in the Queens, New York, District Attorney's Office, set up a crime to see whether members of the local office could be bribed to drop the charges.¹³⁹ To gain jurisdiction, two federal agents, following the orders of an Assistant United States Attorney, went to a hotel in Newark, New Jersey, solely to have one of the defendants engage in an interstate telephone call.¹⁴⁰ The defendants subsequently were indicted and convicted in federal court under the Travel Act,¹⁴¹ but the Second Circuit reversed the convictions and ordered the indictment dismissed.¹⁴² Judge Friendly, who authored *Archer*, observed that the federal officers' conduct "needlessly injected the Federal Government into a matter of state concern,"¹⁴³ and dismissed the case on the ground that the interstate element of a federal offense cannot be manufactured by federal officers.¹⁴⁴

V. CONCLUSION

This Comment argues in support of applying the laws of a state in federal courts within that state, an application of the *Erie* Doctrine to criminal law. If *Erie* were so applied, the rights a state confers

federal trial is to lend federal encouragement to the violation by state officers of the laws which control their conduct.

Id. at 328 (Freedman, J., dissenting).

¹³⁷ *United States v. Jannotti*, 501 F. Supp. 1182, 1204 (E.D. Pa. 1980), *rev'd*, 673 F.2d 578 (3d Cir.), *cert. denied*, 457 U.S. 1106 (1982).

¹³⁸ 486 F.2d 670 (2d Cir. 1973).

¹³⁹ *Id.* at 672.

¹⁴⁰ *Id.* at 674.

¹⁴¹ 18 U.S.C. § 1952 (1982).

¹⁴² *Archer*, 486 F.2d at 672.

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 682. The Supreme Court also eschews specious attempts to gain federal jurisdiction even when such attempts are less blatant than those in *Archer*. In *Rewis v. United States*, 401 U.S. 808 (1971), for example, the Court observed that overexpansive interpretations of the Travel Act could "alter sensitive federal-state relationships, . . . overextend limited federal police resources, and might well produce situations in which . . . relatively minor state offenses [are transformed] into federal felonies." *Id.* at 812.

upon its citizens could not be denied them by the discretionary authority of federal prosecutors to bring what are essentially state cases in federal courts. This idea may seem cumbersome, and perhaps even bizarre, to some—a sacrifice of simplicity on the altar of “states’ rights.” It is in fact, however, merely a recognition of what ought to be axiomatic, but what many federal prosecutors have decided to ignore: that federal courts are courts of limited jurisdiction. This somewhat radical approach is offered because past entreaties to save federal courts for federal matters have been ignored.

An analysis of certain prosecutions under the Mail Fraud and Hobbs Acts has shown that the purpose and plain meaning of the statutes in many cases must be tortured beyond recognition in order to find a nexus to federal law. Application of state criminal law in federal courts is simpler, and certainly more intellectually honest, than the mental acrobatics engaged in by federal prosecutors and jurists as they search, for example, for effects on interstate commerce to justify their prosecutions and decisions. It is also a recognition that every individual in this country has two sources of rights and protections, emanating from dual sovereigns. The *Elkins* Court sought a “healthy federalism” by requiring the federal government to respect a state’s efforts to uphold the Federal Constitution. But federalism’s health is equally jeopardized when the federal government, in effect, may ignore state constitutions and statutes. The rights a state has chosen to confer on its people, as well as the right of a state to prosecute state crimes, are obliterated when the federal government is permitted to misuse federal criminal laws by an expansive interpretation of their scope.

In the abstract, the legal reasoning often used to make a federal statute reach a particular defendant may be seen as an interesting, albeit cumbersome, mental exercise. The reality, however, is that frequently, such “exercises” are engaged in at the expense of an individual’s liberty. It is unsettling to realize that federal prosecutors’ power to turn minor state offenses into federal felonies gives them broad discretion to determine the degree of punishment to be meted out.

Federal prosecutors, because of their vast powers, should be forced to demonstrate a substantial federal interest before spending federal dollars to investigate and prosecute a crime. If this demonstration cannot be made, and it is determined that federal prosecutors are usurping the authority of their state counterparts, the defendant should not be the one to pay the price by facing less protective rules of law and stiffer penalties.

The choice for prosecutors pursuing criminal actions in a federal forum should be clear: They must either demonstrate that the case involves conduct related to a substantial federal interest, or face the application of state law.

Camille Kenny

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Popular Sovereignty, Double Jeopardy, and the Dual Sovereignty Doctrine

Michael A. Dawson

In December 1953, a federal jury acquitted Alfonse Bartkus of robbing a federally insured bank. Because the Double Jeopardy Clause barred reprosecution of Bartkus in federal courts, the disappointed federal authorities instigated reprosecution of Bartkus by Illinois authorities under a state robbery statute. But the federal authorities did even more. They prepared the state case, guided the state prosecution, and postponed the sentencing of Bartkus' alleged co-perpetrators until they testified against Bartkus at the state trial.¹ In January 1954, Bartkus was tried in state court on substantially the same facts. This time, he was convicted and sentenced to life in prison.²

The Supreme Court affirmed Bartkus' conviction on two grounds: (1) the Double Jeopardy Clause did not apply to the states;³ and (2) even if the Double Jeopardy Clause were to apply to the states, offenses against different sovereigns are not the "same offense" for double jeopardy purposes.⁴ In 1969, the Court applied the Double Jeopardy Clause to the states, eviscerating the first ground for the decision in *Bartkus*.⁵ After 1969, cases following *Bartkus* relied solely on the second ground, the dual sovereignty doctrine.⁶ This doctrine alone

1. *Bartkus v. Illinois*, 359 U.S. 121, 169 (1959) (Brennan, J., dissenting).

2. 359 U.S. at 164-68 (Brennan, J., dissenting).

3. 359 U.S. at 124.

4. 359 U.S. at 128-29.

5. *Benion v. Maryland*, 395 U.S. 784 (1969).

6. See, e.g., *Heath v. Alabama*, 474 U.S. 82 (1985).

justifies reprosecution by state authorities of defendants tried before federal courts,⁷ reprosecution by federal authorities of defendants tried before state courts,⁸ and reprosecution by state authorities of defendants tried before the courts of another state.⁹

This Note makes a new argument against the dual sovereignty doctrine.¹⁰ It argues that the doctrine is unconstitutional because it violates the principle of popular sovereignty underlying the Double Jeopardy Clause. This Note contends that the Double Jeopardy Clause should be understood not only as a protection afforded criminal defendants, but as a structural provision implementing the principle of popular sovereignty. This structural aspect of the Double Jeopardy Clause renders the dual sovereignty doctrine unconstitutional because it denigrates the power of the jury as well as the rights of criminal defendants. In short, this Note argues that the reprosecution of Alfonse Bartkus undermined the sovereignty of the people. In *Bartkus*, the people had spoken, acquitting the defendant, and exercising their ultimate check on government authority. The dual sovereignty doctrine allowed government to ignore this verdict, reprosecute Alfonse Bartkus, and undermine the sovereignty of the people.

I. POPULAR SOVEREIGNTY

Whenever the political laws of the United States are to be discussed, it is with the doctrine of the sovereignty of the people that we must begin.

—Alexis de Tocqueville¹¹

The power of the people lies at the foundation of American government.¹² In the United States, government derives its authority "from the consent of the governed"¹³ and maintains its legitimacy through the participation of the

7. *Bartkus*, 359 U.S. at 121 (1959) (permitting state prosecution for robbery following federal prosecution for robbery of federally insured bank).

8. *Abbate v. United States*, 359 U.S. 187 (1959) (permitting federal prosecution for conspiracy to destroy federal communications facilities following state prosecution for conspiracy to destroy property of another).

9. *Heath*, 474 U.S. 82 (permitting state prosecution for murder following murder prosecution by another state).

10. The unconstitutionality of the dual sovereignty doctrine is not, in itself, a novel claim. See generally Walter T. Fisher, *Double Jeopardy: Two Sovereignities and the Intruding Constitution*, 28 U. CHI. L. REV. 591 (1961); Harlan R. Harrison, *Federalism and Double Jeopardy: A Study in the Frustration of Human Rights*, 17 U. MIAMI L. REV. 306 (1963); Dominic T. Holzhaus, *Double Jeopardy and Incremental Culpability: A Unitary Alternative to the Dual Sovereignty Doctrine*, 86 COLUM. L. REV. 1697 (1986); Kenneth M. Murchison, *The Dual Sovereignty Exception to Double Jeopardy*, 14 N.Y.U. REV. L. & SOC. CHANGE 383 (1986); George C. Pontikes, *Dual Sovereignty and Double Jeopardy*, 14 CASE W. RES. L. REV. 700 (1963); Lawrence Newman, *Double Jeopardy and the Problem of Successive Prosecution*, 34 S. CAL. L. REV. 252 (1961).

11. 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 55 (Phillips Bradley ed., 1945).

12. See generally Akhil R. Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1429-66 (1987) (discussing the principle of popular sovereignty).

13. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

people in a representative democracy.¹⁴ Although the people delegate authority and confer legitimacy, they retain sovereignty.¹⁵ As sovereign, the people possess the final check on government authority.¹⁶

When we translate the principle of popular sovereignty from political rhetoric into a legal idea, the distinctions between delegating, legitimating, and supervising government authority become important. While all three relate to the power of the people, only the third—supervising—constitutes an exercise of popular sovereignty, strictly speaking. While delegating authority is essential to constituting a government, until a government is constituted the people have nothing over which to exercise their sovereignty. And while legitimating government authority through representative democracy is also important, this action entails participating in government rather than exercising control over it. Only by asserting their supervisory powers over government do the people exercise their sovereignty.

It is important to understand two related aspects of this supervisory power: (1) an exercise of popular sovereignty must take place from without the structure of government; and (2) an exercise of popular sovereignty must be final and unappealable.

First, an exercise of popular sovereignty must be "supra-legal." Popular sovereignty cannot take place from within the structure of government, for to confine exercises of popular sovereignty to a place or role within the government would subject the popular will to government processes, regulation, and even control.¹⁷ Because the popular will cannot be regulated and remain sovereign, an exercise of popular sovereignty must be "supra-legal."

Historically, the American people have demonstrated this "supra-legal" aspect of popular sovereignty through revolution, constitutional convention, and jury nullification. In revolution and convention, the people exercised their "right . . . to alter or abolish" any form of government destructive of their inalienable rights.¹⁸ The American Revolution occurred from outside the structure of the British Empire: to exercise their right to abolish the government, the colonists found it necessary first to declare independence from British authority and to "dissolve the political bands which have connected them with another [people]."¹⁹ The constitutional convention also occurred from outside the governmental structure: to exercise their right to alter or abolish an ineffec-

14. See PAUL A. DAWSON, *AMERICAN GOVERNMENT: INSTITUTIONS, POLICIES, AND POLITICS* 31-32 (1987) (discussing legitimating function of participatory democracy).

15. See Amar, *supra* note 12, at 1437 (discussing distinction in American political thought between authority and sovereignty).

16. Government authority is controlled in the first instance by a system of "checks and balances" within the government. We should not forget, however, the existence of a final check on government authority possessed by the people.

17. Popular sovereignty should not be confused with populist reform, which takes place through, if not within, existing structures of government.

18. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

19. *Id.* at para. 1.

tual government, the Framers found it necessary to ignore the requirement in the Articles of Confederation that any amendment be approved by all of the state legislatures.²⁰ Jury nullification, too, is supra-legal: most jurisdictions refuse to instruct the jury that they have this authority.²¹ The jury must itself determine that it possesses such power. Furthermore, this determination and the decision to exercise it quite literally occur outside the structure of government—that is, outside the courtroom in the jury room, from which the government is excluded.

The exercise of popular sovereignty must also be final and unappealable. In the words of James Wilson, "In all governments, whatever is their form, however they may be constituted, there must be a power established from which there is no appeal The only question is where that power is lodged? . . . [I]t remains and flourishes with the people."²² The final and unappealable aspect of popular sovereignty follows from the requirement that an exercise of popular sovereignty occur from without the structure of government. Once appeal is permitted, the following questions arise: Who may appeal? Before whom? How many times? Who may limit appeals? It is impossible to answer these questions without subjecting the popular will to government authority. Because an exercise of popular sovereignty must occur from without the ambit of government authority, such an exercise must be final and unappealable.

II. THE DOUBLE JEOPARDY CLAUSE: IMPLEMENTING THE PRINCIPLE OF POPULAR SOVEREIGNTY

. . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb.²³

The Double Jeopardy Clause has a distinguished pedigree. It is "the oldest of all the Bill of Rights guarantees,"²⁴ recognized in one form or another by "all the cultures from which we draw our moral and legal precepts."²⁵ Con-

20. See Akhil R. Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. CHI. L. REV. 1043, 1047-56 (1988) (discussing process of ratification outside of Article V and analogous provisions of state constitutions); cf. BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 173-75 (1991) (discussing "illegality" of Constitutional Convention).

21. See *United States v. Dougherty*, 391 U.S. 145 (1968).

22. GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC* 530 (1969) (quoting JAMES WILSON, *PENNSYLVANIA AND THE FEDERAL CONSTITUTION, 1787-88* (John Bach McMaster & Frederick Dawson Stone eds., 1888)).

23. U.S. CONST. amend. V.

24. See George C. Thomas, III, *An Elegant Theory of Double Jeopardy*, 1988 U. ILL. L. REV. 827, 828.

25. *Id.*: see generally Peter Westen & Richard Drubel, *Toward a General Theory of Double Jeopardy*, 1978 SUP. CT. REV. 81; Comment, *Twice in Jeopardy* 75 YALE L.J. 262 (1963).

cepts similar to the Double Jeopardy Clause may be found in the law of Athens,²⁶ the law of the Roman Republics,²⁷ the Digest of Justinian,²⁸ early canon law,²⁹ English common law,³⁰ and early American colonial law.³¹

A distinguished pedigree can inhibit thought, however, tempting scholars to synthesize millennia of double jeopardy jurisprudence into a simple rubric. An example of a work that attempts this synthesis is *Twice in Jeopardy*.³² Appearing in 1963 as the Warren Court was reaching its "apogee,"³³ this student comment synthesized double jeopardy jurisprudence into a framework grounded in individual rights. In so doing, *Twice in Jeopardy* organized the whole of Double Jeopardy jurisprudence around three rules: "the rules which bar retrial for the same offense after acquittal, retrial for the same offense after conviction, and multiple punishment for the same offense at one trial."³⁴

Twice in Jeopardy has influenced thinking about the Double Jeopardy Clause by courts³⁵ and commentators³⁶ for decades. Its rules-oriented approach proved highly compatible with the individual rights-oriented jurisprudence of the Warren Court. Yet *Twice in Jeopardy* regards the Double Jeopardy Clause as merely the modern version of an ancient legal precept. It ignores the distinctly American innovations imparted to the precept when it was incorporated into the United States Constitution. Because the work fails to evaluate the Double Jeopardy Clause as an integral part of the Bill of Rights and the Constitution, *Twice in Jeopardy* fails to appreciate the structural purpose of the Double Jeopardy Clause. As a result, it reduces double jeopardy jurisprudence to nothing more than a menu of procedural safeguards afforded criminal defendants.

A second seminal work moved beyond the rules-oriented approach of *Twice in Jeopardy* to examine the interests underlying the Double Jeopardy Clause but, like *Twice in Jeopardy*, failed to appreciate fully the structural role of the

26. Thomas, *supra* note 24, at 836 (citing JOHN WALKER JONES, *LAW AND LEGAL THEORY OF THE GREEKS* 148 (1956)).

27. JAY A. SIGLER, *DOUBLE JEOPARDY: THE DEVELOPMENT OF A LEGAL AND SOCIAL POLICY* 2-3 (1969); JAMES LEIGH STRACHAN-DAVIDSON, *PROBLEMS OF THE ROMAN CRIMINAL LAW* 155 (1912).

28. DIG. 48.2.7.2 (Ulpian, *Officium Proconsulis* 7).

29. See *Bartkus v. Illinois*, 359 U.S. 121, 152 n.4 (1959) (Black, J., dissenting) (describing "canon law opposition to double trials" manifest, *inter alia*, in the maxim "Not even God judges twice for the same act").

30. See 4 WILLIAM BLACKSTONE, *COMMENTARIES* *328-29.

31. See *Bartkus*, 359 U.S. at 153 n.7 (Black, J., dissenting) (citing American colonial law prohibiting double jeopardy).

32. *Twice in Jeopardy*, *supra* note 25.

33. Owen Fiss, *A Life Lived Twice*, 100 YALE L.J. 1117, 1117 (1991).

34. *Twice in Jeopardy*, *supra* note 25, at 265-66 (citations omitted). Under narrowly prescribed circumstances, a fourth rule bars retrial following a mistrial. *Id.* at 266.

35. See, e.g., *North Carolina v. Pearce*, 395 U.S. 711, 717 n.8 (1969) (citing *Twice in Jeopardy* in opinion holding that Double Jeopardy Clause does not bar imposition of heavier sentence upon re prosecution following erroneous conviction).

36. See, e.g., Thomas *supra* note 24 (presenting *Twice in Jeopardy* as one of three dominant paradigms in Double Jeopardy jurisprudence).

Clause. In *Toward a General Theory of Double Jeopardy*,³⁷ Peter Westen and Richard Drubel argued that "the principle of double jeopardy serves three interests. In ascending degrees of importance, they are: (1) an interest in finality . . . (2) an interest in avoiding double punishment . . . and (3) an interest in protecting nullification—viz., an interest in allowing the system to acquit against the evidence. . . ."³⁸ Under their analysis, the Double Jeopardy Clause was no longer reduced to a mere menu of procedural safeguards afforded criminal defendants. Indeed, Westen and Drubel downplayed the individual rights aspect of the Clause: though the interest in finality is based largely in a concern for the rights of criminal defendants,³⁹ Westen and Drubel argue that finality is a weak value, "insufficient, by itself, to explain results reached in double jeopardy cases."⁴⁰ In addition, Westen and Drubel developed two structural aspects of the Double Jeopardy Clause: (1) subjecting prosecutors to constraints imposed by legislatures; and (2) subjecting prosecutors to constraints imposed by juries.

The interest in avoiding double punishment assures that prosecutors respect the will of legislatures. This interest reflects a concern that a defendant not be subject to punishment greater than that intended by the legislature.⁴¹ Where punishment is not specifically prescribed but left to the discretion of a judge, the interest in avoiding double punishment ensures that this discretion is exercised within limits prescribed by the legislature.⁴² Under the analysis of Westen and Drubel, avoiding double punishment is an important value. Indeed, the value is promoted by two rules: the rule against reprosecution for the same offense after conviction and the rule against multiple punishment for the same offense at one trial.⁴³ Further, the language of the original Double Jeopardy

37. Westen & Drubel, *supra* note 25.

38. *Id.* at 84.

39. Justice Black captured the value of finality in an oft-cited passage:

The constitutional prohibition against "double jeopardy" was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense. . . . The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the state with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

Green v. United States, 355 U.S. 184, 187-88 (1957) (reversing conviction for first degree murder following conviction for second degree murder).

40. Westen & Drubel, *supra* note 25, at 105-06. *But see* Thomas, *supra* note 24, at 831-32 (contending that all three values commonly supposed to be advanced by Double Jeopardy Clause may be reduced to one: "verdict finality").

41. *Ex parte Lange*, 85 U.S. (18 Wall.) 163, 168 (1873) (discharging habeas petitioner sentenced beyond statutory authorization); *see generally*, Westen & Drubel, *supra* note 25, at 107-11.

42. *North Carolina v. Pearce*, 395 U.S. 711, 718-20 (1969) (holding that prison term served following conviction later held erroneous plus prison sentence imposed upon successive prosecution may not together exceed punishment authorized by statute).

43. *See supra* text accompanying note 34.

Clause proposed by Madison shows that avoiding double punishment was prominent in the minds of the Framers.⁴⁴

The interest in protecting nullification ensures that prosecutors respect the will of juries.⁴⁵ Nullification is the jury's power to acquit against the evidence. Since juries need not explain their verdicts, it may be difficult to distinguish an instance of nullification from an ordinary acquittal. To protect the power of nullification, therefore, reprosecutions following acquittals generally must be prohibited.⁴⁶ Having failed to convince a jury of the defendant's guilt, prosecutors may not simply impanel a new jury and try again.

But *Toward a General Theory of Double Jeopardy*, like *Twice in Jeopardy*, fails to recognize the distinctly American innovations imparted to the Double Jeopardy Clause when it was incorporated into the United States Constitution. Because the work failed to evaluate the Double Jeopardy Clause as an integral part of the Bill of Rights and the Constitution, *Toward a General Theory of Double Jeopardy* fails to link the interest in protecting the power of nullification to the role of the Double Jeopardy Clause in implementing the principle of popular sovereignty.

Further analysis reveals that the interest in protecting the power of juries is even more central than Westen and Drubel suggest. Westen and Drubel associate the interest in protecting nullification with the rule barring reprosecution after acquittal. This interest, however, is associated not only with that rule, but also with the rule barring reprosecution after conviction. Where multiple charges are contained in the indictment, conviction for a lesser offense may entail an implicit acquittal of the greater offense.⁴⁷ As with explicit acquittals, an implicit acquittal may be an instance of nullification or an instance of an ordinary acquittal. Having failed to convince a jury to convict the defendant of the greater offense, prosecutors may not try again with a new jury. Even where the jury convicts on all charges that are presented to it in the indictment, one may assume that the prosecutor did not bring more serious charges because he or she predicted that the jury would acquit the defendant of those charges.⁴⁸ As in the case of explicit acquittals, having obtained a conviction on a lesser charge and an implicit acquittal on a greater charge, the prosecutors may not reprosecute the defendant on the greater charge.⁴⁹

44. The original version of the Double Jeopardy Clause, as proposed by Madison, read, "No person shall be subject, except in cases of impeachment, to more than one punishment or trial for the same offense." 1 ANNALS OF CONG. 434 (Joseph Gales ed., 1789). *See infra* text accompanying notes 56-60.

45. *See* Westen & Drubel, note 25 at 129-30; *see generally* *United States v. Ball*, 163 U.S. 662, 670-71 (1896) (relying on nullification to reverse conviction following acquittal); Alan W. Scheffin, *Jury Nullification: The Right to Say No*, 45 S. CAL. L. REV. 168 (1972).

46. *See supra* text accompanying note 34.

47. *Green v. United States*, 355 U.S. 184, 191 (1957) (finding defendant convicted of second degree murder implicitly acquitted of first degree murder).

48. In such circumstances a prosecutor will decline to include the more serious charges for fear of creating a perception of overreaching and weakening his or her case on the less serious charges.

49. *See Green*, 355 U.S. 184.

The structural role of the Double Jeopardy Clause can be understood by considering the Clause in conjunction with other provisions of the Bill of Rights and with the Constitution itself. The Bill of Rights contains three amendments expressly concerned with juries. The Fifth Amendment sets out the requirement of a grand jury in criminal cases,⁵⁰ the Sixth guarantees the right to a petit jury in a criminal trial,⁵¹ and the Seventh requires a jury in certain civil cases.⁵² In each case, juries serve the role of "populist protectors,"⁵³ designed to exert popular local control over the federal government. Consider, for example, the words of de Tocqueville:

The institution of the jury . . . places the real direction of society in the hands of the governed, . . . and not in that of the government. . . . [It] invests the people, or that class of citizens, with the direction of society. . . . The jury system as it is understood in America appears to me to be as direct and as extreme a consequence of the sovereignty of the people as universal suffrage. They are two instruments of equal power, which contribute to the supremacy of the majority.⁵⁴

Legislatures may proscribe, executives may prosecute, and judges may preside only to have their statutes, closing statements, and jury charges disregarded by the peers of the accused. By exercising their power to acquit against the evidence, twelve angry citizens may be the last check on governmental authority.⁵⁵

Article I of the Constitution and the original language of the Double Jeopardy Clause further reveal the principle of popular sovereignty underlying the Double Jeopardy Clause. The power of impeachment, though ostensibly an exception to the Double Jeopardy Clause, actually reinforces the principle of popular sovereignty. The double jeopardy guarantee originally proposed by James Madison read, "No person shall be subject, except in cases of impeachment, to more than one punishment or trial for the same offense."⁵⁶ The phrase "except in cases of impeachment" did not make it into the final version of the Double Jeopardy Clause. Presumably, however, it was irrelevant. Article I, Section 3 of the Constitution provides,

50. U.S. CONST. amend. V ("No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury. . . .").

51. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by Jury. . . .").

52. U.S. CONST. amend. VII ("In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall otherwise be reexamined in any Court of the United States, than according to the rules of the common law").

53. See Akhil R. Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1183-85 (1991).

54. 1 ALEXIS DE TOCQUEVILLE, *supra* note 11, at 282-83 (quoted in *id.* at 1185).

55. In the Roman Republics, verdicts of acquittal were subject to appeal only before the general assembly. See Thomas, *supra* note 24, at 836 n.64 (citing 1 STRACHAN-DAVIDSON, *supra* note 27, at 155).

56. 1 ANNALS OF CONG. 434 (Joseph Gates ed., 1789).

The Senate shall have the sole Power to try all Impeachments. . . . Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office or honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.⁵⁷

Thus, the text of the Constitution provides that office holders convicted by the Senate remain subject to criminal prosecution for the offenses on which their impeachment conviction was based.

Before the Senate may try an impeachment, however, the House of Representatives must impeach.⁵⁸ The House of Representatives, through biennial elections and sheer numbers, is the branch closest to the people. By limiting the impeachment exception to the Double Jeopardy Clause to circumstances in which the House of Representatives has acted, the exception respects the principle of popular sovereignty.⁵⁹

Considering the Double Jeopardy Clause with other provisions of the Bill of Rights and as part of the Constitution forces the recognition that the Clause is more than a modern version of an ancient legal precept. The Double Jeopardy Clause is also a structural provision implementing the principle of popular sovereignty.⁶⁰

III. THE DUAL SOVEREIGNTY DOCTRINE

As discussed above, *Bartkus v. Illinois* held that the Double Jeopardy Clause did not prohibit prosecution by state authorities of a person who had been subjected previously to federal prosecution for the same offense.⁶¹ *Abbate v. United States*,⁶² a companion case, held the converse: the Double Jeopardy Clause did not prohibit prosecution by federal authorities of a person who had been subjected previously to state prosecution for the same offense. Both decisions rested on the same two grounds. First, the Double Jeopardy Clause

57. U.S. CONST. art. I, § 3.

58. U.S. CONST. art. I, § 2 (providing that "The House of Representatives . . . shall have the sole Power of Impeachment").

59. Under the Seventeenth Amendment, the impeachment trial, in addition to the recommendation to impeach, is directed by a tribunal that is relatively close to the people. See U.S. CONST. amend. XVII (providing for popular election of Senators). Thus, the Seventeenth Amendment strengthens the argument that the impeachment exception to the Double Jeopardy Clause affirms the principle of popular sovereignty underlying the Clause.

60. Even if other double jeopardy principles implement versions of the principle of popular sovereignty, the concept of popular sovereignty implemented by the Double Jeopardy Clause is uniquely American. See Amar, *supra* note 12, at 1432 (distinguishing conception of popular sovereignty implemented by Constitution from earlier notions of popular sovereignty).

61. See *supra* text accompanying notes 3-4.

62. 359 U.S. 187 (1959) (permitting federal prosecution for conspiracy to destroy federal property following state prosecution for conspiracy to destroy property of another).

did not apply to the states.⁶³ Second, under the dual sovereignty doctrine, offenses against different sovereigns were not the "same offense" for double jeopardy purposes.⁶⁴

Before 1969, the Double Jeopardy Clause did not apply to the states. Indeed, the Supreme Court specifically rejected the argument that the Fourteenth Amendment made the Double Jeopardy Clause applicable to the states in *Palko v. Connecticut*.⁶⁵ The Court reasoned that the Double Jeopardy Clause was not so fundamental as to warrant application to the states. Only in cases of "acute and shocking" hardship would the Court prohibit double jeopardy by the states—and then under the rubric of due process.⁶⁶

In 1969, *Benton v. Maryland*⁶⁷ overturned *Palko*. The *Benton* Court termed the Double Jeopardy Clause "a fundamental ideal in our constitutional heritage," so essential as to require application against the states.⁶⁸ After *Benton*, the Double Jeopardy Clause prohibited prosecution by state authorities of a person who previously had been subjected to state prosecution for the same offense. *Benton* eviscerated the first ground of the decisions in *Bartkus* and *Abbate*. After *Benton*, cases following *Bartkus* and *Abbate* could rely only on the dual sovereignty doctrine.⁶⁹ To the history of that doctrine this Note now turns.

A. The History of the Dual Sovereignty Doctrine

The dual sovereignty doctrine derives from the common law notion that a crime is an offense against the sovereign. Where an act violates the criminal prohibitions of both a state and the United States, the act gives rise to two distinct offenses: one against the state and one against the United States. Because the Double Jeopardy Clause protects defendants from successive prosecutions for the same offense, prosecution of offenses against different sovereigns is not barred by the Double Jeopardy Clause, even where the offenses are defined by identical statutory language.

The early cases developing the dual sovereignty doctrine were not concerned with successive prosecutions by state and federal authorities. Rather, they concerned shared state and federal legislative authority to criminalize certain conduct. In a series of cases in the late nineteenth and early twentieth centuries, the constitutional validity of federal crimes was challenged with the following argument:

63. *Bartkus*, 359 U.S. at 124.

64. *Id.* at 128-29.

65. 302 U.S. 319, 322 (1937).

66. *Id.* at 328.

67. 395 U.S. 784 (1969) (applying Double Jeopardy Clause to states).

68. *Id.* at 794-95.

69. See, e.g., *Heath v. Alabama*, 474 U.S. 82 (1985).

- 1) criminal law had traditionally been the province of the states;
- 2) competence to criminalize conduct must be exclusive;
- 3) federal crimes in areas traditionally criminalized by the states would result in shared state and federal competence;
- 4) therefore, federal crimes in areas traditionally criminalized by the states were unconstitutional.⁷⁰

The dual sovereignty doctrine was developed to meet this argument.⁷¹ Criminal competence need not be exclusively the province of state or federal law. It may be shared, proponents of the doctrine argued. These cases did not hold that the Double Jeopardy Clause permitted successive prosecution by separate sovereigns. Rather, the cases merely rejected the idea that the Clause rendered unconstitutional federal statutes criminalizing conduct traditionally criminalized by the states.

Early cases rejected challenges to state convictions on the grounds that the conviction punished conduct over which the Congress had legislative jurisdiction. In these cases, defendants had argued that exposing them to the mere possibility of a successive prosecution by federal authorities violates the Double Jeopardy Clause. The Court rejected these arguments.⁷² In *Moore v. Illinois*, the Court wrote,

The same act may be an offence or transgression of the laws of [Illinois and the United States]. . . . That either or both may (if they see fit) punish such an offender, cannot be doubted. Yet it cannot be truly averred that the offender has been twice punished for the same offence; but only that by one act he has committed two offences, for each of which he is justly punishable.⁷³

Because a federal prosecution had not, in fact, been brought in *Moore*, this statement was dicta. In cases in which the defendant challenged a conviction on grounds that an earlier prosecution by another sovereign had actually been brought, the Court upheld the conviction on grounds that the statutes prohibited different types of behavior and protected different interests.⁷⁴ It was not until

70. See, e.g., *infra* note 71.

71. See, e.g., *Moore v. Illinois*, 55 U.S. (14 How.) 13 (1852) (rejecting argument that possibility of successive prosecution by federal authorities invalidated conviction by state authorities).

72. See *Gilbert v. Minnesota*, 254 U.S. 325 (1920) (rejecting argument that possibility of successive prosecution by federal authorities invalidated conviction by state authorities); *Crossley v. California*, 168 U.S. 640 (1898) (same); *Cross v. North Carolina*, 132 U.S. 131 (1889) (same); *Moore*, 55 U.S. at 13 (same); see also *McKelvey v. United States*, 260 U.S. 353 (1922) (rejecting argument that possibility of successive prosecution by state authorities invalidated conviction by federal authorities); *Ex parte Siebold*, 100 U.S. 371 (1879) (same); *United States v. Cruikshank*, 92 U.S. 542 (1875) (same).

73. 55 U.S. at 20 (upholding conviction for violation of state fugitive slave law notwithstanding existence of federal fugitive slave law).

74. *Pentibone v. United States*, 148 U.S. 197, 209 (1893) (upholding federal conviction for conspiracy to violate injunction against intimidating mine managers into discharging employees following state conviction for conspiracy to intimidate mine managers into discharging employees).

*United States v. Lanza*⁷⁵ that the dual sovereignty doctrine was used to permit prosecution by one sovereign after prosecution by another.⁷⁶ In *Lanza*, the Court permitted federal prosecution for violation of the National Prohibition Act following state prosecution and conviction for violation of state Prohibition laws. In so holding, the Court relied on the dual sovereignty doctrine:

We have here two sovereignties, deriving power from different sources, capable of dealing with the same subject-matter within the same territory. . . . Each government, in determining what shall be an offense against its peace and dignity is exercising its own sovereignty, not that of the other. It follows that an act denounced as a crime by both national and state sovereignties is an offense against the peace and dignity of both and may be punished by each.⁷⁷

Under this doctrine, proscriptions emanating from different "sovereigns" are different offenses. Because the Double Jeopardy Clause only prohibits successive prosecutions for the "same offense," successive prosecutions by different sovereigns are not barred by the Clause.

The holding in *Lanza* might seem limited to successive prosecutions for state and federal offenses prescribed pursuant to the Eighteenth Amendment. Section 2 of that Amendment provides, "[t]he Congress and the several States shall have concurrent power to enforce this article by appropriate legislation."⁷⁸ The Court in *Lanza* held that this language confers upon each state authority to "exercise an independent judgment in selecting and shaping measures to enforce prohibition."⁷⁹ It might seem, therefore, that the dual sovereignty doctrine was limited to areas of law over which states and Congress share legislative authority pursuant to constitutional mandate.

Any idea that the dual sovereignty doctrine depended upon the existence of a constitutional mandate of shared state and federal legislative competence, however, was repudiated by the *Lanza* court itself. Following his reference to the Eighteenth Amendment, Chief Justice Taft wrote, "To regard the [Eighteenth] Amendment as the source of the power of the states to adopt and enforce prohibition measures is to take a partial and erroneous view of the matter."⁸⁰ Chief Justice Taft made clear that the authority of states to legislate flows not from the Eighteenth but from the Tenth Amendment.⁸¹ As if this disclaimer were not enough, the dual sovereignty doctrine survived repeal of the Eighteenth Amendment. This survival removed any remaining possibility

⁷⁵ 260 U.S. 377 (1922).

⁷⁶ See Pontikes, *supra* note 10, at 706-10 (discussing development of dual sovereignty doctrine before *Lanza*).

⁷⁷ *Lanza*, 260 U.S. at 382.

⁷⁸ U.S. CONST. amend. XVIII.

⁷⁹ *Lanza*, 260 U.S. at 381.

⁸⁰ *Id.*

⁸¹ *Id.* at 382.

that the dual sovereignty doctrine was premised merely upon a constitutional mandate of concurrent state and federal authority to criminalize certain types of conduct.⁸²

Ironically, Chief Justice Taft identified the Tenth Amendment as the source of the dual sovereignty doctrine: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States. . . ."⁸³ In so doing, Taft ignored the last four words of the Amendment: "or to the people."⁸⁴ Thus, while the Tenth Amendment is the source for the dual sovereignty doctrine, it reaffirms the principle of popular sovereignty that the Double Jeopardy Clause is designed to implement.

The dual sovereignty doctrine has not been without its critics. Not only has the constitutionality of the doctrine been questioned by scholars;⁸⁵ federal and state authorities have limited the reach of the doctrine via internal policies or legislation. For example, the dual sovereignty doctrine has been limited somewhat by the Justice Department's "Petite Policy"⁸⁶ and by various state statutes.⁸⁷ The Petite Policy was announced by the Attorney General shortly after *Bartkus*, in *Petite v. United States*.⁸⁸ Under the policy, the federal government will not prosecute a defendant who has been previously prosecuted in a state court for the same conduct unless "compelling interests" support a second prosecution.⁸⁹

The Petite Policy is an incomplete limitation on federal prosecution following state prosecution, however. The policy is invoked at the government's discretion. It does not confer upon those prosecuted for state crimes the right to challenge a subsequent federal prosecution in violation of the policy.⁹⁰ Cases in which the Supreme Court vacated and remanded convictions under the Petite Policy have been disposed of by *per curiam* order⁹¹ so as to avoid

⁸² Although the Eighteenth Amendment is not the source of the dual sovereignty doctrine, the context of Prohibition is important to understanding one of the (often implicit) rationales for the doctrine. This rationale is reflected in Chief Justice Taft's concern that "[i]f a State were to punish the manufacture, transportation and sale of intoxicating liquor by small or nominal fines, the race of offenders to the courts of that State to plead guilty and secure immunity from federal prosecution for such acts would not make for respect for the federal statute or for its deterrent effect." *Id.* at 385. The concern that state courts could immunize defendants from federal prosecution seems particularly pressing in the context of federal enforcement of the civil rights laws. As will be discussed below, however, the concern that state courts might immunize defendants from federal prosecution does not cure the constitutional defects in the dual sovereignty doctrine. See *infra* text accompanying notes 139-142.

⁸³ *Lanza*, 260 U.S. at 382.

⁸⁴ U.S. CONST. amend. X.

⁸⁵ See *supra* note 10.

⁸⁶ See *Dual Prosecution and Successive Federal Prosecution Policies*, in UNITED STATES ATTORNEY'S MANUAL 9-2.142 (1980) (limiting federal prosecutions following state prosecutions to situations implicating "compelling interests").

⁸⁷ See *infra* text accompanying notes 94-96.

⁸⁸ 361 U.S. 529 (1960).

⁸⁹ *Id.*

⁹⁰ See *Rinaldi v. United States*, 434 U.S. 22, 31 (1977) (*per curiam*) (conditioning defendant's benefit under the Petite Policy on the government's invocation of that policy).

⁹¹ See, e.g., *Watts v. United States*, 422 U.S. 1032 (1975), vacating 505 F.2d 951 (5th Cir. 1974);

creating any impression of the existence of a "right of criminal defendants to obtain enforcement of the policy."⁹² Furthermore, while the policy limits the instances of federal prosecutions following state prosecutions, such prosecutions are brought routinely.⁹³

Twenty-three states have adopted statutes limiting the dual sovereignty doctrine.⁹⁴ However, the limitation effected by these statutes is even less complete than that effected by the *Petite* Policy. The *Petite* Policy limits federal prosecution of offenses arising out of the *same conduct* previously subject to state prosecutions. Thirteen states impose a similar limitation, limiting state prosecution of offenses arising out of the *same conduct* previously subject to federal prosecution.⁹⁵ Another seven states limiting the dual sovereignty doctrine, however, do so by limiting re prosecution for the *same offense*—not for the *same conduct*.⁹⁶ As in the case of federal prosecutions following state prosecutions, state prosecutions following federal prosecutions for offenses arising from the same conduct are brought routinely.⁹⁷

B. The Curious Longevity of the Dual Sovereignty Doctrine

The incorporation of the various provisions of the Bill of Rights against the states has led to the demise of doctrines like the dual sovereignty doctrine, doctrines that allowed cooperating state and federal prosecutors to do what

92. *Jackerson v. United States*, 419 U.S. 1099 (1975), vacating 502 F.2d 300 (8th Cir. 1974); *Hayles v. United States*, 419 U.S. 892 (1974), vacating 492 F.2d 125 (5th Cir. 1974); *Thompson v. United States*, 400 U.S. 17, vacating 421 F.2d 373 (5th Cir. 1970).

93. *Delay v. United States*, 602 F.2d 173, 176 (8th Cir. 1979) (denying Double Jeopardy claim premised on violation of *Petite* Policy).

94. See, e.g., *United States v. Simpkins*, 953 F.2d 443 (8th Cir. 1992); *United States v. Paiz*, 905 F.2d 1014 (7th Cir. 1990); *United States v. Bartlett*, 856 F.2d 1071 (8th Cir. 1988); *United States v. Bernhardt*, 833 F.2d 181 (9th Cir. 1987); *United States v. Aboumoussalem*, 726 F.2d 906 (2d Cir. 1984).

95. ALA. CODE § 15-3-8 (1975); ALASKA STAT. § 12.20.010 (1962); ARK. CODE ANN. § 5-1-114 (Michie 1987); CAL. PENAL CODE § 656 (West 1988); DEL. CODE ANN. tit. 11, § 209 (1987); GA. CODE ANN. § 16-1-8(c) (Michie 1988); HAW. REV. STAT. § 701-112 (1988); IDAHO CODE § 19-315 (1947); ILL. ANN. STAT. ch. 38, para. 3-4(c) (Smith-Hurd 1961); IND. CODE ANN. § 35-41-4-5 (Burns 1985); KY. REV. STAT. ANN. § 505.050 (Baldwin 1990); MINN. STAT. § 609.045 (1987); MISS. CODE ANN. § 99-11-27 (1972); MONT. CODE ANN. § 46-11-504 (1989); N.J. REV. STAT. § 2C:1-11 (1982); N.Y. CRIM. PROC. LAW § 40.10 to 40.30 (McKinney 1992); N.D. CENT. CODE § 29-03-13 (1960); OKLA. STAT. ANN. tit. 21, § 25 (West 1983); 18 PA. CONS. STAT. § 111 (1983); UTAH CODE ANN. § 76-1-404 (1990); VA. CODE ANN. § 19.2-294 (Michie 1990); WASH. REV. CODE ANN. § 10.43.040 (West 1961); WIS. STAT. ANN. § 939.71 (West 1958).

96. ALA. CODE § 15-3-8 (1975); ALASKA STAT. § 12.20.010 (1962); CAL. PENAL CODE § 656 (West 1988); IDAHO CODE § 19-315 (1947); IND. CODE ANN. § 35-41-4-5 (Burns 1985); MONT. CODE ANN. § 46-11-504 (1989); N.Y. CRIM. PROC. LAW § 40.10 to 40.30 (McKinney 1992); N.D. CENT. CODE § 29-03-13 (1960); OKLA. STAT. ANN. tit. 21, § 25 (West 1983); UTAH CODE ANN. § 76-1-404 (1990); VA. CODE ANN. § 19.2-294 (Michie 1990); WASH. REV. CODE ANN. § 10.43.040 (West 1961); WIS. STAT. ANN. § 939.71 (West 1958).

97. ARK. CODE ANN. § 5-1-114 (Michie 1987); DEL. CODE ANN. tit. 11, § 209 (1987); HAW. REV. STAT. § 701-112 (1988); MINN. STAT. § 609.045 (1987); MISS. CODE ANN. § 99-11-27 (1972); N.J. REV. STAT. § 2C:1-11 (1982); 18 PA. CONS. STAT. § 111 (1983).

98. See e.g., *People v. Covelli*, 540 N.E.2d 569 (Ill. 1989), appeal denied, 545 N.E.2d 118 (Ill. 1989); *Commonwealth v. Trignani*, 483 A.2d 862 (Pa. 1984); *State v. Caliguri*, 664 P.2d 466 (Wash. 1983).

neither was permitted to do independently. For example, under the "silver platter doctrine," federal authorities could use evidence seized by state authorities even when the evidence was seized pursuant to procedures that, had they been performed by federal authorities, would have violated the Fourth Amendment and therefore been suppressed.⁹⁸ *Wolf v. Colorado*⁹⁹ foreshadowed the demise of the silver platter doctrine by holding that the Fourth Amendment's prohibition against unreasonable searches and seizures applied to the states through the Due Process Clause of the Fourteenth Amendment. In *Elkins v. United States*,¹⁰⁰ the doctrine began to tarnish. Citing "expanding federal criminal jurisdiction," cooperation between state and federal law enforcement agencies,¹⁰¹ and the application of the Fourth Amendment to the states,¹⁰² the Court vacated a federal conviction based on evidence illegally obtained by state authorities. With application of the exclusionary rule to the states in *Mapp v. Ohio*,¹⁰³ the Court dropped the doctrine altogether. A similar fate met arrangements between federal and state governments with respect to the use of coerced confessions. In *Murphy v. Waterfront Commission*,¹⁰⁴ the Supreme Court overturned a previous case¹⁰⁵ permitting the federal government to compel testimony possibly incriminating under state law. The incorporation of the Fifth Amendment privilege against self-incrimination ended one sovereign's use at trial of a confession coerced by another sovereign.¹⁰⁶

Given the demise of these concepts, survival of the dual sovereignty doctrine after application of the Double Jeopardy Clause against the states seems anomalous.¹⁰⁷ The only plausible explanation for the survival of the doctrine is that the silver platter doctrine (in both its Fourth and Fifth Amendment varieties) necessarily involves cooperation between state and federal authorities, while the dual sovereignty doctrine theoretically does not. Cooperation is always present when one sovereign offers illegally obtained evidence to another, but it need not be involved in successive prosecutions. In theory, the dual sovereignty doctrine does not apply when cooperation is so close that the two authorities must be viewed as a single sovereign.

98. See *Weeks v. United States*, 232 U.S. 383 (1914) (reversing federal conviction due to Fourth Amendment violations by federal officials but allowing consideration on remand of evidence seized by state officials without inquiry into legality of state seizure); Alan C. Kohn, *Admissibility in Federal Court of Evidence Illegally Seized by State Officers*, 1959 WASH. U. L.Q. 229.

99. 338 U.S. 25 (1945) (applying Fourth Amendment to states via Due Process Clause of Fourteenth Amendment).

100. 364 U.S. 206 (1960) (vacating federal conviction based on evidence illegally obtained by state officials).

101. *Id.* at 211.

102. *Id.* at 213.

103. 367 U.S. 643 (1961).

104. 378 U.S. 52 (1964).

105. *United States v. Murdock*, 284 U.S. 141 (1954).

106. See *Murphy*, 378 U.S. at 52.

107. See Note, *Double Prosecution by State and Federal Governments: Another Exercise in Federalism*, 80 HARV. L. REV. 1538, 1544-49 (1967) (arguing that *Murphy* presages decline of dual sovereignty doctrine).

Bartkus itself suggested such an exception to the dual sovereignty doctrine: the Double Jeopardy Clause would bar successive prosecutions where "the state prosecution was a sham and a cover for a federal prosecution, and thereby in essential fact another federal prosecution."¹⁰⁸ Following this suggestion, several courts have inferred from *Bartkus* a sham prosecution exception to the dual sovereignty doctrine.¹⁰⁹ However, it is clear that the exception, if it exists at all, is "narrow."¹¹⁰ Mere "cooperation between prosecutorial sovereignties" is not sufficient to meet the sham prosecution exception.¹¹¹ Indeed, despite extensive state/federal cooperation in *Bartkus* itself, the Court did not remand on the question of a sham prosecution. The extensive cooperation catalogued by the dissent in *Bartkus* reveals how narrow is the exception.¹¹²

The sham prosecution exception is more than narrow, it is illusory. No double jeopardy claim premised on the sham prosecution exception to the dual sovereignty doctrine has survived appeal.¹¹³ This is true even under circumstances strongly suggesting a sham prosecution. In one case, the exception was denied where a federal prosecutor was listed as a state witness.¹¹⁴ Incredibly, in another case, the exception was denied although the deputy state attorney general was deputized to the Department of Justice as a Special Assistant U.S. Attorney and given responsibility for the federal prosecution while still on the state payroll.¹¹⁵ Indeed, some jurisdictions have questioned whether the sham prosecution exception exists at all.¹¹⁶

The emptiness of the sham prosecution exception is confirmed by the fact that cooperation between state and local and federal law enforcement authorities could scarcely be closer than it is today. In recent years, the level of cooperation between state and federal authorities has increased.¹¹⁷ Particular areas

108. *Bartkus v. Illinois*, 359 U.S. 121, 124 (1959).

109. See, e.g., *United States v. Bernhardt*, 831 F.2d 181, 182 (9th Cir. 1987) (inferring existence of sham prosecution exception while rejecting existence of exception in case at bar).

110. *United States v. Aboumoussalem*, 726 F.2d 906, 910 (2d Cir. 1984) (rejecting sham prosecution claim).

111. *Bernhardt*, 831 F.2d at 182.

112. See *supra* text accompanying note 1.

113. See *United States v. Paiz*, 905 F.2d 1014, 1024 (7th Cir. 1990) (sham prosecution claims have been "uniformly rejected" by 7th Circuit); *United States v. Moore*, 822 F.2d 35, 38 (8th Cir. 1987) (rejecting sham prosecution claim); *Aboumoussalem*, 726 F.2d 906 (2d Cir. 1984) (same); *United States v. Liddy*, 542 F.2d 76, 79-80 (D.C. Cir. 1976) (same). An unappealed district court decision has found a sham prosecution, however. See *United States v. Belcher*, 762 F. Supp. 666 (W.D. Va.) (finding federal prosecution to be sham and cover for prior unsuccessful state prosecution); request for modification denied, 769 F. Supp. 201 (W.D. Va. 1991).

114. *United States v. Aleman*, 609 F.2d 298, 309 (7th Cir. 1979), cert. denied, 445 U.S. 946 (1980).

115. *Bernhardt*, 831 F.2d at 181.

116. See *United States v. Paterson*, 809 F.2d 244, 247 n.2 (5th Cir. 1987) (rejecting sham prosecution claim).

117. Close cooperation between state and federal authorities is not new, as *Bartkus* itself demonstrates. In *Bartkus* the Court upheld the validity of the dual sovereignty doctrine notwithstanding close cooperation between state and local investigative and prosecutorial authorities. See *Bartkus v. Illinois*, 359 U.S. 121, 164 (1959) (Brennan, J., dissenting on grounds that federal cooperation with state authorities was so extensive as to be prohibited by the Double Jeopardy Clause). Since *Bartkus*, courts have held that mere cooperation between state and federal authorities does not prevent application of the dual sovereignty doc-

of law enforcement have assumed importance as elements of national policy. The creation of the national "drug czar" and the declaration of a "war on drugs" symbolize the elevation of narcotics enforcement to the level of national policy. Technological developments encourage increased cooperation between state and federal authorities, allowing them to share central databases and forensics laboratories. Financial constraints also encourage increased cooperation between state and federal authorities. Local agencies cannot afford to fight massive narcotics operations or white collar crime scandals without federal resources. The availability of federal civil and criminal forfeiture provisions¹¹⁸ and long mandatory minimum sentences¹¹⁹ also increase incentives for state authorities to cooperate with federal authorities.

Cooperation between state and federal authorities in enforcing narcotics laws has been particularly close. Even before the creation of a national "drug czar" and the declaration of "the war on drugs," there was extensive cooperation between state and federal agencies. This cooperation is authorized by statute. The Controlled Substances Act of 1970¹²⁰ provides that "[t]he Attorney General shall cooperate with local, State, and Federal agencies concerning traffic in controlled substances and in suppressing the abuse of controlled substances."¹²¹ To that end, the Attorney General is authorized to

- "arrange for the exchange of information"
- "cooperate in the . . . prosecution of cases in the courts of the United States and before the licensing boards and courts of the several States"
- "conduct training programs . . . for local, State, and Federal personnel" and
- maintain a central database through which local, state, and federal authorities can share information¹²²

A 1986 amendment to the Act gave the Attorney General the power to "enter into contractual agreements with State and local law enforcement agencies to provide for cooperative enforcement and regulatory activities."¹²³

In addition, under the forfeiture provisions of Title 21,¹²⁴ the Attorney General may transfer forfeited property to "any Federal agency or to any State or local law enforcement agency which participated directly in the seizure or forfeiture of the property."¹²⁵ This authority is subject only to the conditions

trine. See, e.g., *Moore*, 822 F.2d at 38; *Aleman*, 609 F.2d at 309.

118. See, e.g., *infra* text accompanying notes 124-27.

119. See, e.g., Armed Career Criminal Act, 18 U.S.C. 924(e) (1988) (providing for imprisonment for fifteen years to life for possession of firearm by convicted felon).

120. Pub. L. 91-513, 84 Stat. 1242 (1970) (codified as amended in scattered sections of 21 U.S.C.).

121. 21 U.S.C. § 873(a) (1981).

122. 21 U.S.C. § 873(a)(1)-(4) (1981).

123. 21 U.S.C. § 873(a)(7) (West Supp. 1991).

124. 21 U.S.C. § 881 (1988).

125. 21 U.S.C. § 881(e)(1)(A) (1988).

that the transferred property "has a value that bears a reasonable relation to the degree of participation of the State or local agency in the law enforcement effort resulting in the forfeiture."¹²⁶ The authority is given for the purpose of "encourag[ing] further cooperation between the recipient State or local agency and federal law enforcement agencies."¹²⁷

Federal statutory authority is backed by federal financial resources, much of which is funneled to the states. President Bush requested \$12.7 billion to fight the "war on drugs" in fiscal 1993.¹²⁸ In September of 1989, the Bush Administration's first National Drug Control Strategy "marked a new beginning in the federal government's war on drugs," a "coordinated, systematic national response to the problems posed by illicit drugs" in which "more than one in every four dollars [of the federal budget for drugs] . . . will go directly to the states."¹²⁹ Though some of the effort in the "war on drugs" is directed to treatment, education, and counseling programs, the bulk of the federal effort is directed to enforcement. The 1985 federal budget allocated \$1.2 billion for the drug law enforcement system, for example, as compared to \$253 million for drug abuse prevention and treatment programs.¹³⁰

These financial resources have financed cooperative enforcement campaigns. Consider excerpts from a briefing by Attorney General Barr:

Starting early this morning, over 450 federal and state law enforcement officers started the execution of 38 search warrants and making arrests against members of the Rodrigues P Street Gang. . . . A few weeks ago, I said that because of our tough federal laws we're taking out violent gangs in one fell swoop. And these cases today are dramatic illustrations of how federal law enforcement can assist state and local law enforcement. . . . And I would like to commend all the organizations that made these cases possible through their close cooperation. And they include the United States Park Police; the Drug Enforcement Administration; the Federal Bureau of Investigation; the [Immigration and Naturalization Service]; the [Bureau of Alcohol, Tobacco, and Firearms]; the Metropolitan Police Department in Washington, D.C.; the New York Police Department in Brooklyn, New York; the Arlington County Police Department; the Alexandria Police Department; and the coordinated efforts of the United States Attorneys Offices in the Eastern District of Virginia; in Washington, DC; in the Southern District of New York; the District of Colorado; and the District Attorney's Office for Kings County, Brooklyn, New York.¹³¹

126. 21 U.S.C. § 881(e)(3)(A) (1988).

127. 21 U.S.C.A. § 881(e)(3)(B) (West Supp. 1992).

128. Remarks by President George Bush Prior to News Conference Announcing 1992 National Drug Control Strategy, Federal News Service, Jan. 27, 1992, available in LEXIS, Nexis library.

129. Michael Levine, *The Drug "War": Fight It at Home*, N.Y. TIMES, Feb. 16, 1992, at A15.

130. STEVEN WISOTSKY, BEYOND THE WAR ON DRUGS: OVERCOMING A FAILED PUBLIC POLICY 61 (1990).

131. Press Conference with Attorney General William Barr, Federal News Service, Jan. 31, 1992, available in LEXIS, Nexis library.

Thus, state and federal law enforcement agencies often function as a unit, bound together by information, technology, financial incentives, contractual arrangements, and statutory mandate.¹³²

It is clear, however, that even such extensive cooperation between federal and state law enforcement agencies will not lead to the demise of the dual sovereignty doctrine. So long as courts and commentators see the Double Jeopardy Clause solely as a device to protect individual rights, successive prosecutions by different sovereigns will continue.

Calls for the demise of the dual sovereignty doctrine must move beyond the argument that application of the Double Jeopardy Clause to the states renders the doctrine unconstitutional. Courts can easily justify the continued validity of the doctrine by pointing out that (1) the silver platter doctrine and related doctrines necessarily entailed cooperation, (2) the dual sovereignty doctrine theoretically does not, and (3) where state and federal authorities do cooperate, the sham prosecution exception to the dual sovereignty doctrine theoretically bars reprosecution. The illusory nature of the sham prosecution exception and the extensive nature of state and federal cooperation render this justification hollow but do not threaten the theoretical cogency of the dual sovereignty doctrine. An additional critique, from a structural perspective, is needed.

C. *Why the Dual Sovereignty Doctrine is Unconstitutional*

When the Double Jeopardy Clause is understood structurally, as implementing the principle of popular sovereignty, the unconstitutionality of the dual sovereignty doctrine becomes clear. The dual sovereignty doctrine is unconstitutional because it denigrates the principle of popular sovereignty underlying the Double Jeopardy Clause. An exercise of popular sovereignty is final and unappealable. Remember the words of James Wilson, "In all governments, whatever is their form, however they may be constituted, there must be a power established from which there is no appeal. . . . The only question is where that power is lodged? . . . [I]t remains and flourishes with the people."¹³³ Having invited the popular will to check its authority, government may not simply disregard it and try again.¹³⁴

132. The dual sovereignty doctrine has been held not to apply where the relationship between politics is not independent and separate but dependent and cooperative. For example, the dual sovereignty doctrine does not permit successive prosecutions by city and state authorities. See *Waller v. Florida*, 397 U.S. 387 (1970). Nor does the doctrine permit successive prosecutions by tribal and federal authorities. See *United States v. Wheeler*, 545 F.2d 1255 (9th Cir. 1976).

133. WOOD, *supra* note 22 at 133 (quoting James Wilson).

134. It should be noted that in declaring the dual sovereignty doctrine unconstitutional, this Note does not threaten concurrent state and federal legislative authority. Although the dual sovereignty doctrine was originally formulated to justify such concurrent authority, an expanding interpretation of the Commerce Clause rendered the dual sovereignty doctrine's justification of concurrent state and federal legislative authority obsolete.

The protections of the Double Jeopardy Clause against successive prosecutions by different sovereigns apply not just to jury trials, but to plea bargains. Prosecutors and defendants bargain in the shadow of the jury. A prosecutor may offer a plea agreement because he or she may be uncertain of obtaining a conviction by a jury on the more serious charges. In such circumstances, a plea agreement to a lesser charge should carry the same consequences as an implicit acquittal by a jury on the more serious charge.¹³⁵

In addition, the protections of the Double Jeopardy Clause against successive prosecutions by different sovereigns apply to bench trials. In conducting a bench trial, the judge takes the place of the jury. An acquittal or implicit acquittal by the judge should not, therefore, be subject to successive prosecution by a different sovereign. Although a defendant may waive his or her right to a jury trial,¹³⁶ a defendant may not waive the applicability of a provision implementing the principle of popular sovereignty.

It is no defense of the dual sovereignty doctrine to argue that the principle of popular sovereignty is not denigrated because the second prosecution, like the first, would be before a jury and, therefore, subject to popular control. In addition to flouting the requirement that an exercise of popular sovereignty be unappealable—even to the people—this argument fails to recognize the procedural and strategic opportunities that a second trial presents the prosecution. For example, having conducted a "dry run," the prosecution has an opportunity to observe what evidence resonates with the jury. So informed, prosecutors will attempt to rebut that evidence at the second trial. That is precisely what happened in *Bartkus*.¹³⁷ As another example, prosecutors may take advantage of jurors' awareness of the defendant's earlier prosecution.¹³⁸

It is also no defense of the dual sovereignty doctrine to argue that without the doctrine, state courts may immunize defendants from federal prosecution. Chief Justice Taft recognized a fear that without the doctrine, "[i]f a State were to punish [a criminal act] by small or nominal fines, the race of offenders to the courts of that State to plead guilty and secure immunity from federal prosecution for such acts would not make for respect for the federal statute or for its deterrent effect."¹³⁹ This fear is particularly troubling in the context of federal enforcement of the civil rights laws. This rationale cannot cure the constitutional defect in the dual sovereignty doctrine, however. Fortunately, the dual sovereignty doctrine is not needed to assuage Taft's fear. Federal courts

135. See *supra* text accompanying notes 47-48.

136. See, e.g., *Panton v. United States*, 281 U.S. 276 (1930) (permitting waiver of jury trial in federal criminal court).

137. 359 U.S. 121, 166 (1959) (Brennan, J., dissenting).

138. See *Heath v. Alabama*, 474 U.S. 82 (1985) (upholding on dual sovereignty grounds a second trial for capital murder in Alabama following guilty plea to noncapital murder in Georgia even though jurors in Alabama trial were aware of defendant's guilty plea in Georgia proceeding).

139. *United States v. Lanza*, 260 U.S. 377, 385 (1922).

have long refused to attach any precedential value to collusive suits.¹⁴⁰ Therefore, state criminal convictions produced at the "stipulation of [the] parties" need not bar successive prosecution by federal authorities. As the Supreme Court wrote in *Young v. United States*,¹⁴¹

The public interest that a result be reached which promotes a well-ordered society is foremost in every criminal proceeding. That interest is entrusted to our consideration and protection as well as to that of the enforcing officers. Furthermore, our judgments are precedents, and the proper administration of the criminal law cannot be left merely to the stipulation of parties.¹⁴²

Finally, it is no defense of the dual sovereignty doctrine to argue that the principle of popular sovereignty is not denigrated because the second prosecution is before a different sovereign. This argument turns on the notion that, while the people are sovereign, there are many peoples in a federal republic. Under this notion, state juries represent the people of the state while federal juries represent the people of the United States. Successive prosecutions, the argument continues, do not denigrate the principle of popular sovereignty. On the contrary, successive prosecutions give each people an opportunity to speak. Under this argument, if the people are not one but many, successive prosecutions actually vindicate the principle of popular sovereignty. This argument supposes that a collection of citizens empaneled in a state courthouse is different in kind from a collection of citizens empaneled across the street in a federal courthouse. This supposition is spurious. Under the Constitution, state and federal trials must be held at comparable locations—in the state in which the crime occurred.¹⁴³ State and federal juries must be drawn from the district in which the crime occurred.¹⁴⁴ Finally, neither state nor federal jury selection processes may systematically exclude members of any cognizable class.¹⁴⁵

Diehard dual sovereignists might still contend that even though state and federal juries are drawn at comparable locations from the same populations, state and federal juries are not identical. The diehards might argue that jurors empaneled in a state court house will represent the people of the state while the very same jurors empaneled across the street in a federal court house will

140. See *United States v. Johnson*, 319 U.S. 302 (1943).

141. 315 U.S. 257 (1942).

142. *Id.* at 259.

143. See U.S. CONST. art. III, § 2, cl. 3 (providing that "The trial of all crimes . . . shall be held in the state where the said crimes shall have been committed").

144. U.S. Const. amend. VI (providing that "In all criminal prosecutions, the accused shall enjoy the right to a . . . speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law").

145. *Neal v. Delaware*, 103 U.S. 370 (1881) (holding black defendant denied equal protection when tried before all white jury selected through ostensibly fair jury selection procedures); *Strauder v. West Virginia*, 100 U.S. 303 (1880) (holding black defendant denied equal protection when tried before all white jury selected through blatantly unfair jury selection procedures).

represent the people of the United States. It is not clear, however, why those jurors would feel compelled to represent different sovereigns. On the contrary, the drafters of the Sixth Amendment seemed certain that jurors empaneled in a federal courthouse would represent the people of the state.

In one respect, the diehard dual sovereignists may be right. Jurors of one state may represent a different "people" than jurors of another state. If so, the dual sovereignty doctrine might permit state prosecutions following prosecutions brought by another state. The Double Jeopardy Clause, even when understood structurally, does not forbid such prosecutions. Regulation of successive state prosecutions, therefore, must be left to individual states. As it happens, many states place some limitations on such prosecutions.¹⁴⁶

IV. CONCLUSION

The Double Jeopardy Clause is not simply a procedural safeguard afforded criminal defendants. The Clause is also a structural provision implementing the principle of popular sovereignty. Understood as such, the Double Jeopardy Clause bars federal prosecution of an offense that was the subject of an earlier state prosecution. Similarly, the Clause bars state prosecution of an offense that was the subject of an earlier federal prosecution. The dual sovereignty doctrine may continue to justify state prosecution of an offense that was the subject of an earlier prosecution by another state, however.

V. POSTSCRIPT: AFTER THE SIMI VALLEY VERDICT

As this Note neared publication, tragedy befell Los Angeles.¹⁴⁷ Four white officers of the Los Angeles Police Department were charged in state court for criminal use of excessive force while arresting a black man. The trial was transferred from Los Angeles to Simi Valley, an area removed from inner-city Los Angeles and, perhaps, stocked with potential jurors ignorant of the racial hatred and brutal police practices that charge some urban environments.¹⁴⁸ A Simi Valley jury acquitted the officers, notwithstanding videotaped evidence of the beating. Outraged by an apparently lawless verdict, some Los Angeles residents took to the streets and, through their own lawlessness, compounded the tragedy. The officers were subsequently indicted in federal court on charges arising from the same circumstances.

In the face of this tragedy, this Note attacks the very doctrine that permits federal authorities to re prosecute the Los Angeles Police officers. Given the depth of the tragedy, it is not enough to explain how this Note vindicates the

¹⁴⁶ See *supra* text accompanying notes 94-97.

¹⁴⁷ See generally Tom Mathews, *The Siege of L.A.*, NEWSWEEK, May 11, 1992, at 20.

¹⁴⁸ See *Powell v. Superior Court of Los Angeles County*, 232 Cal. App.3d 785 (1991) (directing trial court to grant defendants' motion for change of venue).

principle of popular sovereignty underlying the Double Jeopardy Clause. It is also essential to explain how the Note contributes, in a small way, to a criminal justice system that is truly just.

While this Note limits its attack to the dual sovereignty doctrine, its implications are much wider in scope. An appreciation of the principle of popular sovereignty underlying the Constitution compels reconsideration of many of the procedural devices that emanate from the Bill of Rights. For example, a structural understanding of the vicinage and venue provisions of the Constitution may require reform of the rules governing change of venue. The vicinage and venue provisions may be understood as implementing the principle of popular sovereignty by ensuring that the power of a jury be wielded by people close to the facts and familiar with the context in which the alleged crime occurred.¹⁴⁹ Only a jury drawn from a populace knowledgeable of the circumstances in which the crime occurred can fulfill their role as a popular check on government authority.

Several jurisdictions are reconsidering the rules governing change of venue.¹⁵⁰ For instance, shortly after the Los Angeles riots, a Florida state judge ordered the transfer of the trial of a Miami policeman from Orlando to Tallahassee.¹⁵¹ The judge reasoned that jurors in Tallahassee were more likely to share characteristics with the citizens of Miami (where the alleged crime occurred).¹⁵² This action is consistent with the analysis of this Note. Under that analysis, trials should be held before a populace that understands the context in which the alleged crime occurred. If the courts had adopted the full implications of this Note, the trial of the Los Angeles officers would not have been transferred to Simi Valley.

Remembering the structural purposes of the Bill of Rights is an awesome task, challenging us to rethink many of the procedural devices developed during the rights revolution. Full-scale reform of these devices will frighten some. Just as surely, piecemeal reform will frustrate others. The frightened should take comfort in the fact that full-scale reform reflects both the structure and the faith of the Constitution.

¹⁴⁹ See U.S. CONST. amend. VI (relating to vicinage); U.S. CONST. art. III, § 2, cl. 3 (relating to venue); Drew L. Kershen, *Vicinage* (pts. 1 & 2), 29 OKLA. L. REV. 801 (1976); 30 OKLA. L. REV. 1 (1977) (demonstrating that Sixth Amendment imposes requirement that criminal juries be drawn from locality in which crime occurred). In the cautionary words of Joseph Story, the power of the jury should not be entrusted to those "incapable of estimating its worth, or . . . too inert, or too ignorant, or too imbecile, to wield its potent armour." JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 657 (Ronald D. Rotunda & John E. Nowak eds., 1987).

¹⁵⁰ See Mark Hansen, *Different Jury, Different Verdict?*, A.B.A. J., Aug. 1992, at 56 (describing proposed legislative reforms of change of venue law pending in New Jersey and California).

¹⁵¹ See Larry Rohrer, *Trial of a Miami Policeman in Death of Blacks is Moved*, N.Y. TIMES, May 7, 1992, at A23.

402 U.S. 146

Alcides PEREZ, Petitioner,

v.

UNITED STATES.

No. 600.

Argued March 22, 1971.

Decided April 26, 1971.

Defendant was convicted in the United States District Court for the Eastern District of New York of the use of extortionate means to collect extensions of credit. The Court of Appeals, 426 F.2d 1073, affirmed and certiorari was granted. The Supreme Court, Mr. Justice Douglas, held that portion of Consumer Credit Protection Act prohibiting "loan sharking" activities is within Congress' power under the commerce clause to control activities affecting interstate commerce.

Affirmed.

Mr. Justice Stewart dissented and filed opinion.

1. Commerce ⇨1

The commerce clause reaches the use of channels of interstate or foreign commerce which Congress deems are being misused, protection of the instrumentalities of interstate commerce, and activities affecting commerce.

2. Threats ⇨1(1)

Person engaged in loan sharking activity is a member of the class which engages in "extortionate credit transactions" as defined by the Consumer Credit Protection Act. 18 U.S.C.A. §§ 891 et seq., 891 note.

See publication Words and Phrases for other judicial constructions and definitions.

3. Constitutional Law ⇨70(1)

Where the class of activities is regulated and that class is within the reach

of federal power, the courts have no power to excise, as trivial, individual instances of the class.

4. Commerce ⇨82

Congress' findings were adequate to support its conclusion that loan sharks who use extortionate means to collect payments on loans are in a class largely controlled by organized crime with a substantially adverse effect on interstate commerce. 18 U.S.C.A. §§ 891 et seq., 891 note.

5. Commerce ⇨82

Portion of Consumer Credit Protection Act prohibiting "loan sharking" activities is within Congress' power under the commerce clause to control activities affecting interstate commerce. 18 U.S.C.A. §§ 891 et seq., 891 note.

Syllabus *

Petitioner was convicted of "loan sharking" activities, *i. e.*, unlawfully using extortionate means in collecting and attempting to collect an extension of credit, in violation of Title II of the Consumer Credit Protection Act, and his conviction was affirmed on appeal. He challenges the constitutionality of the statute on the ground that Congress has no power to control the local activity of loan sharking. *Held*: Title II of the Consumer Credit Protection Act is within Congress' power under the Commerce Clause to control activities affecting interstate commerce and Congress' findings are adequate to support its conclusion that loan sharks who use extortionate means to collect payments on loans are in a class largely controlled by organized crime with a substantially adverse effect on interstate commerce. Pp. 1358-1363.

426 F.2d 1073, affirmed.

Albert J. Krieger, New York City, for petitioner.

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for

the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

Sol. Gen. Erwin N. Griswold, for respondent.

Mr. Justice DOUGLAS delivered the opinion of the Court.

The question in this case is whether Title II of the Consumer Credit Protection Act, 82 Stat. 159, 18 U.S.C. § 891 et seq. (1964 ed., Supp. V), as construed and applied to petitioner, is a permissible exercise by Congress of its powers under the Commerce Clause of the Constitution. Petitioner's conviction after trial by jury and his sentence were affirmed by the Court of Appeals, one judge dissenting. 426 F.2d 1073. We granted the petition for a writ of certiorari because of the importance of the question presented. 400 U.S. 915, 91 S.Ct. 175, 27 L.Ed.2d 154. We affirm that judgment.

Petitioner is one of the species commonly known as "loan sharks" which Congress found are in large part under the control of "organized crime." "Extortionate credit transactions" are defined as those characterized by the use or threat of the use of "violence or other criminal means" in enforcement. There was ample evidence showing petitioner was a "loan shark" who used the threat of violence as a method of collection. He

loaned money to one Miranda, owner of a new butcher shop, making a \$1,000 advance to be repaid in installments of \$105 per week for 14 weeks. After paying at this rate for six or eight weeks, petitioner increased the weekly payment to \$130. In two months Miranda asked for an additional loan of \$2,000 which was made, the agreement being that Miranda was to pay \$205 a week. In a few weeks petitioner increased the weekly payment to \$330. When Miranda objected, petitioner told him about a customer who refused to pay and ended up in a hospital. So Miranda paid. In a few months petitioner increased his demands to \$500 weekly which Miranda paid, only to be advised that at the end of the week petitioner would need \$1,000. Miranda made that payment by not paying his suppliers; but, faced with a \$1,000 payment the next week, he sold his butcher shop. Petitioner pursued Miranda, first making threats to Miranda's wife and then telling Miranda he could have him castrated. When Miranda did not make more payments, petitioner said he was turning over his collections to people who would not be nice but who would put him in the hospital if he did not pay. Negotiations went on, Miranda finally saying he could only pay \$25 a week. Petitioner

1. Section 201(a) of Title II contains the following findings by Congress:

"(1) Organized crime is interstate and international in character. Its activities involve many billions of dollars each year. It is directly responsible for murders, willful injuries to person and property, corruption of officials, and terrorization of countless citizens. A substantial part of the income of organized crime is generated by extortionate credit transactions.

"(2) Extortionate credit transactions are characterized by the use, or the express or implicit threat of the use, of violence or other criminal means to cause harm to person, reputation, or property as a means of enforcing repayment. Among the factors which have rendered past efforts at prosecution almost wholly ineffective has been the existence of exclusionary rules of evidence stricter than necessary for the protection of constitutional rights.

"(3) Extortionate credit transactions are carried on to a substantial extent in

interstate and foreign commerce and through the means and instrumentalities of such commerce. Even where extortionate credit transactions are purely intrastate in character, they nevertheless directly affect interstate and foreign commerce."

2. Section 891 of 18 U.S.C. (1964 ed., Supp. V) provides in part:

"(6) An extortionate extension of credit is any extension of credit with respect to which it is the understanding of the creditor and the debtor at the time it is made that delay in making repayment or failure to make repayment could result in the use of violence or other criminal means to cause harm to the person, reputation, or property of any person.

"(7) An extortionate means is any means which involves the use, or an express or implicit threat of use, of violence or other criminal means to cause harm to the person, reputation, or property of any person."

said that was not enough, that Miranda should steal or sell drugs if necessary to get the money to pay the loan, and that if he went to jail it would be better than going to a hospital with a broken back or legs. He added, "I could have sent you to the hospital, you and your family, any moment I want with my people."

Petitioner's arrest followed. Miranda, his wife, and an employee gave the evidence against petitioner who did not testify or call any witnesses. Petitioner's attack was on the constitutionality of the Act, starting with a motion to dismiss the indictment.

The constitutional question is a substantial one.

Two "loan shark" amendments to the bill that became this Act were proposed in the House—one by Congressman Poff of Virginia, 114 Cong.Rec. 1605-1606 and another one by Congressman McDade of Pennsylvania. *Id.*, at 1609-1610.

The House debates include a long article from the New York Times Magazine for January 28, 1968, on the connection between the "loan shark" and organized crime. *Id.*, at 1428-1431. The gruesome and stirring episodes related have the following as a prelude:

"The loan shark, then, is the indispensable 'moneymover' of the underworld. He takes 'black' money tainted by its derivation from the gambling or narcotics rackets and turns it 'white' by funneling it into channels of legitimate trade. In so doing, he exacts usurious interest that doubles the black-white money in no time; and, by his special decrees, by his imposition of impossible penalties, he greases the way for the underworld takeover of entire businesses." *Id.*, at 1429.

There were objections on constitutional grounds. Congressman Eckhardt of Texas said:

"Should it become law, the amendment would take a long stride by the Federal Government toward occupying the field of general criminal law and

toward exercising a general Federal police power; and it would permit prosecution in Federal as well as State courts of a typically State offense.

* * * * *

"I believe that Alexander Hamilton, though a federalist, would be astonished that such a deep entrenchment on the rights of the States in performing their most fundamental function should come from the more conservative quarter of the House." *Id.*, at 1610.

Senator Proxmire presented to the Senate the Conference Report approving essentially the "loan shark" provision suggested by Congressman McDade, saying:

"Once again these provisions raised serious questions of Federal-State responsibilities. Nonetheless, because of the importance of the problem, the Senate conferees agreed to the House provision. Organized crime operates on a national scale. One of the principal sources of revenue of organized crime comes from loan sharking. If we are to win the battle against organized crime we must strike at their source of revenue and give the Justice Department additional tools to deal with the problem. The problem simply cannot be solved by the States alone. We must bring into play the full resources of the Federal Government." *Id.*, at 14490.

[1] The Commerce Clause reaches, in the main, three categories of problems. First, the use of channels of interstate or foreign commerce which Congress deems are being misused, as, for example, the shipment of stolen goods (18 U.S.C. §§ 2312-2315) or of persons who have been kidnaped (18 U.S.C. § 1201). Second, protection of the instrumentalities of interstate commerce, as for example, the destruction of an aircraft (18 U.S.C. § 32), or persons or things in commerce, as, for example, thefts from interstate shipments (18 U.S.C. § 659). Third, those activities affecting commerce. It is with this last category that we are here concerned.

Chief Justice Marshall in *Gibbons v. Ogden*, 9 Wheat. 1, 195, 6 L.Ed. 23, said:

"The genius and character of the whole government seem to be, that its action is to be applied to all the external concerns of the nation, and to 151 those internal concerns which affect the States generally; but not to those which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government. The completely Internal commerce of a State, then, may be considered as reserved for the State itself."

Decisions which followed departed from that view; but by the time of *United States v. Darby*, 312 U.S. 100, 61 S.Ct. 451, 85 L.Ed. 609, and *Wickard v. Filburn*, 317 U.S. 111, 63 S.Ct. 82, 87 L.Ed. 122, the broader view of the Commerce Clause announced by Chief Justice Marshall had been restored. Chief Justice Stone wrote for a unanimous Court in 1942 that Congress could provide for the regulation of the price of intrastate milk, the sale of which, in competition with interstate milk, affects the price structure and federal regulation of the latter. *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 62 S.Ct. 523, 86 L.Ed. 726. The commerce power, he said, "extends to those activities intrastate which so affect interstate commerce, or the exertion of the power of Congress over it, as to make regulation of them appropriate means to the attainment of a legitimate end, the effective execution of the granted power to regulate interstate commerce." *Id.*, at 119. 62 S.Ct., at 526.

Wickard v. Filburn, 317 U.S. 111, 63 S.Ct. 82, 87 L.Ed. 122, soon followed in which a unanimous Court held that wheat grown wholly for home consumption was constitutionally within the scope of federal regulation of wheat production be-

cause, though never marketed interstate, it supplied the need of the grower which otherwise would be satisfied by his purchases in the open market.³ We said:

"* * * [E]ven if appellee's activity be local and though it may not be regarded as commerce, it may still, 152 whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce, and this irrespective of whether such effect is what might at some earlier time have been defined as 'direct' or 'indirect.'" 317 U.S., at 125, 63 S.Ct., at 89.

In *United States v. Darby*, 312 U.S. 100, 61 S.Ct. 451, 85 L.Ed. 609, the decision sustaining an Act of Congress which prohibited the employment of workers in the production of goods "for interstate commerce" at other than prescribed wages and hours, a *class of activities* was held properly regulated by Congress without proof that the particular intrastate activity against which a sanction was laid had an effect on commerce. A unanimous Court said:

"Congress has sometimes left it to the courts to determine whether the intrastate activities have the prohibited effect on the commerce, as in the Sherman Act. It has sometimes left it to an administrative board or agency to determine whether the activities sought to be regulated or prohibited have such effect, as in the case of the Interstate Commerce Act, and the National Labor Relations Act, or whether they come within the statutory definition of the prohibited Act, as in the Federal Trade Commission Act. And sometimes Congress itself has said that a particular activity affects the commerce, as it did in the present Act, the Safety Appliance Act and the Railway Labor Act. In passing on the validity of legislation of the *class* last mentioned the only function of courts is to determine whether the

3. That decision has been followed: *Beckman v. Mall*, 317 U.S. 597, 63 S.Ct. 190, 87 L.Ed. 488; *Bender v. Wickard*, 319 U.S. 731, 63 S.Ct. 1326, 87 L.Ed. 1693;

United States v. Haley, 358 U.S. 644, 79 S.Ct. 537, 3 L.Ed.2d 567; *United States v. Ohio*, 385 U.S. 9, 87 S.Ct. 66, 17 L.Ed. 2d 8.

particular activity regulated or prohibited is within the reach of the federal power." (Italics added.) *Id.*, at 120-121, 61 S.Ct., at 460.

[2] That case is particularly relevant here because it involved a criminal prosecution, a unanimous Court holding that the Act was "sufficiently definite to meet constitutional demands." *Id.*, at 125, 61 S.Ct., at 463. Petitioner is clearly a member of the class which engages in "extortionate credit transactions" as defined by Congress⁴ and the description of that class has the required definiteness.

It was the "class of activities" test which we employed in *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 85 S.Ct. 348, 13 L.Ed.2d 258, to sustain an Act of Congress requiring hotel or motel accommodations for Negro guests. The Act declared that "any inn, hotel, motel, or other establishment which provides lodging to transient guests" affects commerce *per se.*" *Id.*, at 247, 85 S.Ct., at 353. That exercise of power under the Commerce Clause was sustained.

"[O]ur people have become increasingly mobile with millions of people of all races traveling from State to State; * * * Negroes in particular have been the subject of discrimination in transient accommodations, having to travel great distances to secure the same; * * * often they have been unable to obtain accommodations and have had to call upon friends to put them up overnight * * * and * * * these conditions had become so acute as to require the listing of available lodging for Negroes in a special guidebook. * * *." *Id.*, at 252-253, 85 S.Ct., at 355.

In a companion case, *Katzenbach v. McClung*, 379 U.S. 294, 85 S.Ct. 377, 13 L.Ed.2d 290, we ruled on the constitutionality of the restaurant provision of the same Civil Rights Act which regulated the restaurant "if * * * it serves or offers to serve interstate trav-

elers or a substantial portion of the food which it serves * * * has moved in commerce." *Id.*, at 298, 85 S.Ct., at 381. Apart from the effect on the flow of food in commerce to restaurants, we spoke of the restrictive effect of the exclusion of Negroes from restaurants on interstate travel by Negroes.

"[T]here was an impressive array of testimony that discrimination in restaurants had a direct and highly restrictive effect upon interstate travel by Negroes. This resulted, it was said, because discriminatory practices prevent Negroes from buying prepared food served on the premises while on a trip, except in isolated and unkempt restaurants and under most unsatisfactory and often unpleasant conditions. This obviously discourages travel and obstructs interstate commerce for one can hardly travel without eating. Likewise, it was said, that discrimination deterred professional, as well as skilled, people from moving into areas where such practices occurred and thereby caused industry to be reluctant to establish there." *Id.*, at 300, 85 S.Ct., at 381.

In emphasis of our position that it was the *class of activities* regulated that was the measure, we acknowledged that Congress appropriately considered the "total incidence" of the practice on commerce. *Id.*, at 301, 85 S.Ct., at 382.

[3] Where the *class of activities* is regulated and that *class* is within the reach of federal power, the courts have no power "to excise, as trivial, individual instances" of the class. *Maryland v. Wirtz*, 392 U.S. 183, 193, 88 S.Ct. 2017, 2022, 20 L.Ed.2d 1020, 1029.

Extortionate credit transactions, though purely intrastate, may in the judgment of Congress affect interstate commerce. In an analogous situation, Mr. Justice Holmes, speaking for a unanimous Court, said: "[W]hen it is necessary in order to prevent an evil to make the law embrace more than the

4. See n. 2, *supra*.

precise thing to be prevented it may do so." *Westfall v. United States*, 274 U.S. 256, 259, 47 S.Ct. 629, 71 L.Ed. 1036, 1037. In that case an officer of a state bank which was a member of the Federal Reserve System issued a fraudulent certificate of deposit and paid it from the funds of the state bank. It was argued that there was no loss to the Reserve Bank. Mr. Justice Holmes replied, "But every fraud like the one before us weakens the member bank and therefore weakens the System." *Id.*, at 259, 47 S.Ct., at 629. In the setting of the present case there is a tie-in between local loan sharks and interstate crime.

[4, 5] The findings by Congress are quite adequate on that ground. The McDade Amendment in the House, as already noted, was the one ultimately adopted. As stated by Congressman McDade it grew out of a "profound study of organized crime, its ramifications and its implications" undertaken by some 22 Congressmen in 1966-1967. 114 Cong. Rec. 14391. The results of that study were included in a report, *The Urban Poor and Organized Crime*, submitted to the House on August 29, 1967, which revealed that "organized crime takes over \$350 million a year from America's poor through loan-sharking alone." See 113 Cong. Rec. 24460-24464. Congressman McDade also relied on *The Challenge of Crime in a Free Society*, A Report by the President's Commission on Law Enforcement and Administration of Justice (February 1967) which stated that loan sharking was "the second largest source of revenue for organized crime," *id.*, at 189, and is one way by which the underworld obtains control of legitimate businesses. *Id.*, at 190.

The Congress also knew about New York's Report, *An Investigation of the Loan Shark Racket* (1965). See 114 Cong. Rec. 1428-1431. That report shows the loan shark racket is controlled by organized criminal syndicates, either directly or in partnership with independent operators; that in most instances

the racket is organized into three echelons, with the top underworld "bosses" providing the money to their principal "lieutenants," who in turn distribute the money to the "operators" who make the actual individual loans; that loan sharks serve as a source of funds to bookmakers, narcotics dealers, and other racketeers; that victims of the racket include all classes, rich and poor, businessmen and laborers; that the victims are often coerced into the commission of criminal acts in order to repay their loans; that through loan sharking the organized underworld has obtained control of legitimate businesses, including securities brokerages and banks which are then exploited; and that "[e]ven where extortionate credit transactions are purely intrastate in character, they nevertheless directly affect interstate and foreign commerce."⁵ 156

Shortly before the Conference bill was adopted by Congress a Senate Committee had held hearings on loan sharking and that testimony was made available to members of the House. See 114 Cong. Rec. 14390.

The essence of all these reports and hearings was summarized and embodied in formal congressional findings. They supplied Congress with the knowledge that the loan shark racket provides organized crime with its second most lucrative source of revenue, exacts millions from the pockets of people, coerces its victims into the commission of crimes against property, and causes the takeover by racketeers of legitimate businesses. See generally 114 Cong. Rec. 14391, 14392, 14395, 14396.

We have mentioned in detail the economic, financial, and social setting of the problem as revealed to Congress. We do so not to infer that Congress need make particularized findings in order to legislate. We relate the history of the Act in detail to answer the impassioned plea of petitioner that all that is involved in loan sharking is a traditionally local activity. It appears, instead, that loan 157

5. See n. 1, *supra*.

sharking in its national setting is one way organized interstate crime holds its guns to the heads of the poor and the rich alike and syphons funds from numerous localities to finance its national operations.

Affirmed.

Mr. Justice STEWART, dissenting.

Congress surely has power under the Commerce Clause to enact criminal laws to protect the instrumentalities of interstate commerce, to prohibit the misuse of the channels or facilities of interstate commerce, and to prohibit or regulate those intrastate activities that have a demonstrably substantial effect on interstate commerce. But under the statute before us a man can be convicted without any proof of interstate movement, of the use of the facilities of interstate commerce, or of facts showing that his conduct affected interstate commerce. I think the Framers of the Constitution never intended that the National Government might define as a crime and prosecute such wholly local activity through the enactment of federal criminal laws.

In order to sustain this law we would, in my view, have to be able at the least to say that Congress could rationally have concluded that loan sharking is an activity with interstate attributes that distinguish it in some substantial respect from other local crime. But it is not enough to say that loan sharking is a national problem, for all crime is a national problem. It is not enough to say that some loan sharking has interstate characteristics, for any crime may have an interstate setting. And the circumstance that loan sharking has an adverse impact on interstate business is not a distinguishing attribute, for interstate business suffers from almost all criminal activity, be it shoplifting or violence in the streets.

Because I am unable to discern any rational distinction between loan sharking and other local crime, I cannot escape the conclusion that this statute was beyond the power of Congress to enact. The definition and prosecution of local, intrastate crime are reserved to the States under the Ninth and Tenth Amendments.

LAW/JUDICIARY

Crossing State Lines: Criminal Law And the Federal Government

In late June 1991, in the heat of a contentious Senate debate on the crime bill, Alfonse M. D'Amato, R-N.Y., rose to offer a potentially historic amendment. The proposal would have turned any crime involving a gun that had been taken across state lines into a federal offense. Because 96 percent of all firearms cross state lines, the amendment would have included most illegal acts committed with a gun.

D'Amato said in defense of his amendment that "the national epidemic of gun-related homicides requires increased federal attention, expanded federal jurisdiction and increased use of federal law enforcement resources."

D'Amato's proposal did not become law — it passed the Senate but was dropped in conference with the House — but the reasoning behind it has been used time and again to justify an expansion of the federal government's role into many areas of law enforcement.

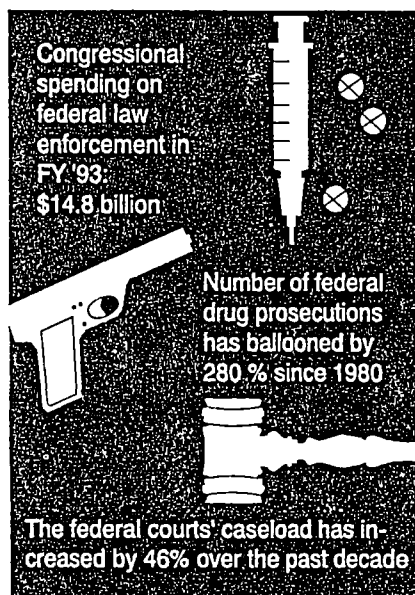
In recent decades, for example, Congress has made federal crimes of drug trafficking, "carjacking," vandalism at biomedical research laboratories and a host of other offenses once handled by states and municipalities.

Supporters of such legislation, including liberals and conservatives, argue that bringing the federal government's extensive resources to bear on localities can help reduce crime. Currently, according to a Senate Republican staffer, "a lot of state systems are clearly overwhelmed ... and people who commit heinous crimes aren't doing jail time."

Advocates both on and off Capitol Hill envision increased federal responsibility as a way to complement state law enforcement.

But some in the legal community say that a broadening of federal criminal jurisdiction is a waste of precious resources. It is, they claim, an unnecessary usurpation of state authority that will overburden an already strained federal court system and downgrade the overall quality of justice.

Critics also say these laws are primarily motivated by political rather



PATT CHISHOLM

than law enforcement concerns. Members perceive making something illegal as "an inexpensive step that allows them to tout their crime-fighting credentials with the voters. It 'allows them to show that they're tough on crime,'" says Laurie Robinson of the American Bar Association (ABA).

And while the economy will preoccupy the new Congress in the opening months of 1993, experts on and off the Hill feel that the new president — a former state attorney general and governor — will take a keen interest in fighting crime.

Consequently, if Congress and the White House want to move beyond politics, they will have to address the question of whether federalizing criminal law ultimately leads to safer streets and neighborhoods. So far, the evidence is inconclusive: According to figures provided by the Office of Management and Budget, the crime rate dipped slightly during the 1980s as federal law enforcement appropriations increased. But it remains unclear whether these two statistics are directly linked.

Responding to an Epidemic

As Americans grow increasingly frustrated with crime rates that have more than tripled in the last 30 years,

government at every level has scrambled to respond. In the past decade, congressional spending on federal law enforcement has roughly tripled to \$14.8 billion in fiscal 1993.

In October, Congress passed legislation (HR 4542 — PL 102-519) making carjacking a federal crime. Congress also came reasonably close to clearing a major anti-crime package (HR 3371) that would have created new federal offenses for crimes such as the murder of local police officers assisting in federal investigations.

Supporters argue that these laws — 3,000 of them and counting — give the federal government the opportunity to provide states with invaluable help through additional agents, prosecutors and courts.

In addition, federal courts tend to impose longer jail terms, often because of mandatory sentencing guidelines. By bringing a case before the federal bench, in many instances, "you can at least double the sentence a defendant would have received in state court," says Cheryl Epps of the National Association of Criminal Defense Lawyers.

Donald Baldwin, executive director of the National Law Enforcement Council, an information clearinghouse for police organizations, says that an extensive federal criminal code also provides more "consistency" nationwide. Creating a federal offense allows state governments to fashion something close to a national legal standard of procedure and penalties regarding certain crimes, such as drug trafficking. Given the increased mobility of criminals and the decreasing importance of state boundaries, this legal continuity, Baldwin says, "has proven helpful."

Moreover, many states are happy to have the federal government pick up part of the tab for local law enforcement.

The federal government often has targeted law enforcement resources in areas with high crime and drug rates. "In New York City, the mayor and the people in the neighborhoods love this," said an aide to D'Amato. "I mean in some areas, targeted law enforcement has literally turned them around."

By David Masci

Rep. Charles E. Schumer, D-N.Y., who sponsored this year's carjacking legislation, argues that the federal government must assume a greater responsibility for law enforcement. "We have a crisis in crime," he said. "It's like America in the early 1900s, when the states were unable to deal with problems like child labor and the sweatshops and the federal government had to step in."

Schumer and others in both houses are confident that Congress will continue to expand the federal government's role in fighting crime. A likely early effort will be passage of a new version of this year's anti-crime package, which included provisions on gun control and mandatory death sentences. That bill died in the Senate Oct. 2 when Democratic supporters failed to cut off a threatened Republican filibuster. (*Weekly Report*, p. 3167)

Dangers of Federal Involvement

But many opponents of the "federalization" of criminal law think it will do more harm than good. Charles "Bud" Meeks, executive director of the National Sheriffs' Association, feels that by "stepping in," the federal government may be infringing on states' police power.

"By passing statutes in an effort to make [the situation] better, we're getting closer to a federal police state," he said, adding that localities already are doing a "fantastic job with the resources they have." Meeks and others feel that local crime problems require local solutions and that the Founding Fathers recognized this when they wrote the Constitution leaving criminal justice to the states.

Meeks said he feels that if the trend toward greater federal involvement continues, states may begin to shift their resources away from law enforcement in the expectation that Washington will pick up the slack. That would just accelerate the shift from state to federal policing, he says.

And opponents concerned with defendants' rights argue that creating a parallel federal law gives prosecutors an unfair advantage by letting them pick the judge or court — local or federal — most likely to convict.

Impact on Courts

Criticism also comes from those who feel that federalizing crimes will overburden federal courts and lower the quality of justice.

The federal courts' criminal caseload has increased by 46 percent

3,000 Federal Crimes



The U.S. Constitution names one federal crime: treason. Nevertheless, the federal government has long been involved in the war against crime.

The founders envisioned a criminal justice system administered at the state level, with the 10th Amendment reserving to the states all powers that were not specifically granted to the federal government.

But Prohibition in the 1920s and the rise of organized crime accelerated the establishment of an extensive body of federal criminal law.

By the 1960s, crime had become a standard issue in presidential campaigns. And in the years that followed, Congress passed many anti-crime laws.

There are more than 3,000 federal criminal offenses. The following is a list of just a few of Congress' more recent laws, both broadly and narrowly tailored:

- **Anti-Auto Theft (PL 102-519)** — Enacted this year, it made "carjacking" — armed robbery of a vehicle while the driver is present — a federal crime. It imposes a maximum penalty of life in prison when the theft results in death.

- **Animal Research Protection (PL 102-346)** — The law made it a federal crime to vandalize biomedical research laboratories, farms, rodeos and virtually all other facilities that use animals commercially. It set sentences from 10 years to life in prison for injuries that people suffer during attacks on facilities covered under the act.

- **Crimes Against Religions (PL 100-346)** — Cleared in 1988, the statute made it a federal offense to damage or deface religious property or interfere with anyone's free exercise of religion. Penalties included life imprisonment when a death resulted from activities prohibited under the act.

- **Omnibus Drug Initiative Act of 1988 (PL 100-690)** — The act expanded anti-drug laws. It established new federal offenses for child pornography and obscenity. More specifically, it made it illegal for anyone with custody of a child to allow that minor to be used in the creation of pornographic material.

- **Comprehensive Crime Control Act of 1984 (PL 98-473)** — The act made murder-for-hire a federal crime when interstate commerce was involved. It also made murder and assaults federal crimes if they were committed in aid of racketeering activities.

- **Anti-Arson Act of 1982 (PL 97-298)** — This act expanded federal arson law to include all property used in or affected by interstate or foreign commerce. Previous law had allowed federal prosecution only when an explosion had resulted.

- **Drug Abuse Prevention and Control Act of 1970 (PL 91-513)** — The legislation built on earlier laws to expand federal jurisdiction in the war against drugs. It set new penalties for drug trafficking and possession.

- **Omnibus Safe Streets and Crime Control Act of 1968 (PL 90-351)** — The act set extensive restrictions on the distribution, sale and possession of firearms, and prohibited the sale of a handgun to a person under 21 or to someone not living in the dealer's state. It also prohibited the possession of firearms by felons, mental incompetents, illegal aliens and others.

—David Masci

over the last decade. Opponents of federalization say that these increases are forcing the system to dispense criminal justice quickly, leaving less time for careful consideration of each case.

Chief Justice William H. Rehnquist echoed this argument in the 1991 Year-end Report on the Federal Judiciary. Calling the court system a "resource which is both precious and exhaustible," Rehnquist compared the federal bench with "a city in the arid West which is using every bit of its water resources to supply current needs.... In that situation, we must conserve water, not think of building new subdivisions."

But Baldwin says Rehnquist and others are missing the point. "If getting more criminals off the street is clogging up the court system," he says, "then clog it up."

And clearly, the federal government is preparing for more criminals. According to statistics provided by the Bureau of Prisons at the Justice Department, federal prison capacity was expanded by more than 10,000 persons from 1989 to 1991. Currently, the government plans to almost double capacity to more than 85,000 over the next five years.

One landmark piece of legislation in this process is the Drug Abuse Prevention and Control Act of 1970 (PL 91-513), which turned most drug-related crimes into federal offenses. According to Meeks of the sheriffs' association, the 1970 act and related statutes have led prosecutors to try most major drug dealers in federal court.

Consequently, the number of federal drug prosecutions has ballooned by 280 percent since 1980. Some of this increase is tied to a rise in the sale and consumption of illegal narcotics. The rest, opponents say, is attributable to the expansion of federal criminal law.



Suspects lie on the ground while U.S. marshals make a drug raid in Washington in 1989.

As Americans grow increasingly frustrated with crime rates that have more than tripled in the last 30 years, government at every level has scrambled to respond. Congressional spending on federal law enforcement has roughly tripled in the past decade; many states are happy to have federal help in paying for local law enforcement.



D'Amato

Still, more than 95 percent of all criminal prosecutions in America are dealt with at the state and local level. And this figure has not changed much recently, according to Vivian Watts, a consultant with the Advisory Commission on Intergovernmental Relations, which studies the relationships between different levels of government.

But, Watts says, passage of new criminal laws has forced federal courts to shift resources to more common street crime and away from traditional prosecutions, such as cases involving copyright abuse and Social Security fraud.

Opponents of the expanded federal role say that the federal civil justice system also is suffering as a result of the greater number of criminal cases. Robert Raven, a former president of the ABA, pointed out in a recent speech that from 1980 to 1990, the number of federal prosecutors doubled while, during the same period, the number of federal judges increased by only 10 percent. This, according to Raven, has led to more criminal filings and has lengthened the waiting period for federal civil

cases by three months over the last year.

Political Motivations

Finally, critics of greater federal involvement question the motivations of congressional sponsors. They charge that members create new federal laws as a shield against criticism that the government is not doing enough to fight crime.

The ABA's Robinson says Congress is looking for "quick and cost-free solutions." However, she warns, "cost-free" is actually very costly in terms of prosecutors, judges and jails.

But proponents feel federal statutes can be helpful. The D'Amato amendment was not intended as a panacea, a D'Amato aide said, but it and similar provisions "might put some very bad people away for a longer time than in the state system."

As Congress prepares to resume business in 1993, some members likely will push for further federalization of criminal law, separately or as part of a new crime bill. Proposals to bring everything from juvenile justice to homicide into the federal system are likely to be topics of debate. And yes, D'Amato is expected again to offer an amendment making federal offenses of most crimes committed with guns.



Schumer

In the long term, if the crime rate continues to increase, Congress will almost certainly further expand the federal role in law enforcement.

"When the streets aren't safe, government is failing," Schumer says, adding that "there are many more [areas] where the federal government ought to be involved."

Or as Watts of the intergovernmental relations commission said, "It's very hard for politicians at any level to vote against anti-crime legislation."