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The Future of Violent Crime Federalism

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It has long been a truism that, in our federal system, episodic violent crime (street crime) is the province of state and local authorities. And usually *local* authorities at that, for very few states have integrated law enforcement hierarchies. State governments provide the preconditions of the system: the penal statutes to be enforced, and the prisons to be filled. It is the local police, working with local district attorneys, and county sheriffs, working with county attorneys, who have primary responsibility for keeping the streets and roads safe, and going after rapists, robbers, and murderers.

This responsibility has been enshrined in Supreme Court rulings, in the telephone numbers that citizens use to report violent crime, and in any number of television and movie productions. With it comes at least the potential for some institutional accountability. The Uniform Crime Reports are hardly a perfect measure of violent crime, and crime rates are certainly not a simple function of local enforcement efforts. Still, for these crimes, victims know who they are, and enforcement officials are likely to know that they have occurred. The same cannot be said of the crimes that are undisputably “federal.” Murders leave bodies, and robberies leave aggrieved victims. But frauds (or counterfeiting or corruption or tax evasion or espionage) may not even be noticed, and when alleged, may not have even happened.

One might expect a system that lacks performance measures to revel in its unaccountability and its ability to focus on better dressed offenders. But, like a moth to a flame, the feds have been drawn to street crime (particularly of the urban variety). The operating assumption seemed to be that what citizens can feel and count they will vote on. And so, at least since the 1960s, the index crime rate has been a focus of legislative and executive action at the federal level. The drop in the crime rate in the later part of the 1990s made little difference, and the federal commitment persisted, even intensified. (Russell-Einhorn, 2000, i).

The history of the federal involvement in street crimes has frequently been told as one of entrepreneurial or opportunistic action by presidential administrations and Congress. All of this is true, so far as it goes. The problem with this story, however, is that it treats state and local governments as objects of federal initiatives, not as independent agents. Appreciating the extent to which state, and particularly local, governments courted and benefitted from the federal interest is important not just for understanding the past two decades, but also for understanding the institutional strains created by the absolute priority the feds have given to counterterrorism since the September 11, 2001 terrorist attacks.

The goal of this article, which draws on the deft exploration by William Geller and Norval Morris of the federal-local dynamic in 1992 (Geller & Morris, 1992), is to show intergovernmental relations at a crossroads. For two decades, the net costs of the federal interaction with state and local governments in the criminal area were absorbed nationally, with

the benefits felt locally. Now, the federal commitment to terrorism prevention, and the role federal authorities envision state and local agencies playing in this endeavor demand certain sacrifices and offer uncertain rewards. Precisely where we will go from here remains to be seen, but this, somewhat impressionistic essay is an attempt look back to where we have been and to chart the course we seem to be on.

A Whirlwind Tour of Federal Involvement in Violent Crime before 1964

The Framers of the Constitution did not envision that the federal government would play much of a role in criminal enforcement. To the extent that they contemplated substantive federal criminal law at all, their discussions centered only on piracy, crimes against the law of nations, treason, and counterfeiting. (Kurland, 1996, 25-26). The document they produced made no effort to give the federal government general police powers of the sort States exercised. The only criminal justice interests that government would have were those relating to the powers specifically delegated to it.

In its early years, Congress was not even quick to address violent crime in those areas in which it could have used its delegated powers. In 1818, presented with a case in which a marine had murdered a cook's mate while on board the *U.S.S. Independence*, anchored in Boston Harbor, the Supreme Court threw out the conviction. (*United States v. Bevens*, 16 U.S. (3 Wheat.) 336 [1818]). Writing for the Court, Chief Justice John Marshall explained that while Congress could have passed a murder statute covering federal warships, it had not, and the matter was left to Massachusetts' exclusive jurisdiction. Indeed, exclusive state jurisdiction over putatively criminal offenses was very much the rule during most of the Nineteenth Century. Congress took care to target activity that injured or interfered with the federal government itself, its property or its programs. But "[e]xcept in those areas where federal jurisdiction was exclusive (the District of Columbia and the federal territories), federal law did not reach crimes against individuals, . . . such as murder, rape, arson, robbery and fraud." These "were the exclusive concern of the states." (Beale 1996, 39-40).

By the end of the Nineteenth Century, Congress had begun to look somewhat beyond direct federal interests to the general welfare of citizens, passing civil rights statutes as part of Reconstruction, and exercising its postal powers to address crimes committed through the mails. Yet, save in extraordinary situations where violence threatened these still relatively narrow interests – as occurred the protection of the mails was asserted as a basis for federal intervention in turn-of-the-century labor wars – the feds left the arrest of violent bad guys to the states, at least where there were well-developed state governments. (Brickey 1995, 1138-41; Richman 2000, 83-84). In the territories, of course, U.S. marshals and their deputies played their now-storied role as keepers of the peace. (Calhoun 1990) [CHECK].

An effect, and a cause, of their limited role was that there were just not very many feds during this period. Agents of the postal service protected the mails; United States marshals protected judges and performed sundry other duties; treasury personnel fought smuggling, and,

after its creation in 1865, the Secret Service targeted counterfeiting. (Richman 2002, 700). But, the federal enforcement establishment was remarkably small. The office of the Attorney General dates back to the Founding, but there was no Justice Department until 1870. Until then, the United States attorneys brought prosecutions in their respective federal districts, but with little national coordination, and with little control over the how federal law enforcement personnel were deployed. Even after its creation, the Justice Department had scant resources, and had to rely on Treasury's Secret Service agents or Pinkerton Detective Agency operatives for investigative support. (Cummings & McFarland 1937, 373; Theoharis 1999, 2-3; Powers 2004, 42-61).

In the early part of the twentieth century, Congress's readiness to enlist federal criminal law in the service of national moral crusades – like those against “white slavery,” narcotic drugs, and, in time, alcohol – and its concerns about the challenges that Americans' increased mobility posed to local enforcement efforts, led to a substantial extension of federal criminal jurisdiction. Yet while these enactments, and the agents deployed to enforce them, targeted many of the same bad actors who had hitherto fallen within the exclusive remit of local authorities, the specialized nature of the federal beat, the small size of the federal apparatus, and the alacrity with which locals left morals enforcement (particularly Prohibition cases) to the feds, kept the friction down. (Boudin 1943, 261, 273-74; Hoover 1933; Langum, 1994).

A snapshot of federal enforcement in 1930 is helpful. Of the 87,305 total federal prosecutions in 1930, about 57,000 were for prohibition violations; 8000 were of District of Columbia cases; 7000, immigration cases, and 3500, drug cases. (Rubin, 1934). Of the 4345 convictions obtained in cases investigated by the 400 agents of “Bureau of Investigation” in 1930, 2452 were for violations of the “National Motor Theft Act,” and 516 were for “White Slave Traffic Act” prosecutions. (Attorney General Report, 1930, at 80-81; Theoharis 1999, 4). The real federal activity in the violent crime area that year came in the provision of infrastructure to local authorities. Just months after creating the Uniform Crime Reporting system as a way of preventing newspapers from “manufacturing ‘crime waves’ out of thin air,” the International Association of Chiefs of Police (IACP) handed it over to be administered by the Bureau of Investigation. (Maltz 1999, 4; Rosen 1995; Geller & Morris, 1992, 283). The Bureau's chief, J. Edgar Hoover, was quite aware of the limitations of a system that relied on self-reporting. But any supervision, he maintained, would have to come from the IACP, not his or any other federal agency. (Hoover 1932, 451). The Bureau's Identification Division, also established under the “auspices” of the IACP as a clearinghouse for fingerprint and other such data, also took care to play a supporting role. (Hoover 1932, 442; Theoharis 1999, 12).

In 1930, even as violent gangs were garnering national attention, Attorney General Mitchell was able to say that “[d]ealing with organized crime” was “largely a local problem.” “[T]he fact that these criminal gangs incidentally violate some federal statute,” he noted, “does not place the primary duty and responsibility of punishing them upon the Federal Government, and until state police and magistrates, stimulated by public opinion, take hold of the this problem, it will not be solved.” (Cummings & MacFarland 1937, 478).

Then came the kidnapping of Charles Lindbergh's son in March 1932, which one newspaper called "a challenge to the whole order of the nation." (Powers 1987, 175). Moving gingerly into this new area, President Hoover asked Director Hoover to coordinate federal assistance, but his administration stressed that "it was not in favor of using the case as an excuse for extending Federal authority in the area of law enforcement." (Ibid.). National interest in the case must have been hard to bear, however, for in May 1932, a week after the baby's body was found, Congress passed a federal kidnapping statute, invoking its power under the Commerce Clause. (Potter 1998, 112). Attorney General Mitchell complained to the President:

If this law had been on the statute books at the time the Lindbergh case arose, there would have been an outcry demanding that the federal government take hold of the case; local police authorities would have relaxed their activities and been glad to dump the responsibilities on the federal government; we would have spent thousands of dollars with no better results than the state authorities obtained, only to find out at the end that no federal crime had been committed as there had been no interstate transportation.

But the attorney general still recommended that the President not go so far as to veto the bill. And it became law. (Cummings & MacFarland 1937, 479).

The kidnapping statute was just the beginning of what soon became a wave of congressional enactments targeting criminal behavior that had hitherto been the exclusive province of state and local enforcers. And the charge was led by the new president, Franklin Roosevelt, who in his January 3, 1934, address to Congress, put crime high on his administration's legislative agenda. Congress immediately responded, and within six months 105 crime bills had been introduced. Many passed, including the National Stolen Property Act (barring the transportation of stolen property in interstate commerce), the National Firearms Act, the Fugitive Felon Act, and the Federal Bank Robbery Act. That same year, Congress also passed the Anti-Racketeering Act of 1934, which allowed federal prosecution of the urban gangsters thought to be flourishing around the country. (Richman 2000, 87).

Under Director Hoover's savvy leadership, the FBI rode the crest of this legislative wave – and of the perceived "crime wave" that occasioned it – to fame and fortune. Its agents "acquired the popular identity of the G-man: the highly professional and apolitical hero who 'always got his man.'" (Theoharis 1999, 13; see also Potter 1998; Burrough 2004). But while the number of these agents more than doubled, from 388 in 1932 to 713 in 1939 (Theoharis 1999, 13), the Bureau's "war against the underworld" (Whitehead 1956, 103) was quite limited, and indeed was intended to be so: The idea was to go only after those roving gangsters who had proved too big for local enforcement, particularly those whose apprehension made (or could be turned into) headlines. State and local officials may have chafed at a justification for federal activity based on their own inadequacies, and at grandstanding by their federal counterparts. But they likely saw Hoover more as an entrepreneur creating a new market than as a source of real competition. After all, while the Bureau was not above encouraging local police officers (with monetary rewards) to pass information to it about matters of federal interest (Potter 1998, 194),

the fact was (and continues to be) that the feds could not venture far into local domains without the cooperation of the local enforcement hierarchy. And local authorities got additional assurance from Hoover's oft-repeated opposition to a National Police Force (Ungar, 1976, 79) – an opposition born as much from politick modesty as from fear that any move in that direction would impose onerous new responsibilities on his agency.

Having increased precipitously in the 1930s, the federal role in prosecuting violent crime (organized or otherwise) held steady in the 1940s and 1950s, in large part because “the overwhelming primacy of internal security and counterintelligence matters diverted FBI resources.” (Theoharis 1999, 35). Having jumped from just over 13,000 inmates in 1930 (when the Federal Bureau of Prisons was created) to 24,360 inmates in 1940, the federal prison population thereafter “did not change significantly between 1940 and 1980 (when the population was 24,252).” (Federal Bureau of Prisons 2001, 3). And for a while, “the crime issue largely disappeared from national politics.” (Beckett, 1997, 30).

1964 - 1980s: New Federal Funding Role

Barry Goldwater's acceptance speech at the 1964 Republican convention ushered in a new era of federal interest in violent crime. Attributing the recent rise in crime rates to Democratic administrations, Goldwater made the “violence in our streets” a focus of his presidential campaign. (Beckett 1997, 31; Marion 1994, 39). Goldwater lost big to incumbent Lyndon Johnson, but Johnson noted how much mileage Goldwater had gotten out of the issue and soon made crime a priority in his new administration. One response was the traditional blue-ribbon commission – the President's Commission on Law Enforcement and the Administration of Justice. (President's Commission 1968). Another was the passage of the Law Enforcement Assistance Act of 1965, and the establishment, under its terms, of the Office of Law Enforcement Assistance to fund state and local anticrime projects. Having “annointed himself Washington's main conduit to local police chiefs,” the FBI's Hoover looked askance at the office's efforts, however small, to reach out to local authorities. But members of Congress saw the benefit of a program that allowed them to steer federal money to their constituencies. (Gest 2001, 18-19). As Malcolm Feeley and Austin Sarat's valuable study explains, the Office of Law Enforcement Assistance “legitimized the view that the federal government should provide financial assistance to state and local law enforcement.” And thereafter, the President's Commission “proposed that the federal government become an active partner in combating crime at the state and local levels.” (Feeley & Surat 1980, 36-38).

The primary activity of this new partner, however, was simply writing checks. For despite all the rhetoric of planning and coordination, that is what the federal government's new role initially amounted to. (DiIulio 1995, 454). When in 1967, anticipating (quite correctly) that street crime would be a critical issue in the 1968 election, the Johnson Administration sought to create a larger-scale grants program, House Republicans successfully demanded that funding be given as block-grants to the states. (Feeley & Surat 1980, 42-46). And without adequate means to target and monitor expenditures, the new Law Enforcement Assistance Administration,

established in the Omnibus Crime Control & Safe Streets Act of 1968, became not a force for crime-policy innovation but simply a way of increasing funding to the status quo.

The LEAA story is usually told as one of policy failure. That it was, from the perspective of those looking for improved crime policies and reduced crime rates. (DiIulio 1995, 455; Feeley & Surat 1980; Navasky 1976; Diegelman 1982). But from the perspective of state and local enforcement agencies eager for federal dollars without federal mandates, the LEAA was a success that only improved with time. Its budget kept increasing, at least until 1977. And the bureaucratic steps that stood between agencies, particularly large police forces, and their money were only reduced over time. (Diegelman 1982, 998-99).

Yet police forces did not directly receive most of the LEAA money, which instead was funnelled through the states. The arrangement made perfect sense, as a matter of congressional politics. But it was willfully blind to the fact that a state's interests often diverged from those of its local instrumentalities, and that some local needs varied greatly. Under pressure from President Nixon to "show results" in time for the 1972 election, LEAA picked out several cities for special "high impact" funding, but the program "subsequently come to be little more than a public relations gimmick." (Feeley & Sarat, 1980, 84; Gest, 2001, 27-29).

The LEAA soon fell out of favor in Washington, attacked by Jimmy Carter for wasting money, and finally phased out by Ronald Reagan in 1982. Reagan's 1983 budget message to Congress noted: "Public safety is primarily a state and local responsibility. This administration does not believe that providing criminal assistance in the form of grants or contracts is an appropriate use of federal funds." (DiIulio 1995, 455). Under his administration, "LEAA was declared a failure, its name changed, its authorization narrowed, its appropriations slashed, and its bureaucratic status reduced – the public equivalent of a corporate bankruptcy." (Heymann & Moore, 1996, 107). Before its demise, the LEAA had spent \$8 billion on state and local crime control. (McDonald et al., 1999, 12).

1980s and 1990s – New Operational Role & Continued Funding

Yet Reagan certainly did not preside over the withdrawal of the federal government from the war on crime. It would have been hard to so in 1980, when the homicide rate – 10.2 per 100,000 – was the highest ever recorded in the UCR system. (Fox & Zawitz, 2002). During his presidential campaign, he "paid particular attention to the problem of street crime and promised to enhance the federal government's role in combating it." (Beckett 1997, 44). Moreover, his administration's readiness to give federal agencies a direct operational role in the area suggested that its opposition to the LEAA had more to do with fiscal policy than federalism concerns.

The primary vehicle for this operational role, at least initially, was the enforcement of the federal narcotics laws. Explaining why his agency needed to "assume a larger role" in the area, FBI Director William Webster noted in 1981 that "when we attack the drug problem hed

on, [] we are going to make a major dent in attacking violent street crime.” (Beckett 1997, 52). Reflecting this priority, the administration sought and obtained massive increases in funding for the FBI’s drug enforcement work and for that of the Drug Enforcement Administration.

Many of the criminal statutes needed to support this new operational role were already on the books by 1980: drug trafficking offenses, gun offenses, and racketeering laws. In any event, more were soon passed by legislators eager to show their commitment to the Wars on Crime and Drugs. (Richman 2000; Brickey 1995, 1145). The principle practical effect of this legislation was to raise federal sentences for narcotics and weapons offenses. Certainly the Supreme Court impose any significant impediments to federal activity in this area. In cases like *United States v. Culbert*, 435 U.S. 371 [1978]), the Court made clear that the fact that criminal activity – in this case a robbery – was also punishable under state law was of no concern, so long as there was some (often quite slim) connection to “commerce” and where Congress intended such a change in the traditional federal-state balance. Indeed, the limits that the Supreme Court put on the expansion of federal criminal jurisdiction during this period tended to be more of form than substance. Interpreting 1968 legislation that made it illegal for a convicted felon to possess a firearm, the Court read in an element that required prosecutors to prove “some interstate commerce nexus.” *United States v. Bass* (404 U.S. 336 [1971]). But in a subsequent case the Court soon made clear that all the prosecutors need show was that the firearm have *at some time* traveled in commerce – something that could be easily shown for just about any gun. (*Scarborough v. United States*, 431 U.S. 563, 575 [1977]; Richman, 2000, 89).

The existence of federal jurisdiction over a great deal of regular local crime (or at least, through the use of the gun statutes, over regular local criminals) was already clear. What really changed in the 1980s, however, was the readiness of the federal government to *exercise* its broad jurisdiction under these statutes, to commit investigative and adjudication resources to street crime, and to pay for the incarceration of convicted offenders. It is hard to quantify the degree to which federal enforcers in the 1980s moved into what hitherto had been local cases. The number of drug cases certainly climbed, with the number of suspects prosecuted in federal court for drug offenses going from 9906 in 1982 to 25,094 in 1990. (Bureau of Justice Statistics, 1996, 2), but that number includes both higher and lower level trafficking offenses. And while federal weapons charges can be used against street criminals, the large number of federal weapons prosecutions brought during this period – which went from 1970 in 1982 to 12,168 in 1990 (*ibid.*) – could have had other targets as well. After all, even an enforcement strategy targeting only organized crime or large-scale narcotics enterprises would involve the use of weapons or low-level drug charges as a means of gaining information or pleading out cases. By the 1990s, however, efforts by both the Bush(I) and Clinton administrations to raise the visibility of federal enforcement operations against street criminals made the extent of federal activity quite clear. One compelling political reasons to raise this visibility was that the homicide rate, which had somewhat dropped since 1980 – down to 7.9 in 1985 – had started climbing again, going back up, to 9.8 in 1991. (Fox & Zawitz, 2002).

The nouns fly fast and furious here. “Project Triggerlock,” announced in 1991 by Attorney General Thornburgh, asked U.S. Attorneys to work with local police forces to identify repeat and violent offenders who used guns and to prosecute them in federal court, where they would face “the full force of federal sentences, with a commitment to no plea bargaining.” The programs’ motto was “A gun plus a crime equals hard Federal time.” (Richman, 2001, 374; Russell-Einhorn, 2000, 42). In January 1992, the FBI redeployed 300 of its agents from foreign counterintelligence activities as part of its “Safe Street Violent Crimes Initiative” targeting violent gangs, crimes of violence, and the apprehension of violent fugitives.” (Johnston 1992; FBI 2000; Russell-Einhorn 2000, 45). During the summer of 1992, the chief of the Criminal Division in the FBI’s New York office told some agents that “terrorism was dead,” and tried to move them away from investigating the group later responsible for the 1993 World Trade Center bombing, and into urban gang investigations. (Miller 2003, 84). In August 1992, the Bureau of Alcohol Tobacco and Firearms – which would soon become the federal enforcement agency most focused on violent crime -- announced “Operation Achilles Heel,” and pledged to work with state and local authorities to round up 600 “of this nation’s most violent criminals.” (Richman, 2001, 375; Russell-Einhorn, 2000, 34).

The change in presidential administrations from Bush(I) to Clinton did not significantly alter the trajectory of federal enforcement policy in this area, or the desire to highlight it. Violent crime was again on an upswing in the early 1990s, and the homicide rate in 1991 up to 9.8. Violent crime victimization climbed as well. (Fox & Zawitz, 2002; Rennison, 2002). While there was sustained debate on Capitol Hill about the Clinton Administration’s approach to gun crimes, the only real issue was whether the federal interest in pursuing these offenses could be served by federally sponsored state prosecutions as well as federal prosecutions (as the Clinton Administration wanted) or whether only federal prosecutions would do (as Republican opponents suggested). (Richman 2001). Between 1989 and 1998, the number of federal firearms prosecutions went up 61%. (Walker & Patrick, 2000). And the number of arrests by the FBI’s violent crimes task forces (in which state and local participants – whose overtime was paid by the feds outnumbered the federal agents) jumped from over 14,000 in fiscal 1992 to over 25,000 in fiscal 1997. (Russell-Einhorn, 2000, 45; FBI 2000, 2-3).

The most important change in federal-local interaction during the 1990s is not fully captured by these statistics, however, as it came in institutionalization of federal anti-violence programs. The precise structure of these programs varied from district to district – and indeed such variation was a hallmark of the Clinton Administration’s approach. (Richman, 2001, 383). But the trend, particularly in large urban areas, was to formalize collaborative relationships between agencies. (Russell-Einhorn, 2000; McDonald et al., 1999, 13).

In one flagship program, “Project Exile,” federal prosecutors in Richmond, Virginia, made an open commitment of federal resources in February 1997: “When a police officer finds a gun during the officer’s duties, the officer pages an ATF agent (twenty-four hours a day). They review the circumstances and determine whether a federal statute applies. If so federal criminal prosecution is initiated.” According to the U.S. Attorney’s office, the benefits of taking these

cases federally flowed from the federal bail statute, which allows pre-trial detention on the ground of dangerousness; the federal system of mandatory minimums and sentencing guidelines, which limited sentencing discretion and resulted in predictable and substantial sentences, and the federal prison system, which made it likely that the sentence would be served far from home (hence the idea of “exile”). By March 1999, 438 federal indictments had been brought, and the U.S. Attorney’s office credited the program with helping reduce Richmond’s homicide rate by 33%. President Clinton extolled Exile’s virtues in a radio address, and it was duplicated (in one form or another) around the country. (Richman, 2001, 379-85; Baker 1999, 682).

Lest any violent crime prove beyond the reach of at least one federal statute, Congress was quick to jump in with new ones. Even crimes zealously pursued by local authorities led to new federal legislation. After a widely publicized Maryland case in which the victim of an auto theft was dragged to her death while trying to rescue her daughter, Congress passed a carjacking statute in 1992. That the Maryland perpetrators were prosecuted in state court and received life prison terms made little difference. (Gest, 2001, 69; Zimring & Hawkins, 1996, 20). Observing the relationship between election years and crime legislation, a former House staffer found especially noteworthy “the amount of floor time spent repeatedly on anecdotal horrific *state* crimes to justify enactment of *federal* law.” (Bergman, 1998, 196). By the late 1990s, a large body of scholarly literature condemning the cynical politics behind this tendency to federalize everything had developed. (e.g., Beale, 1997; Beckett, 1997; Marion, 1997; Marion, 1994; Scheingold, 1984). But it had little or no effect. When, in 1994, a bill was proposed that would have made almost every state crime committed by a gun into a federal offense, it took opposition by FBI Director Louis Freeh and Chief Justice William Rehnquist to block the measure. (Richman 1999, 767; Gest 2001, 69-70).

The efforts by the Bush(I) and Clinton administrations to deploy federal agents and prosecutors against violent crime (and drug trafficking) – either on their own or in various joint task forces – did not come at the expense of federal grants to state and local governments in this area. Indeed, both in their dollar amounts and in the discretion they gave to state and local enforcers, federal grant programs took off during the 1990s. The Crime Control Act of 1990 (Pub. L. 101-647) authorized \$900 million for the Edward Byrne Memorial State and Local Law Enforcement Assistance programs – which funded narcotics enforcement and were administered by the states. (Laney, 1998; Russell-Einhorn 2000, 36). With the election of Bill Clinton, and in the wake of his campaign promise to put 100,000 new police officers on the streets came the Violent Crime Control and Law Enforcement Act of 1994, (Pub. L. 103-322). which “authorized the spending of a staggering \$30 billion to help State and local enforcement agencies fight crime over the 6-year life of the bill’s coverage.” (Roth, 2000, 41). The big development here was a readiness – in the form of the COPS (“Community Oriented Police Services”) programs to put money directly into the hand of local police departments, and in particular big city police departments. Of all the agencies awarded grants under the COPS program by end of 1997 “only 4% served core city jurisdictions. But they received 40% of COPS dollar awards for all programs combined and 62% of all COPS MORE [“Making Officer Redeployment Effective”] funds (which went to technology, civilians, and overtime.” “On both the per capita and per crime

bases, mean awards to core cities were highest in the Middle Atlantic region and lowest in the West South Central region.”) (Ibid., 10, 65). By 1997, local crime prevention took a bigger slice of the Justice Department’s budget than the FBI, DEA, or INS. In fact, among all Justice components, only the Bureau of Prisons got more than the units that funneled money to state and local enforcers. (Sherman, 1997, 1-11).

How dependent did state and local governments become on this federal assistance? The answer eludes easy quantification. (Nathan, 1983). “In 1995, four-fifths of the National’s total expenditure for criminal justice operations were spent by State and local governments.” (McDonald et al., 1999, 13). Yet in California, where the annual expenditures on law enforcement agencies ranged between \$7 and 8.7 billion in 1995-98, (Cal. Dep’t of Justice ____), the Legislative Analysis Office could report that the agencies had received “almost \$343 million through the COPS program” between 1995 and 1997, “almost \$72 million in block grants” in 1997 alone, and could expect “almost \$50 million” in Byrne grants for 1998. Indeed, that Office advised that, given this influx of federal funds to state police agencies, the Legislature needed to determine “whether state funds for law enforcement [could] be reduced or redirected to other parts of the criminal justice system that have not received new federal monies.” (Cal. Legislative Analyst’s Office 1998, 19-24). To be sure, the conditions attached to some federal grants sometimes put states at a net fiscal disadvantage. The funds offered by the 1994 crime bill to states passing truth-in-sentencing legislation, for example, probably did not offset the increased correctional spending resulting from that legislation. (Reitz 1996, 118). Yet the net flow was definitely positive.

The Allure of Violent Crime Federalism

This is not the place to debate whether these federal programs achieved their stated goal of crime reduction. Figuring out whether or to what extent any policing program or approach has affect crime rates will always be hard. (Levitt 1997; Sherman, 1992). One recent study goes so far as to suggest that Project Exile, whose success in reducing the Richmond homicide rate was celebrated by the Clinton and later the Bush(II) administrations, actually had little or no effect on it. (Raphael & Ludwig, 2003). As for the role of federal funding: There *is* good evidence that an increase in the size of police forces play a significant role in reducing crime in the 1990s (Levitt, 2004, 186). This increase was coincident with and some extent was funded by the COPS program. Yet though one economist would give Clinton and the COPS program “credit for engineering more crime reduction through federal policy action than any President since Franklin Roosevelt ushered in the repeal of Prohibition” (Donahue, 2004), precisely how much credit should be given to that program is still open to debate. (Office of the Inspector General 1999; Roth 2000; Ekstrand & Kingsbury, 2003; Zhao et al. 2002; Zhao & Thurman, 2003). One needs to figure out how much money localities would independently have spent on a serious crime problem, and how much money actually stuck to the departments it was given to (as opposed to subplanting local funding that ended up being spent outside the criminal justice system. (Evans & Owens. 2004).

From the intergovernmental perspective, however, the important point is that the latter part of the 1990s marked the high-water mark of a federal-state-local relationship, based on violent crime enforcement, that (amazingly enough) nicely served the interests of almost all of the governmental actors involved. Presidential administrations of both parties got to tout their commitment to the Fight against Crime and the War on Drugs. Legislators, who readily appropriated large sums of money for these endeavors, could tout their commitment as well, but there was more to it than that. For the essence of the violent crime targeted by the enforcement and funding programs was local. While there was much talk, and perhaps some reality, of coordination, innovation, and “best practices,” the thrust of these programs was to deploy federal dollars and manpower against local problems. And with each conspicuous deployment -- be it funding grant or enforcement program -- a legislator’s press release could take some credit. Congressional representatives could also take credit for relieving local enforcers of burdensome grant compliance. (Chubb 1985).

The in-kind aid to localities entailed by federal enforcement activities offered certain advantages to the feds over the direct funding alternative: First, federal prosecutors and agents could ensure that the aid reached its intended destination. And to the extent that these line federal bureaucracies failed to do that, their activities could be more easily monitored from Washington than those of state and local agencies. Second, lacking any easily ability to predict and measure the extent of this sort of federal aid, state and local policymakers would presumably be less “inclined to offset increased federal aid through decreases in their expenditures.” (O’Hear, 2004, 850).

The interests of federal enforcement agencies were also well served by the new violent crime priorities (which overlapped with the narcotics enforcement priority). The general public was happy to see the “feds” deployed against local bad guys – street gangs, armed robbers, and murderers. And the championship of these cases by local legislative delegations could only redound to the benefit of agencies at funding time, and to field offices in their relations with headquarters. The timing for the FBI was particularly propitious, as the end of the Cold War appeared to allow the redeployment of agents from counterintelligence to anti-violence assignments. (Johnston, 1992). And ATF had its own incentives: By making a speciality of violent crime, the agency whose unpopular gun control mission had almost led to its elimination gained a mission that even the National Rifle Association could not quarrel with, and gained valuable allies in the local law enforcement community. (Richman 2001, 399; Vizzard, 1997). Agents and prosecutors also enjoyed the extent of their discretion in this area. There may have been political pressure to do violent crime cases. But there was little pressure to any particular case. Violent crime was still, after all, primarily a local responsibility. Federal enforcers thus could be quite strategic in their case selection decisions.

The only federal branch that did not support federal intrusion into the street crime area was the judiciary (or at least a significant component thereof). Many judges believed that the burgeoning criminal docket impaired the “quality of justice” in criminal cases and also impaired their “ability to perform their core constitutional function in civil cases.” (Beale 1995, 983).

These particular criminal cases also demanded a unusual expenditure of judicial resources. A study by the Administrative Office of the U.S. Courts found not just a huge increase in federal firearms cases between 1989 and 1998, but also the costs of that increase: “In comparison to 1989, a firearms case filed in 1998 was more likely to involve multiple defendants, more likely to take longer between filing and disposition of the case, more likely than other types of crimes to result in a jury trial, and more likely to result in a longer prison sentence for the defendant.” (Walker & Patrick 2000, 6). Some judges also complained about efforts to turn “garden-variety state law drug offenses into federal offenses,” (*United States v. Aguilar*, 779 F.2d 123, 125 [2d Cir. 1985]), or violent crime prosecutions that turned their dignified setting “into a minor-grade police court.” (Campbell 1999).

Another likely cause of judicial discomfort may also been that they had become the only indispensable federal actors in federal criminal prosecutions. As a result of various programmatic innovations, much of enforcement federal authority was being outsourced: Police officers, working within federal task forces or in programs like Project Exile, were initiating and investigating federal cases. State or local prosecutors, cross-designated as assistant U.S. attorneys, were often prosecuting them. Only judges had to come from the limited pool of federal actors. And they wondered why Congress could not accomplish its purposes “by increasing federal assistance to state criminal justice systems,” and having “federal” crimes prosecuted in state courts. (Committee on Long Range Planning 1995, 26). Congress, however, showed not the slightest interest in this approach.

Perhaps because the judiciary bridled at the costs the political branches imposed on it, and certainly because of changes in the Supreme Court’s composition, the nonchalance with which the Court viewed extensions of federal criminal jurisdiction came to a halt in 1995. In *United States v. Lopez* (514 U.S. 549 [1995]), the Court, by a narrow majority, held that Congress had exceeded its Commerce Clause powers when it enacted the Gun-Free School Zones Act of 1990, which made it a federal offense “for any individual knowingly to possess a firearm” in a school zone. Chief Justice Rehnquist, writing for the majority, stressed the need to judicially enforce the “distinction between what is truly national and what is truly local.” (Moulton 1999). Outside the courtroom, Rehnquist and other luminaries of the bar made the point as well, in testimony to Congress, speeches, and reports. (Task Force on the Federalization of Criminal Law 1998; Baker, 1999, 675; Richman 2003, 795 n.216). The very intensity of this lobbying effort, however, highlighted the Supreme Court’s impotence against the political branches. So did the Court’s own precedents. Once the school gun statute was revised to require a jury to find that a defendant’s gun had, at some point moved in interstate commerce, its constitutionality became unassailable under well-settled case law. (Richman, 2000, 90).

For their part, the local officials whose sovereign interests the Supreme Court purported to defend against federal encroachment were generally pretty comfortable with federal initiatives. (Geller & Morris, 1992, 312-13). They liked the direct grants, overtime pay, and the aid-in-kind that federal enforcement activity – and the significant procedural and sentencing advantages flowing therefrom -- really amounted to. (GAO 1996; Jeffries & Gleeson, 1995, 1103-25; Geller

& Morris, 1992, 257-62; Russell-Einhorn 2000, 14-15; Richman, 2003, 768)). In part because of favorable procedural and evidentiary rules, and in part because they had the luxury of lighter dockets, the likelihood of a defendant's conviction was greater in federal court than in state. And because of the federal sentencing scheme, federal defendants ended up getting more time in prison. (Clymer 1997). Not only was each federal street crime defendant someone who otherwise would have been prosecuted in state court, but local enforcers who coordinated their activities with the feds benefitted simply from working in the federal shadow: The large difference between federal and state sentences meant that defendants would quickly plead out in state court to avoid (maybe) having their case taken federally. (O'Hear, 2004, 813).

Turf battles between local and federal enforcers happened from time to time. And local officials often perceived cooperation with federal agencies as "a one-way street." (Russell-Einhorn, 2000, 18). But when it came to violent crime, local police officials were generally in the cat-bird's seat. FBI, ATF, DEA and other federal agents could not patrol the streets. They rarely infiltrated gangs. 911 calls were not routed to them. And citizens generally took their complaints to the police. If a federal agency wanted to work the violent crime area, it would have to do it with the acquiescence and probably the full cooperation of the police. And the police knew that. They also gained some bargaining leverage over local prosecutors, on whom they used to be wholly dependant. Explaining how his department determined whether to take a case to federal or state prosecutors, A Richmond, Virginia, police captain noted, in 1998, that "it's like buying a car: we're going to the place we feel we can get the best deal. We shop around." (Bonner, 1998, 930). Local agencies also were given institutional mechanisms for coordinating and collaborating with federal agencies through the creation of various joint task forces. (Russell-Einhorn 2000).

From time to time, one would hear local district attorneys complaining about federal incursion. (Richman, 1999, 784 n.129). But even those complaints were rare, since there certainly was enough street violence to go around, and, as one district attorney put it, the increased federal commitment gave local prosecutors "more flexibility." (Richman, 2001, 405). If local prosecutors complained about anything, it was more likely to be about the alacrity with the feds *declined* cases rather than the greed with which they grabbed them. (Russell-Einhorn, 2000, 116). The readiness of U.S. Attorneys' offices to cross-deputize local assistant D.A.s as federal prosecutors also paved the way to coordination across jurisdictions.

Just because federal authorities depended on the local police to jump-start their violent crime investigations did not mean that information flowed freely between agencies. Indeed, police officers frequently complained that federal agencies, and the FBI in particular, were not very good about sharing. (Russell-Einhorn, 2000, 120). The advantages flowing from federal activity in the area, however, outweighed this concern, and there was in fact improvement over time. (Geller & Morris, 1992, 266, 272).

State officials occasionally went on record expressing concern that "some attempts to expand federal criminal law into traditional state functions . . . could undermine state and local

anticrime efforts.” (Baker, 1999, 676; Richman, 2001, n. 249). Their annoyance is particularly understandable when one thinks about the effects that federal activity had on the balance of power between state and local governments. On the funding side, states saw an increased readiness by the federal government to funnel money directly to localities, in contrast to the LEAA model, in which some money and power stuck to state hands on the way. (Zimring & Hawkins, 1992, 166). On the enforcement side, they saw local officials working directly with field offices and U.S. Attorneys’ offices, not just in big cities but in smaller ones as well, making state policymaking even less relevant than before. (O’Hear, 2004, 852; Richman, 1999, 786-87). Overall, though state officials resistance was muted, perhaps because of their appreciation of the relief that federal activity offered to the state criminal justice budget.

This decade of direct grants, block grants, and enforcement assistance from the federal government to state and local authorities did not come to an end with the election of George W. Bush in 2000. With great fanfare, the new President announced an “Initiative to Reduce Gun Violence,” and, as he had in his campaign, embraced a program of maximal federal involvement in gun violence prosecutions. (Bush & Ashcroft, 2001). And in a May 2001 memo to department heads, Attorney General John Ashcroft included, as two of his seven goals, “reducing drug violence and drug trafficking,” and “helping states with anti-crime programs.” He did not even mention terrorism. (Clymer, 2002; Seper, 2001). The new Administration did announce plans to phase out the COPS program – not that surprising, given that Republicans had long questioned of the efficacy of this Clinton program that tended to funnel most of its money to big city Democratic strongholds. But the plan envisioned a reconfiguring of federal aid in the violent crime area, not a transfer away from it. (Oliphant, 2001).

Then came the attacks on September 11, 2001.

II. The Post-9/11 Dynamic

We are often told that September 11 “changed everything.” Perhaps this is an overstatement in some contexts. But it is quite apt when applied to the federal, state and local law enforcement dynamic.

Immediate Effects

The shock to the federal enforcement bureaucracy was extraordinary. Before this, there had been a few specialized “beats” that the feds had to patrol. But the system’s defining luxury was the absence of any responsibility to pursue any particular case in most of the areas in which it had jurisdiction. Now, it was suddenly saddled with a politically unavoidable, and all-but-impossible responsibility: preventing another such attack.

To their credit, federal enforcement officials made a concerted effort to reach out to state and local agencies for intelligence-gathering assistance, and diplomatically sought to address long-standing local complaints about the feds’ reluctance to share information. FBI Director

Mueller made conciliatory speeches, and created a new Office of Law Enforcement Coordination, headed by a former police chief, within the FBI. Attorney General Ashcroft created new institutional mechanisms for coordinating counterterrorism activities across all levels of government. (Dep't of Justice Fact Sheet 2002). And the Department worked hard to speed up security clearances for state and local officials. (GAO 2004).

These moves all testified to the new intergovernmental intelligence dynamic. Given the nature of the perceived terrorist threat – the sleeper cells waiting to strike again -- federal agencies now relied on the intelligence capabilities of local police forces in a way they never did when the primary area of interaction was violent crime. Back then, the feds needed help from the locals, but since they could walk away from any case and had could offer many benefits, they had considerable leverage. Now, the rush was on to create the semblance of a national intelligence network providing what Philip Heymann has called “untargeted prevention.” (Heymann 1998, 82). And, in this, the participation of local cops was absolutely essential.

What state and local enforcers bring to the counterterrorism intelligence-gathering process is not simply a function of their numbers – 708,022 sworn state and local police officers in 2000 (the last count) compared to 93,446 federal law enforcement officers (more than a quarter of whom were in the Federal Bureau of Prisons) in 2002. (Reeves & Bauer 2002, 8; Reeves & Hickman, 2002, 1) – nor even of the many things they learn while on street patrol. It also stems from their involvement in bringing the bulk of serious criminal charges in the United States, because the threat of prosecution (even prosecutions having nothing to do with terrorism) is one of best tools around for prying loose closely held information. Their order maintenance and public safety duties also give local police a more balanced “portfolio” in dealing with community leaders. The police officer who seeks information from a local Arab-American community leader has probably met, and assisted that leader before. (Murphy & Plotkin, 2003, 43).

The Justice Department quickly went beyond vague talk of “information sharing” and asked for local assistance in a large-scale program to interview thousands of people (mostly young Middle Eastern males) in the country on non-immigrant visas. (GAO, 2003). In the Spring of 2002, the Department went further and announced its plan to place of names of certain aliens who had violated their visa requirements into the national database of wanted suspects. It asked state and local police to arrest these “absconders,” and noted that, as a legal matter, such immigration enforcement assistance was “within the inherent authority of the states.” (Ashcroft, 2002; Thompson, 2002).

Police departments rushed to help, and the constant drumbeat from them during 2002 and into 2003 was that the feds weren't sharing information with the locals, weren't putting them “in the game.” (Murphy & Plotkin, 2003, 9). That said, conditions were not altogether propitious for police cooperation. In a number of cities and states (by December 2004, 4 states and 358 local governments) (Bill of Rights Defense Committee, 2004)), officials took stands (pretty symbolic, to be sure) against the Administration's counter-terrorism efforts. Some of this

scattered resistance may have arisen from partisan politics or liberal orientation. But there was a historical basis as well, for the federal efforts to recruit local police into a national intelligence network brought back memories of 1968, when, at the behest of the feds, local departments had created intelligence units whose zeal to gather and disseminate information on potential “civil disorders” had led to abuses. (Church Committee, 1976, 332-33).

Local concerns were not merely partisan, philosophical or historical. They also grew out of local politics. When the federal-local interaction was centered on violent crime, federal initiatives brought significant positive externalities – credit for local leaders and maybe even improved local safety. The counterterrorism dynamic has been precisely the reverse (save in some exceptional locations, like New York City). There is no reason to expect that terrorists pose a particular threat to the many of the places where they or information about them will be found. In those areas, the gains from domestic intelligence gathering thus are felt primarily, even exclusively, at the national level. But the costs of gathering fall on the localities – not just the fiscal costs but the significant negative externalities that attend any large-scale investigations of immigrant activities in communities that have large numbers of immigrants.

Police departments, of course, do not always share the concerns of their political masters. But police officials have had their own pragmatic concerns about federal counterterrorism initiatives, particularly those involving the use of federal immigration statutes. As one official explained in the fall of 2002 on the website of the International Association of Chiefs of Police explained in the Fall of 2002:

[E]nforcement of civil immigration laws by local law enforcement would have a chilling effect on both legal and illegal aliens reporting criminal activity or assisting police in criminal investigations. Local police want illegal aliens to come forward when they have been the victims of, or witnesses to, crimes. Police depend on the cooperation of immigrant communities to help them solve all sorts of crimes and to maintain public order. Without the assurances that they will not be deported, many illegal immigrants with critical information would not come forward.”

(Farrell, 2002; see Badie, 2002; Thompson, 2002; House Judiciary Committee, 2003).

The non-federal officials most disposed to assist in enforcing the immigration laws have come from the state level, not the local. In Maryland, a newspaper reported that “[m]any local police departments [], including those in Baltimore and in Anne Arundel and Baltimore counties, generally will not report illegal immigrants unless they have committed crimes.” But “state police policy is to inform federal authorities about any suspected of being in the country illegally.” (Song 2003). As of April 2004, only Florida and Alabama had formally signed on to the federal initiative, and in Alabama it appears that only state troopers are involved. (Swarns, 2004; House Judiciary Committee, 2003).

Why the difference between the attitudes of local police departments and their statewide counterparts? Straightforward political differences may play a part here – Republican governors versus more liberal urban local officials. But institutional obligations (or the lack thereof) likely play a role as well. For it is at the local level and particularly in big cities, that the costs imposed by the federal enforcement initiative on relationships with immigrant communities would hit hardest.

Even had nothing else changed in the relationship between federal and local enforcers, the new federal counterterrorism initiatives would have imposed new intelligence gathering responsibilities on the police and arguably have made it harder to maintain order in areas with significant immigrant populations, including most big cities. But the costs effectively imposed on the police by the federal counterterrorism focus went beyond that, because that focus threatened to come at the expense of federal enforcement activity in the violent crime area. Certainly this was true with respect to the FBI, where the number of agents working in the area dropped from 2000 to below 1000 between October 2000 and May 2004. The Bureau significantly reduced its narcotics activity as well. Because ATF increased its violent crime activity during this period, the overall number of violent crime referrals in the federal system actually increased by 29% between fiscal 2001 and fiscal 2003. But it is not yet clear whether the DEA will take up the FBI's burden in the narcotics area. And local officials might well see the Bureau's assertion of the primacy of terrorism prevention as a harbinger of future shifts by all federal agencies away from the areas in which federal activity had eased their load. (GAO, 2004; Office of the Inspector General, 2004, 17).

Note that the point here is not that the shift in federal resources was a mistake. Indeed, one of the greatest benefits flowing from the federal enforcement bureaucracy's relative lack of political accountability is its flexibility in responding to changing circumstances. However, the duration and apparent stability of federal agencies' commitment to street crime enforcement during the 1980s and 1990s set a new baseline for local expectations of federal enforcement assistance. And, since September 11, these expectations have not been met.

Fiscal expectations were dashed as well. During a period in which the economic downturn and the political popularity of tax cuts placed new budget pressure on state and local governments (Multistate Tax Commission, 2003 ; Mattoon, 2004), local and state governments also found themselves facing massive homeland security expenditures. And, particularly in the most populous states, the federal reimbursement formula established by Congress, and reinforced by the new Department of Homeland Security, left these governments bearing the most of these costs. (House Select Committee on Homeland Security, 2004; Logan 2004).

Recapitulating the old debates about how federal crime money was to be distributed, local authorities also complained about the decision to distribute homeland security funds through the states, rather than to them directly. One police chief complained in a Spring 2003 congressional hearing that homeland security

resources do not go directly to local police departments. They cannot be used to hire new police. They cannot be used to pay overtime expenses that we incur each and every time Secretary Ridge changes the alert level. They can be used to purchase equipment, but not by me. I have to wait for a statewide plan to be developed and then I have to hope that a fair share of those funds will filter to my department.

(Senate Governmental Affairs Committee, 2003; U.S. Conference of Mayors, 2002).

The response of state governments to the calls of local units for direct federal funding also echoed the state responses in the days of the LEAA. Speaking for the National Governors Association at a Spring 2003 congressional hearing, Massachusetts governor Mitt Romney testified: “[W]e believe it critical that homeland security funding and resources be applied against comprehensive and integrated statewide plans.” “Without statewide coordination, there is no check on gaps in coverage, incompatible equipment and communications systems, and wasteful duplication.” (Senate Governmental Affairs 2003a). As before, they may have been a degree of self interest behind these state arguments. But they had considerably more power in the homeland security context, given the geographic scale of the catastrophic attacks that were envisioned. (Kettl 2003; Wise & Nader, 2002, 49).

Because they see cities as bearing the brunt (in both fiscal and political costs) of any nationwide intelligence gathering and security patrolling effort, local officials, particularly from bigger cities, would likely have complained about the very nature of Bush Administration’s embrace of the statewide funding model for homeland security. Their sense of grievance has been intensified, however, by their perception that it is “their” violent crime money that is now going to the states.

The fungibility of money makes the link impossible to prove. And, in the Bush Administration’s defense, it should be noted that the COPS program has long been a Republican target. Yet urban officials have made much of the coincidence that the COPS program is being phased out, and other crime control grants reduced, just as homeland security funding plans are being made. And they have noted the significant reductions in grants under the Local Law Enforcement Block Grant programs, which went from a total of around \$400 million in 2001 to \$115 million in 2004. (BJS 2004, 1). These are the grants that go directly to local government units, and local officials took it hard. One police chief recently testified: “[T]here is a concern in the law enforcement community, that new assistance programs are being funded at the expense of traditional law enforcement assistance programs such as the COPS program, the Local Law Enforcement Block Grant Program and the Byrne Grant program.” (Senate Governmental Affairs. 2003a). As a report by the U.S. Conference of Mayors noted in 2002: “The administration is proposing to cut funding for existing law enforcement programs such as the COPS program (80 percent cut) and the Local Law Enforcement Block Grant (merged and cut 20 percent). If approved by Congress, these cuts would result in a major reduction in the ability of mayors and the police to prevent and respond to both traditional street crime and the new threat of terrorism.” (U.S. Conference of Mayors. 2002).

The fiscal picture remains in flux. In November 2004, Congress passed an appropriations bill for fiscal 2005 that cut the three main law enforcement assistance programs by 24.4%. The IACP reported that “the funding levels for these programs have declined by almost \$1.24 billion,” since 2002, representing “a cut of 50%.” (IACP 2004). Congress also eliminated funding for local gun prosecution programs under Project Safe Neighborhoods. (Lichtblau, 2004; Heinzmann & Bush, 2004). In December 2004, Department of Homeland Security announced that a larger share of its funding would go to big cities. (Lipton, 2004). But in March 2005, the mayors of Chicago, Los Angeles and New York complained about the inadequacy of funding to their cities, and about the inflexibility of rules that prevented the use of such funding to pay police salaries. (Hu, 2005).

Longer Term Effects

It is hard (although not impossible) to imagine that the federal government’s new counterterrorist focus will completely displace its decades-old commitment to assisting state and local governments in controlling violent crime. An insightful report completed in 2000 for the National Institute of Justice predicted that, although the level of federal activity in the violent crime area would remain high, the reasons for that level might change:

Rather than reflecting the original, predominantly Washington-directed impetus for Federal involvement in urban crime, expanded collaborative activities in the coming decade may demonstrate the influence and support of local politicians and law enforcement authorities who – at least in many areas of the country – have grown accustomed to relying on Federal collaboration as a way of demonstrating heightened commitment to the fight against crime and supplementing what are often scarce local resources in that fight. (Russell-Einhorn, 2000, 125).

These local political influences may lie behind the readiness of the federal government even after September 11 to make conspicuous commitments of resources to the War on Crime. Even with the national crime rate down – steadily during 2001-2004 (FBI 2004a; FBI 2004b) – and the shift of FBI agents from violent crime to counterterrorism, the Bush Administration still found it necessary in June 2004, to announce the “Violent Crime Reduction Initiative.” (Dep’t of Justice, 2004; Silver, 2004).

The announcement of this initiative, however, came with a new degree of clarity as to its duration and the means by which its success would be measured: The explicit program goals are to decrease, within six months, the number of homicides and violent crimes. Without reading too much into these programmatic features, one can still see in them a recognition that the open-handed days of federal enforcement assistance in this area are over. (Richman & Stuntz 2005, ___).

In December 2003, Massachusetts Public Safety Secretary Edward Flynn called terrorism “the monster that ate criminal justice.” (Law Enf. News 2003). Perhaps this is a bit of an

overstatement. But it is certainly clear that for the foreseeable future, violent crime will not define the relationship between the federal government and state and local governments with respect to criminal justice. Even as the feds assume responsibility for terrorism prevention, however, violent crime remains an infeasible local obligation – one that no longer draws feds and locals together and indeed threatens to put them at odds.

It is possible that the developing clash of interests between federal and local enforcers will create a zero sum game in which any improvements in the emerging domestic intelligence network will come at the expense of local efforts against violent crime. Although overriding national security concerns might be offered to justify the wholesale enlistment of local police forces into a federally directed counterterrorist bureaucracy, the constitutional prohibition against federal “commendeering” would likely prevent the feds from simply ordering the police to cooperate. (*Printz v. United States*, 521 U.S. 898 [1997]; *New York v. United States*, 505 U.S. 144 [1992]; Hills, 1999). Still, some combination of political pressure and federal conditional funding could push the police in that direction, requiring them to draw down on the community relations capital that they have spent the last decade or more building up.

One could also imagine a scenario in which the police pulled back from cooperating with the federal authorities, and the feds tried to develop their own domestic intelligence network that avoided relying too heavily on non-federal personnel. The sheer economics of this endeavor would be prohibitive. Moreover any such effort would be hamstrung by the comparative distance of federal agencies from the lives of people in densely populated urban communities. One has only to think about the TIPS (Terrorist Information and Prevention System) debacle to recognize how fraught broad-based federal information-gathering initiatives can be. First mentioned by President Bush in his 2002 State of Union address, the program was pitched by the Justice Department as a way to enlist the observatory powers of service providers around the nation in the War on Terror. Before long, under pressure from Congress and others, the program was reconfigured to “involve only truck workers, dock workers, bus drivers and others who are in positions to monitor places and events that are obviously public.” (Eggen, 2002a). Even this tactical retreat was not enough, and the initiative was soon legislated out of existence. (Eggen, 2002b).

Those who prefer looking further back for troubling precedents can recall the American Protective League, with which the Bureau of Investigation (the FBI’s predecessor agency) developed an auxiliary relationship during World War I. The League’s “freewheeling” operations against alleged “slackers,” “spies” and “saboteurs” remain an embarrassment to any who believes in civil liberties, competent domestic security programs, or some combination thereof. (Powers, 2004, 87-100). Mid-way between the APL and TIPS came COINTELPRO and other programs in the 1960s. The fact is that domestic intelligence operations historically (and perhaps inherently) pose peculiar risks to democratic society. Domestic intelligence operations have even fewer outcome measures than federal law enforcement, have extremely low visibility because of security sensitivities, and often involve political or potentially potential judgments. The more committed an agency is to these operations, the greater its need for political cover from

the White House, which has too often been tempted to extract intelligence targeting power in return, and to use that power for inappropriate political ends.

These pessimistic scenarios are not the only possible ones, however. A far more optimistic scenario would recognize that improved counterterrorism efforts need not come at the expense of violent crime enforcement at the local level. And it would have the federal government court the assistance of state and local governments by giving them a greater voice in how the federal government interacts with citizens, and particularly with immigrant communities.

The ability of the local police to mediate between federal needs and community sensitivities was highlighted when the Justice Department's call for interview of certain Middle Eastern immigrants went out in the wake of 9/11. As the police chief of Ann Arbor, Michigan later recounted, local leaders of the Arab American community asked that an officer from his force be present during these interviews. (George, 2001). Later, in March 2003, the director of the American Arab Chamber of Commerce in Dearborn noted how the local Police Department had worked to win the Arab community's trust and how the FBI and other federal law enforcement agencies had not done enough. He also noted that after the war with Iraq had broken out, the Wayne County sheriff had dispatched his forces to guard mosques. (Gorman, 2003).

In our optimistic story, state and local agencies—and particularly local police departments—will exact a toll from federal authorities, as the price of gathering and supplying information. Because of current fiscal constraints, the federal government will not pay in cash, but by giving local police a larger voice in federal domestic intelligence policy. And that voice will transform the new national network, giving it a far greater measure of accountability to the citizenry than would otherwise be possible.

The touted benefits of federalism often just reflect the virtues of managerial decentralization, and not necessarily of a genuinely federalist and “polycentric” system in which “leaders of the subordinate units draw their power from sources independent of [the] central authority.” (Rubin & Feeley, 1994. 911). This is partly true here. Even officials in a hypothetical “National Police Force” that had prime responsibility for pursuing all violent and street crime would think twice about using tactics that risked alienating chunks of the population in their respective patrol sectors (at least to the extent they cared about enforcing the law in all neighborhoods). These are crimes that can be and are measured, with police performance judged accordingly. The contribution that local police forces can make to domestic intelligence policy-making and collection are thus related to the nature of their “beat.”

But the political contribution that police involvement can make to federal counterterrorism efforts stems not just from their “informational accountability”—the obligation to deal with any community from which they will need crime tips. It also reflects their greater electoral accountability. Police chiefs themselves are not generally elected, but the mayors and county executives to whom they report are, as are the chief prosecutors with whom they deal.

And scrutiny of police performance by the local electorate, although hardly constant, regularly occurs. Decades of political focus on violent crime, coupled with increasing sophistication in the way crime-fighting is assessed have put police departments under an unprecedented degree of pressure to actually achieve results. And, although the precise contours of each department's approach will vary, each has made vast strides, with considerable federal encouragement in the 1990s, toward recognizing the essential connection between community relations and effective law enforcement. (Scott, 2000; Hickman & Reaves, 2001; Kelling, 1988).

To be sure, a lot of the revolution in policing has been rhetorical, and in some departments, "community" or "problem-solving" policing has been more a grants-writing strategy than an operational reality. Still, deployment patterns really have changed, and police commanders now look to community leaders not simply for tips on whom to arrest but increasingly for guidance on how the police can best improve the quality of life within a precinct. Approaches can vary, with departments that have adopted a "community policing" style more ready to share decision-making authority with the community than those that, wary of committing themselves to ambitious social objectives, would restrict themselves to "problem solving." But either way, the last two decades have seen enormous and accelerating changes in the readiness of urban police forces to solicit and address the concerns of the people they serve. [endnote: And solicitude for the concerns of ethnic or racial minority groups – which are often majorities within a city or precinct – has increasingly become a non-negotiable part of a police chief's job description.

To some, the notion of police departments as bulwarks of civil liberties against federal encroachment might sound a bit odd. We are accustomed to the idea that the federal government is responsible for monitoring local abuses -- stepping in with civil suits or civil rights prosecutions whenever the locals are derelict in their attention to such matters -- not local monitoring of the feds. (Livingston, 1999). The rejoinder, of course, is that while we all have our idiosyncratic estimations of the skills and predilections of each enforcement level, no level has a monopoly of virtue. The obligation of local police departments to combat violent crime and maintain order can push them towards aggressive and even abusive control tactics. Yet that same obligation causes police departments to be especially attentive to the costs imposed by abusive interactions with the local community.

There have been sign of friction – particularly in the immigration area – as intergovernmental relationships that used to be based on violent crime are pushed to accommodate the threat of terrorism. As a recent white paper by Police Executive Research Forum noted, there is considerable room for cooperation between the local police and the Bureau of Immigration and Customs Enforcement. (Davis & Murphy, 2004, 18). The dimensions of this interaction, however, need to be a matter of negotiation, not federal fiat. Broadly tasking the police with immigration work – as envisioned by the Bush Administration and pending legislative proposals – would in all likelihood result in a net intelligence loss, because in the neighborhoods that could be the richest source of terrorist tips, it changes the beat cop from peacekeeper to a potential source of personal ruin. And incidents like federal raids that led to the

deportation of someone "who was helping local police identify crime suspects and was influential in building better community relations with law enforcement" (id. 40) will presumably decrease over time. Indeed, even FBI officials have noted their concern "that overly zealous immigration and customs enforcement will undercut its collection operations." (Nat'l Academy of Public Administration, 2005, 37).

There also have been signs of real progress, such as the National Criminal Intelligence Sharing Plan. This initiative was spearheaded by the International Association of Chiefs of Police, as a response to the September 11 attacks. Yet its orientation was not limited to counterterrorism. Instead, the "vision" was one in which "state and local agencies are not merely adjuncts to a national strategy for improving intelligence communication, but founding partners of and driving participants in any organization that helps coordinate the collection, analysis, dissemination and use of criminal intelligence data in the U.S." (Criminal Intelligence Sharing. 2002, 2). Thereafter, planners sought to create "a nationally coordinated criminal intelligence council that would develop and oversee a national intelligence plan." (National Criminal Intelligence Sharing Plan, 2003, iii). While it is far too early to assess this program, the Plan appears to promise a new era of collaboration among federal, state, and local agencies, and an infrastructure within which the diverse political and operational concerns of local departments can be raised and addressed. Building on existing federally sponsored intelligence sharing systems – the FBI's Law Enforcement Online and the Regional Information Sharing Systems – this plan marks a far more ambitious effort to draw agencies from all levels into a national intelligence network. (National Criminal Intelligence Sharing Plan. 2004). It would be churlish to suggest that the police have extracted aid in their immediate criminal enforcement responsibilities as the price of their counterterrorism efforts. After all, no responsible police official wants to be on the sidelines of the War on Terror. Yet it is also difficult to avoid seeing in this plan an effort by police officials to strategically pivot off the federal interest in counterterrorism to address their own local criminal enforcement responsibilities. The inspiration for the Intelligence Sharing Plan is quite recent, and the technology that will support it, quite advanced. But the idea marks a return to the federal role in criminal enforcement that a hopeful observer might have envisioned in the early 1930s: as the sponsor, but not the controller, of a platform for broad interjurisdictional cooperation in the service of each participant's respective enforcement priorities.

There will be many kinks to work out as the federal interest in a secure intelligence network is squared with demands for accountability at the local level. One such conflict emerged in 2002-03 in Boise, Idaho. There, the community ombudsman invoked his power, under a city ordinance allowing him access to all police files, to look at files created by a new police intelligence unit. This oversight effort, however, ran afoul of federal intelligence-sharing guidelines that barred access to non-law enforcement officers. Backed by Idaho's congressional delegation and the local U.S. attorney, the city unsuccessfully sought a waiver from the Justice Department. The city council was thus left with the choice of either demanding civilian access and precluding membership in the federal intelligence network, or giving up its chosen mechanism for promoting civilian oversight. (Orr, 2003; Orr 2002). Another conflict is playing

out in Portland, Oregon, where the Mayor – a former police chief – has threatened to pull the police out of the joint terrorism task force unless federal officials give city leaders greater oversight powers. (Griffin, 2005). How these sorts of issues will be resolved around the country remains to be seen. But we should expect intergovernmental negotiations to proceed fruitfully, as the gains to localities of membership in the national network are balanced by the federal interest in nation-wide domestic intelligence capability, and as local governments use their congressional representatives to exert influence over the feds under the now-sacred banner of “information sharing.” (GAO, 2003b).

Even were localities generally eager to participate in a national intelligence network, there would still need to be coordination at the sub-national level. One emerging trend is the readiness of state governments to rise to this challenge, and to take on operational responsibilities that they never assumed when violent crime alone lay at the heart of federal-local interaction. (NGA Center 2005; Farber, 2004; Wickham, 2004). A cynic might say that the states are just trying to justify the healthy cut of federal homeland security money that they are receiving. Yet a realist (or part-time optimist) might note that if the choice for sub-national coordinator lies between regional centers run by the Department of Homeland Security and fusion centers managed by state governments, the latter are more attractive. State views will not fully represent those of their urban instrumentalities, as their needs and burdens can be quite different. The recent tension over immigration law enforcement makes that clear enough. Nonetheless, states – which in any event are politically and constitutionally indispensable – may end up providing ready-made politically accountable platforms to support the new architecture, in a way that a new federal construct could not.

Conclusion

Perhaps the coming years will see the threat of terrorism recede, and violent crime (regardless of the rate at which it actually occurs) reclaim its place at the heart of intergovernmental relationships in the law enforcement area. Perhaps in the wake of future terrorist attacks, the War on Terror will so dominate all government business that officials at all levels will put aside all other concerns. If we continue on our present trajectory, however, the developing equilibrium will fall far short of either extreme. Spearheaded by the federal government, terrorism prevention efforts will continue, and will become more institutionalized. Yet the institutions that develop will have to be largely crafted from a system of federal, state, and local agencies that over the past few decades made violent crime (and drugs) the primary focus of their interactions. How this institutional development will proceed, and to what effect remain uncertain. There is no blinking the inherent tension between counterterrorism and street crime enforcement strategies. But with thoughtful consideration of the demands of each priority, this tension need not be destructive and can in fact lead to a national enforcement and intelligence network that is true to the political values of the nation it protects.

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