

FEDERALISM

OUR FEDERAL SYSTEM OF SENTENCING

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INTRODUCTION

The federal system of the United States is based on the bedrock premise that the states bear the primary responsibility for criminal justice policy. States are better able to ensure that local communities can define crimes and set sentences according to the preferences of their residents. Indeed, it has long been recognized that criminal justice is at the core of state, not national, responsibility.

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In recent decades, however, the importance of federalism has often been overshadowed by shortsighted political concerns. In particular, there has been an unprecedented expansion of federal criminal law into areas traditionally left to the states. The federal government has intervened in many local crimes—from carjacking to crimes committed with a firearm or involving drugs¹—without any showing that federal intervention is necessary or appropriate. While there are important areas that require federal intervention, many federal crimes of the past few decades fall outside this category.

Congress has responded to high-profile local crimes not only with new federal laws, but also with longer sentences for existing laws. Over the past three decades, federal sentences have grown dramatically. Congress has ignored the recommendations of the United States Sentencing Commission to cease using mandatory minimum sentences, despite widespread evidence by the Commission and other experts that such minimums result in disparate sentences for similarly situated offenders and do not yield greater deterrence. And Congress has continued to increase the maximum penalty for crimes without any evidence that these increases are the most effective way to combat crime.

This pattern of federal expansion has placed a drain on federal resources, including federal prosecutors, judges, and prisons. In 1980, just over 26,000 cases were filed by U.S. Attorneys. In 2001, that number climbed to well over 53,000 cases.² A huge part of that increase can be attributed to the explosion in drug cases, which increased from 7119 cases in 1980 to 30,775 in 2002.³ This in turn led to an increase in the prison population. Between 1980 and 1996, the federal prison population increased 333%—a larger increase than state prisons experienced over that same time period.⁴ Recent statistics show that the federal government has continued to outpace the states,⁵ with the federal government now housing more prisoners than any single state.⁶

This Article highlights why these trends are problematic and why it is important for Congress to pay close attention to federalism values when

1. Indeed, federal drug enforcement is the primary cause of the growth in federal criminal law enforcement. Federal officials have even used the Controlled Substances Act to interfere in wholly intrastate activity. *See Gonzales v. Raich*, 125 S. Ct. 2195 (2005).

2. BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 2003, at 403 tbl.5.6 (2003), <http://www.albany.edu/sourcebook/pdf/t56.pdf> (last visited Sept. 21, 2005).

3. BUREAU OF JUSTICE STATISTICS, KEY CRIME & JUSTICE FACTS AT A GLANCE (2005), <http://www.ojp.usdoj.gov/bjs/glance/tables/fedtyptab.htm> (last visited Sept. 21, 2005).

4. ALFRED BLUMSTEIN & ALLEN J. BECK, 26 CRIME & JUST. 17, 44 (1999).

5. PAIGE M. HARRISON & ALLEN J. BECK, BUREAU OF JUSTICE STATISTICS, PRISON AND JAIL INMATES AT MIDYEAR 2004, at 2 (2005), <http://www.ojp.usdoj.gov/bjs/pub/pdf/pjim04.pdf> (last visited Sept. 21, 2005) (during the period from 1995 to midyear 2004, the federal prison population grew at a rate of 7.8%, compared to 2.7% for the states); *see also id.* at 1 (“During the 12-month period ending June 30, 2004, the number [of prisoners] under State jurisdiction rose 1.6%, while the number under Federal jurisdiction rose 5.1%.”).

6. *Id.* at 1.

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considering sentencing policy. Congress must stay within its appropriate sphere not only because it is constitutionally mandated to do so, but also because it is wise policy. Moreover, even when federal jurisdiction is appropriate, it is important for Congress to remember that the states have much to teach the federal government about sentencing policy. The states have produced a bevy of sound sentencing innovations that the federal government would be well served in adopting.

This Article will proceed in three parts. Part I begins by discussing the appropriately limited nature of federal criminal jurisdiction. The arguments for limited federal jurisdiction over crimes are as strong today as they were at the framing. Part II explains that limited federal jurisdiction over crimes is particularly important because of shortcomings in the politics of sentencing at the federal level as compared to the politics of sentencing at the state level and because of the greater ability of the states to respond to the diverse preferences of local communities. Part III takes on the question of how the federal government should proceed in those limited areas where it properly exercises jurisdiction over criminal law. This Part argues that, even when the federal government intercedes, it remains critically important for the federal government to take cues from the states. That is because the states have served precisely as Justice Brandeis described them: as laboratories of experimentation.⁷ They have much to teach the federal government about effective and efficient sentencing policy.

I. WHY FEDERAL JURISDICTION OVER CRIME IS LIMITED

When it comes to criminal law enforcement, as the Supreme Court has recognized, “[s]tates historically have been sovereign.”⁸ This Part discusses the reasons for the states’ primary responsibility for crime control. Part I.A begins with the Constitution and its federalism requirements. Part I.B then discusses the functional arguments for keeping most matters of crime control with the states.

A. *The Constitution and Federalism*

The Framers vested the federal government with few explicit criminal enforcement powers.⁹ Congress therefore promulgates most federal crimes under its Commerce Clause powers.¹⁰ In 1995, the Supreme Court made clear

7. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

8. *United States v. Lopez*, 514 U.S. 549, 564 (1995).

9. *See, e.g.*, U.S. CONST. art. I, § 8, cl. 6 (authorizing congressional punishment of counterfeiting); *id.* art. I, § 8, cl. 10 (listing piracy, felonies committed on the high seas, counterfeiting, and offenses against the law of nations as among those that can be punished by Congress).

10. Section 5 of the Fourteenth Amendment is an additional source of congressional

in *United States v. Lopez*¹¹ that this authority is limited and does not allow Congress to take an expansive view of federal criminal law enforcement. The Supreme Court held in *Lopez* that Congress had exceeded its powers in enacting the Gun-Free School Zones Act of 1990, which made it a federal crime to possess a firearm within 1000 feet of a school. Although the decision was a marked shift from the lax enforcement of the Commerce Clause that prevailed in the almost six decades of Supreme Court jurisprudence prior to *Lopez*, the decision was grounded in “first principles” of constitutional law: that the “the powers delegated . . . to the federal government are few and defined” whereas those vested in the states “are numerous and indefinite.”¹²

Whatever the scope of the Commerce Clause in other substantive areas, it is particularly important to adhere to a strict dichotomy between federal and state authority when it comes to criminal law enforcement. Indeed, this was a critical part of the Court’s decision in *Lopez*. The Court emphasized that “[w]hen Congress criminalizes conduct already denounced as criminal by the States, it affects a ‘change in the sensitive relation between federal and state criminal jurisdiction.’”¹³ As the Court made clear, “[u]nder our federal system, the ‘States possess primary authority for defining and enforcing the criminal law.’”¹⁴

All too often, however, Congress has overlooked the primacy of the states’ authority to enforce criminal laws. Congress frequently passes federal criminal laws that overlap with state criminal laws without any showing that the state laws are deficient. Congress gets around the technical limits of the Constitution observed by the Supreme Court by including a jurisdictional provision in these federal criminal laws that requires a nexus to interstate commerce in each individual case. But the nexus requirement is added to bootstrap jurisdiction; it does not show that federal involvement is necessary. For example, there have been numerous proposals in Congress to federalize state crimes that are committed with a firearm that has traveled in interstate commerce.¹⁵ Yet there is no evidence that the states are not adequately handling firearms offenses, just as there was no evidence that the Gun-Free School Zones Act filled a gap otherwise left by state law. The federal carjacking law provides another illustration. Although the federal carjacking statute requires that there be a constitutionally adequate nexus with interstate commerce,¹⁶ the statute was in

authority to make criminal law, but that authority is limited to remedying violations of the Fourteenth Amendment. *See id.* amend. XIV, § 5.

11. 514 U.S. 549 (1995).

12. *Id.* at 552.

13. *Id.* at 561 n.3 (quoting *United States v. Enmons*, 410 U.S. 396, 411-12 (1973)).

14. *Id.* (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 635 (1993)).

15. Gregory W. O’Reilly & Robert Drizin, *United States v. Lopez: Reinvigorating the Federal Balance by Maintaining the States’ Role as the “Immediate and Visible Guardians” of Security*, 22 J. LEGIS. 1, 7 (1996). Congress already criminalizes violent felonies and drug crimes committed with a firearm. *See* 18 U.S.C. § 924(c) (2005).

16. 18 U.S.C. § 2119 (2005) (requiring that vehicle be “transported, shipped or

fact passed “to deal with carjacking as a crime of violence,” not because the crime had a large effect on the interstate economy.¹⁷

The constitutional balance should not rest on technicalities such as the inclusion of a jurisdictional nexus element. Limited federal jurisdiction under the Constitution is based on the rationale that divided powers protect liberty and that states should bear responsibility for crime because the effects of crime are, in most cases, localized and have no repercussions outside a community, let alone outside a state.¹⁸ A mere nexus to interstate commerce falls short of the kinds of crimes that require federal intervention. To be consistent with the constitutional allocation of power, federal criminal law should duplicate state criminal law only when state enforcement of criminal law is inadequate.

B. *The Functional Case for Federalism*

Preserving the primary role for states is not merely an antiquated rule dictated by the Constitution. There remain powerful reasons for vesting most crime-control responsibility with the states.

First and foremost, state authority to define and prosecute crimes respects the heterogeneity of the American population and increases social utility by responding to local preferences.¹⁹ Indeed, this flexibility is the great advantage of our federalism. It allows people to settle in communities with people of like-minded values and tastes, and state laws better reflect that variation than national laws.

Second, an expansion of federal criminal jurisdiction places a drain on the federal courts. Chief Justice William Rehnquist (in his annual reports on the state of the federal judiciary), the Federal Courts Study Committee, the Judicial Conference, and numerous scholars have repeatedly decried the expansion of federal criminal law because of the heavy toll it exacts on the functioning of the federal courts.²⁰ The federal system should bear this burden only when the benefits of federal intervention outweigh the costs. That is, the federal courts should be used for those matters that the federal government is uniquely qualified to handle and not for issues that the states address equally well.

Third, a clear separation between federal and state authority is valuable because it ensures more uniformity in sentencing. Federal crimes often overlap

received in interstate or foreign commerce”).

17. *United States v. Bishop*, 66 F.3d 569, 600 (3d Cir. 1995) (Becker, J., dissenting).

18. Thomas M. Mengler, *The Sad Refrain of Tough on Crime: Some Thoughts on Saving the Federal Judiciary from the Federalization of State Crime*, 43 U. KAN. L. REV. 503, 516 (1995) (noting that “the local community feels the brunt of the offense”).

19. See Michael W. McConnell, *Federalism: Evaluating the Founders’ Design*, 54 U. CHI. L. REV. 1484, 1493-94 (1987). This is particularly true because state and local prosecutors are elected.

20. Kathleen F. Brickey, *Crime Control and the Commerce Clause: Life After Lopez*, 46 CASE W. RES. L. REV. 801, 840 (1996).

with state crimes. Thus, in many instances, increased federalization subjects similarly situated defendants to disparate treatment because they may receive different sentences for the same crimes based on whether they are prosecuted in state or federal court.²¹

Finally, federalism allows states to serve as laboratories of experimentation. When states bear the primary responsibility for crime, they have incentives to come up with the best solutions.²² If they share jurisdiction with the federal government, they may hope to free ride off federal initiatives, dampening states' incentives to develop their own innovations.

Because of the many advantages of the states' control over crime, the federal role in criminal law enforcement should be limited to those areas in which it has a decided advantage over the states, such as when crimes are truly national in scope or when state regulation would impose externalities on other states.

II. FEDERALISM AND SENTENCING

Part I explained that there are many reasons for limiting federal jurisdiction over criminal law enforcement to those areas in which the states are deficient. This Part expands on the federalism argument by focusing specifically on federal and state differences in setting sentencing policy.²³ The experience of the states and the federal government over the past three decades reveals that the states have additional advantages when it comes to setting sentencing policy.

A. *The Federal Approach to Sentencing*

To understand the potential shortcomings in the federal process, it is first necessary to consider the political dynamics of setting sentencing policy.²⁴

1. *Inattention to costs*

It is now common knowledge that there is substantial political mileage to

21. Gerald G. Ashdown, *Federalism, Federalization, and the Politics of Crime*, 98 W. VA. L. REV. 789, 811 (1996); Stephen D. Clymer, *Unequal Justice: Federalization of Criminal Law*, 70 S. CAL. L. REV. 643, 674-75 (1997).

22. As Kevin Reitz has observed, "most of the important penological reform movements in the nation's history have unfolded at the state and local levels." Kevin R. Reitz, *The Federal Role in Sentencing Law and Policy*, 543 ANNALS AM. ACAD. POL. & SOC. SCI. 116, 128 (1996).

23. For an expanded discussion of these differences, see Rachel E. Barkow, *Federalism and the Politics of Sentencing*, 105 COLUM. L. REV. 1276 (2005).

24. For a more detailed evaluation of the politics of sentencing, see Rachel E. Barkow, *Administering Crime*, 52 UCLA L. REV. 715, 723-30 (2005).

be had by appearing to be “tough” on crime. At the federal level, the typical response to this dynamic is to create new federal crimes and to lengthen terms of incarceration.

Several dynamics push in this direction. First, voters want their elected officials to keep crime rates down. While there are many options for dealing with crime, elected officials may have a disproportionate incentive to pursue solutions that have an immediate impact, or at least appear to have an immediate impact, because they want a strong record on crime when they run for reelection. Longer sentences therefore present an attractive option for politicians because they take effect immediately. Moreover, powerful groups push for longer sentences because it is in their interests to do so. Prosecutors, for example, benefit from longer sentences and mandatory minimums because it makes their jobs easier. Defendants are more likely to cooperate and to plea bargain when they face these harsher penalties.²⁵ Corrections officer unions, private prison companies, and rural communities often lobby for longer terms because they stand to benefit from the construction of additional prisons. Victims organizations also advocate for longer sentences. These groups, therefore, produce an abundance of information on the benefits of longer prison terms.

What this political process tends not to generate, however, is similar data about the costs of these longer terms. While imprisonment does reduce crime—at the very least, it prevents individuals from committing crimes in the community while they are incapacitated—imprisonment is far from costless. For starters, it is expensive to house prisoners. As inmates grow older, the costs increase because of their greater health care needs. Moreover, when inmates are released—as the overwhelming majority of them are—they may pose a greater threat to their communities upon reentry, particularly if they failed to receive rehabilitative or vocational training during their terms of confinement. Former inmates have trouble gaining employment and reintegrating into a social structure. And, as the numbers of released prisoners in a community increase, the deterrent and cultural significance of going to prison dissipates because it becomes normalized. Thus, more individuals from the community may commit crimes, creating a devastating criminogenic cycle.²⁶ These communities, therefore, suffer tremendous economic and social costs.

Added to these costs are the racial disparities in incarceration rates.

25. See *Defending America's Most Vulnerable: Safe Access to Drug Treatment and Child Protection Act of 2005: Hearing on H.R. 1528 Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 109th Cong. (2005) (statement of Jodi L. Avergun, Chief of Staff, Drug Enforcement Administration), <http://judiciary.house.gov/HearingTestimony.aspx?ID=266> (last visited Sept. 21, 2005) (noting that “mandatory minimum sentences provide an indispensable tool for prosecutors, because they provide the strongest incentive to defendants to cooperate against the others who were involved in their criminal activity”).

26. See Jeffrey Fagan et al., *Reciprocal Effects of Crime and Incarceration in New York City Neighborhoods*, 30 *FORDHAM URB. L.J.* 1551 (2003).

Approximately one-third of all African-American men between the ages of twenty and twenty-nine are under some form of criminal justice supervision, be it prison, jail, probation, or parole.²⁷ It is difficult to imagine how any community can withstand numbers like these without significant costs to the social order.

These costs are often overlooked at the federal level because few voices raise these concerns. Current and former inmates are politically weak groups, and their families lack the organization to garner much attention. The civil liberties groups that focus on sentencing likewise hold little sway. They simply lack the political clout of the many voices pushing for longer terms. As a result, the policy debates on criminal justice matters tend to be one sided.

In addition, there are few fiscal conservatives who focus on incarceration expenditures. Spending on corrections is not a salient target for a budget cut, both because it is a small part of the federal budget²⁸ and because it is a politically popular expenditure. In addition, the federal budget process is not generally viewed in zero-sum terms—particularly when it is possible to carry a deficit instead.²⁹

Because of a political structure that tends to focus on the benefits of longer sentences without considering the costs of those sentences or alternative approaches toward dealing with crime, there is reason to be concerned that federal sentences are sometimes set at inappropriately high levels and that effective alternatives are being overlooked. We do not know, however, because these concerns are rarely addressed at the federal level.

2. *The limits of limited jurisdiction*

The federal system has another institutional characteristic that tends to hinder its ability to make fully informed decisions about sentencing: its limited jurisdiction. This characteristic impedes its decisionmaking in two respects.

First, limited jurisdiction over crimes means that the federal government sets sentences for federal crimes without comparing those crimes to the full array of criminal conduct. Instead, federal crimes are compared only against each other. This lack of information may cause federal policymakers to set sentences at inappropriate levels. For example, while drug crimes may seem serious when compared to securities fraud or mail fraud, the federal government typically does not consider how drug offenses stack up against

27. MARC MAUER, *THE CRISIS OF THE YOUNG AFRICAN AMERICAN MALE AND THE CRIMINAL JUSTICE SYSTEM* 3 (1999), <http://www.sentencingproject.org/pdfs/5022.pdf> (last visited Sept. 21, 2005).

28. In 2004, federal correctional activities accounted for \$5,509,000,000 in spending, a mere 0.24% of that year's total \$2,292,215,000,000 outlay. OFFICE OF MGMT. & BUDGET, *BUDGET OF THE UNITED STATES GOVERNMENT: HISTORICAL TABLES* tbl.3.2 (2005), <http://www.gpoaccess.gov/usbudget/fy06/sheets/hist03z2.xls> (last visited Sept. 21, 2005).

29. See Barkow, *supra* note 23, at 1302-03.

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core common law crimes such as murder, rape, robbery, and arson. As a result, federal sentences for some crimes might be longer than they would be if the federal government had jurisdiction for the entire range of crimes.

One solution to this problem would be to compare federal crimes and sentences with state crimes and sentences. So, for instance, when setting drug sentences, the federal government could consider how those sentences correspond to the violent offenses regulated by the states. Currently, however, it appears that no effort is being made to treat federal offenses as part of a larger criminal justice framework that includes the states.³⁰

The problem with the current approach is that it lacks systemic coherence and may create perverse incentives. If a drug dealer faces sixty years for a drug crime, he may not be deterred from committing an additional violent crime that carries an equal or lesser punishment, particularly if he believes that the violent crime will help him avoid detection (for example, by killing or threatening a witness). The other downside to this approach is that the law fails to express the appropriate moral condemnation for some crimes. While society may view an armed marijuana dealer as reprehensible, it is unlikely that it finds his conduct more reprehensible than that of a rapist or murderer—yet federal sentences for drug offenders are often more severe than those for people who commit violent crimes.

The federal government's limited jurisdiction has an additional effect on sentencing policy. Because the federal government is not responsible for policing most crimes, it need not maintain a large police force. Its officers are not responsible for patrolling neighborhoods and tracking the most violent offenders. Indeed, the overwhelming majority of arrests are made by local police officers. The federal government therefore relies primarily on local officers to capture violators of federal laws whose offenses overlap with state laws, such as drug and gun crimes.³¹ Because the federal government does not face the same pressures that state governments face for increasing local police forces, federal policymakers are more likely to turn to longer sentences to increase deterrence than to measures, such as more officers, that would increase the odds of detection.

There are two concerns with an approach that relies on longer sentences instead of improved odds of detection for fighting crime. First, studies suggest

30. Indeed, Congress often sets sentences for crimes without considering even how those sentences stack up against other federal crimes. *See, e.g.,* United States v. Angelos, 345 F. Supp. 2d 1227, 1245 tbl.1 (D. Utah 2004) (noting that the Guidelines sentence for an armed drug dealer was at least twice as long as the Guidelines sentence for, among others, a terrorist who detonates a bomb, an aircraft hijacker, a murderer, and a rapist); Albert W. Alschuler, *Disparity: The Normative and Empirical Failure of the Federal Guidelines*, 58 STAN. L. REV. 85, 90-91 & n.17 (2005) (in this Issue) (citing Mark Osler, *Indirect Harms and Proportionality: The Upside-Down World of Federal Sentencing*, 74 MISS. L.J. 1, 1-6 (2004)).

31. This is even more likely in the current climate in which more and more federal resources are being devoted to combating terrorism and gathering intelligence.

that improving the odds of detection is a more effective strategy for fighting crime than raising penalties.³² Thus, Congress might be undervaluing improved detection in its approach to punishment.

The second concern raised by this approach is that defendants charged by federal prosecutors might face vastly longer sentences than defendants who engage in the same conduct but are charged by state officers. This disparity flies in the face of reform efforts of the past few decades to make sentencing policy more uniform. Moreover, in some contexts, such as current federal drug sentences, there are fairness concerns involved when the federal prosecutors seek to impose long sentences on low-level dealers in order to send a message to others.

B. *State Approaches to Sentencing*

The states share with the federal government political pressures to appear “tough on crime” and to adopt longer sentences. But there are some key institutional differences between the states and the federal government that make it more likely that states will consider the costs, as well as the benefits, of their approaches toward sentencing.

First, states are more concerned with their criminal expenditures because such expenditures make up a larger part of the annual budget and because the states do not have the same freedom to carry deficits that the federal government has. As a result, states actively look to cut areas of spending each year to free up revenues for other important social goals, such as education and public health. Criminal justice is a prime target because often a relatively large proportion of a state budget is spent on corrections costs. The nature of the state budget process therefore typically makes it more likely that fiscal conservatives will target corrections and criminal justice spending to ensure that the money is being spent in the most effective manner. Indeed, many states demand resource-impact statements before any sentencing proposal is adopted so that they will know what the proposal will cost in terms of dollars and prison space. This process thus produces information about costs that is often lacking in the federal system—and the information has salutary effects. It means that states are more likely to consider both the costs and benefits of an enforcement policy to make sure they are effectively allocating resources among the various crimes. These cost concerns could also improve the political debate by allowing more interests to be considered, including those of defendants.

Second, unlike the federal government, the states do not have limited jurisdiction. They have jurisdiction over a full panoply of crimes, so when

32. See Sara Sun Beale, *What's Law Got To Do with It? The Political, Social, Psychological and Other Non-Legal Factors Influencing the Development of (Federal) Criminal Law*, 1 BUFF. CRIM. L. REV. 23, 26 (1997) (citing conclusions of a National Academy of Sciences panel and RAND report that increasing detection and prevention is more effective than sentencing increases).

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states set sentences, they can gauge how all of the different crimes stack up against one another. For example, drug crimes are considered not only against white-collar frauds but also against murders, rapes, and other violent crimes. Broader jurisdiction appears to give states an edge over the federal government regardless of whether the goals of punishment are utilitarian or retributive. Utilitarians want to make sure that there are disincentives to committing more serious crimes. If the penalties for a relatively less dangerous crime are as high as they are for the most violent crimes, then there is little disincentive for an offender to stop at the less dangerous crime. This is a danger when the federal government sets penalties, because the federal government does not have jurisdiction over most violent crimes and tends to ignore state penalties. Because the states do control the enforcement and regulation of virtually all crimes, they can ensure that the penalties for the most serious crimes are set at a higher level than nonviolent crimes. Having jurisdiction over all crimes also leads to better decisionmaking if the goal is retribution. Under a just deserts theory of punishment, the goal is to make sure that more blameworthy crimes receive more severe punishments, which states are more likely to do because they are able to consider the entire range of criminal behavior in setting punishments.

Third, because states must enforce and prosecute a broader array of crimes, the states are more likely to internalize all the costs of enforcement. Local governments are responsible for patrolling the streets and addressing violent crimes in the community, so they are less likely than the federal government to cut enforcement spending because such cuts will spark a negative community response. Moreover, states and localities cannot externalize that enforcement responsibility in the same way the federal government can. As a result, there is a greater incentive at the state level to work with local governments to increase law enforcement expenditures to improve deterrence and not simply to rely on lengthening prison terms.

C. Trusting the States

There are lessons to be learned from the differences between the state and federal approaches to sentencing. First, to the extent that states do a better job evaluating the trade-offs of different punishment strategies against each other because of a greater concern with costs, the state approach to sentencing appears likely to be more informed than that of the federal government. Just as cost-benefit analysis improves the decisionmaking in other regulatory areas, so, too, should it improve decisionmaking about sentencing. Consequently, this analysis provides another reason for states to play the primary role in criminal law enforcement. Its advantages extend not only to determinations of substantive liability, but to sentencing as well.

Second, and relatedly, Congress should intervene with the states' decisionmaking process only when it is necessary to achieve a national

objective. Thus, if Congress wants to support state or local crime-control efforts with funding assistance, it should not dictate how that funding should be used because states are better suited to allocate resources efficiently. The Violent Crime Control and Law Enforcement Act of 1994³³ provides an illustration of how federal spending can distort state incentives and undermine state crime-control efforts. The Act provided incentive grants to states that adopted truth-in-sentencing policies that required certain offenders to serve not less than eighty-five percent of their prison sentences. Although this funding source allowed states to continue to set prison sentences, it changed their incentive structures. If residents of a given state preferred sentencing models that set higher initial penalties but allowed earlier release for rehabilitative or prison-management reasons, then the federal legislation distorted the decisionmaking process. The legislation provided additional funds to entice states to adopt Congress's preferred policies; if the value of the additional funds outweighed the costs to the state of ignoring its preferred policy, the state may have adopted the policy to get the money.³⁴ But this incentive scheme undermines all the benefits of state decisionmaking described above. Instead, if Congress wants to provide funding, it should do so in block grants with few or no strings. States are more likely to know how to make the most of the federal money because of their greater attention to the costs and benefits of sentencing policies and their ability to assess what works best in their particular jurisdiction.³⁵

Finally, as the next Part explains, Congress should learn from the best practices of the states when it comes to setting federal sentencing policy.

III. LEARNING FROM STATE SENTENCING LAWS

While this Article has argued that federal jurisdiction over crimes should be limited, there are, of course, many areas where federal jurisdiction over criminal law is appropriate, and, therefore, federal sentencing policy should kick in. But in setting those sentences, the federal government should pay attention to the states and learn from their experiences in setting sentencing

33. Pub. L. No. 103-322, 108 Stat. 1796 (1994) (codified as amended in scattered sections of U.S.C.).

34. Nora V. Demleitner, *The Federalization of Crime and Sentencing*, 2 FED. SENT'G REP. 123, 127 (1998) (noting that fifteen of the twenty-seven states that received the truth-in-sentencing funding at that time noted that receiving the grant money "was a partial or key factor in passing TIS legislation").

35. See Reitz, *supra* note 22, at 122 (observing that federal criminal law is "so different from . . . [that of] the states that it would be a small miracle to find great expertise—or minimal competence—about state sentencing problems in the federal bureaucracy").

Congress should also consider spending more resources on enforcement instead of focusing on length of confinement if it wants to improve detection and deterrence. This could be done by subsidizing state or local police forces or by expanding the federal force.

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policies.³⁶ This Part briefly highlights some of the innovations at the state level that Congress should consider adopting.

A. State Sentencing Commissions and the Importance of Data

Although Congress joined the movement toward sentencing commissions with the Sentencing Reform Act of 1984,³⁷ the U.S. Sentencing Commission is a relatively weak agency. Congress has rejected the Commission's major policy proposals—to eliminate the disparity between crack and powder cocaine and to cease using mandatory minimum sentences—and has often failed to consult the Sentencing Commission about major sentencing initiatives.³⁸ Congress should pay more attention to the Commission and take advantage of its expertise. The Commission, after all, is responsible for considering sentencing policy at a system-wide level, whereas Congress often tackles issues in a piecemeal fashion.

Congress should also consider reforming the U.S. Sentencing Commission and adopting some of the best institutional design features of the state commissions. One characteristic of state commissions worth emulating is their diverse membership. State commissions often have experts in corrections, policing, criminology, and juvenile justice, as well as judges, prosecutors, and defense lawyers, among its members.³⁹ This diversity is a valuable feature, as it allows individuals with different perspectives on the system to voice concerns and learn from one another.⁴⁰ The Federal Commission, in contrast, has been dominated by former prosecutors⁴¹ and has had very few individuals with

36. Of course, not all aspects of the state approach to crime are laudable. Federal corrections facilities and programs are by and large much better than state facilities and programs, and federal investigative methods are often superior as well. The claim here, then, is not that the federal government should emulate all aspects of state sentencing policy. But when it comes to setting sentences—as opposed to conditions of confinement—some states appear to have an edge.

37. Pub. L. No. 98-473, 98 Stat. 1987 (1984) (codified in scattered sections of 18 and 28 U.S.C.).

38. The most glaring example is the enactment of the sentencing provisions in the PROTECT Act. The Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today (PROTECT) Act of 2003, Pub. L. No. 108-21, 117 Stat. 650 (codified as amended in scattered sections of U.S.C.). A recent suggested amendment to the PROTECT Act that would fundamentally alter sentencing policy by eliminating most downward departures was also proposed without the advice of the Commission. H.R. 1528, 109th Cong. (2005).

39. See, e.g., Barkow, *supra* note 24, at 772, 778-79, 783 (describing membership of commissions in Minnesota, Washington, and North Carolina).

40. State commissions also have legislative members, but this particular feature would likely violate the separation of powers if adopted at the federal level. States can do this because their commissions are often placed in the legislative branch instead of the judicial branch.

41. Indeed, although the Sentencing Commission has had many judges as members, those judges have often been former prosecutors. See Barkow, *supra* note 24, at 764, 765

experience in policing, corrections, criminology, or criminal defense.⁴² As a result, the U.S. Sentencing Commission lacks the same range of experience as its state counterparts, and its decisionmaking process is therefore more likely to be captured by the interests of prosecutors.

Another key characteristic of state commissions is their attention to cost considerations and prison capacity. As noted above, the political process on its own tends to do a poor job drawing attention to these facts. Many states have recognized this limitation and have ordered their commissions to pay particular attention to costs. This directive has generally allowed states with commissions to keep their incarceration rates from increasing too rapidly and to ensure that there is available prison space for the most violent offenders.⁴³ It has also enabled states to spend their money on crime in the most effective manner.

Thus, in those instances where federal jurisdiction over crime is appropriate, Congress should take a cue from the states and pay greater attention to the costs of various sentencing proposals to determine the best option for a given crime problem. In some instances, a longer term of incarceration might be the most effective measure, but in other cases, extending a term of confinement will yield diminishing returns, and other options are superior. Because the federal political process currently does a poor job producing and highlighting this information, Congress, with the assistance of the U.S. Sentencing Commission, should require every proposed sentencing bill to include a resource-impact statement that is carefully reviewed before any sentencing changes are adopted. These statements should include the cost of the proposal under consideration and the revenue source for funding the proposal.⁴⁴ They should also contain an explanation of why the proposed sentence is superior to alternatives, including alternatives to incarceration.⁴⁵ In addition, the statement should include an explanation of why the states do not currently address the problem adequately. This additional procedure will allow the federal government to spend its criminal justice resources wisely and not

n.172.

42. *Id.* at 763-65 (describing the composition and selection of Federal Commission members).

43. *See id.* at 804-05.

44. This is the model used in Virginia, and it has been quite effective. *See* VA. CODE ANN. § 30-19.1:4 (2005); Kim Hunt, *Sentencing Commissions as Centers for Policy Analysis and Research: Illustrations from the Budget Process*, 20 LAW & POL'Y 465, 483 (1998) (describing the effects of fiscal-impact statements in Virginia); *see also* DANIEL F. WILHELM & NICHOLAS R. TURNER, VERA INST. OF JUSTICE, IS THE BUDGET CRISIS CHANGING THE WAY WE LOOK AT SENTENCING AND INCARCERATION? 10 (2002), http://www.vera.org/publication_pdf/167_263.pdf (last visited Sept. 21, 2005).

45. *Cf.* Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Oct. 4, 1993) (directing agencies to consider alternatives to direct regulation and to seek views of state and local officials); Exec. Order No. 12,291, 46 Fed. Reg. 13,193 (Feb. 19, 1981) (requiring executive agencies proposing regulations to consider "alternative approaches that could substantially achieve the same regulatory goal at a lower cost" and to explain why "such alternatives, if proposed, could not be adopted").

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react impulsively and ineffectively to a single high-profile event.⁴⁶

B. State Sentencing Guidelines

Like the federal government, many states have turned to sentencing guidelines. But there are crucial differences between the states' approaches and the federal approach. First and foremost, the states have not attempted to micromanage judges to the same extent. Thus, state guidelines are not as complex or as detailed as the Federal Guidelines and are much easier to use.

Second, and relatedly, states have rejected the so-called modified real-offense sentencing approach of the federal system, which requires judges to increase a defendant's sentence on the basis of facts found by judges under a preponderance of the evidence standard.⁴⁷ For example, suppose a defendant is convicted of a drug-possession charge and acquitted of a charge that he was part of a larger drug conspiracy. Under the federal system, if a judge finds that the defendant was part of the conspiracy, the Sentencing Guidelines provide that the defendant's sentence should be set on the basis of the drugs involved in that conspiracy, regardless of the jury's acquittal. Although the Supreme Court's decision in *United States v. Booker*⁴⁸ no longer permits the Guidelines to mandate this increase, there is still a strong presumption that judges should follow the Guidelines to avoid being reversed on appeal for imposing an unreasonable sentence. Thus, even today, the federal system places heavy emphasis on judicial findings of fact that ignore the jury's verdict. No state has adopted a system along these lines, and, at the very least, Congress should no longer permit Guidelines increases on the basis of acquitted and uncharged criminal conduct.⁴⁹

Finally, although states have sought to reduce disparity—and have done so—they have recognized that departures from guidelines ranges are a necessary component of sound sentencing policy. In contrast to recent congressional efforts to abolish almost all departures,⁵⁰ the states have

46. While Congress currently requires the Sentencing Commission to prepare resource-impact statements for some bills, it is not required to do so for all pieces of legislation. In addition, the information that is prepared does not include all of the information discussed above, such as the consideration of alternatives. Congress also does not now require that the bill's sponsor identify the source for funding the proposed legislation. See Reitz, *supra* note 22, at 123 ("The important process point that the federal government gets wrong and many states get right is that laws should be passed and paid for with reasonable simultaneity.").

47. For a more detailed discussion of the differences between state and federal guidelines approaches to real-offense sentencing, see David Yellen, *Reforming the Federal Sentencing Guidelines' Misguided Approach to Real-Offense Sentencing*, 58 STAN. L. REV. 267 (2005) (in this Issue).

48. 125 S. Ct. 738 (2005).

49. See also Yellen, *supra* note 47, at 275 (in this Issue) (arguing that sentences should not be "enhanced for conduct that could be the basis for a separate criminal charge").

50. See, e.g., PROTECT Act of 2003, Pub. L. No. 108-21, § 401(d)(2), 117 Stat. 650,

permitted and indeed encouraged departures when judges find that an individual case falls outside the prototypical case for which the guidelines are designed. States have recognized that the infinite patterns of human behavior cannot be captured in a sentencing grid—no matter how detailed the grid may be—and, therefore, departures are necessary to maintain a just sentencing system. Congress, too, should recognize the value and importance of departures.

C. Reduced Reliance on Mandatory Minimums

Almost every expert in sentencing policy, including the U.S. Sentencing Commission, has recommended the disuse of mandatory minimums. Mandatory minimums result in more, not less, disparity, and they are prohibitively expensive.⁵¹ Additionally, they have helped fuel the massive rise in incarceration. Some states are starting to heed these calls and have eliminated or curtailed the use of mandatory minimums. Congress, too, should reconsider its use of mandatory minimums and allow the Sentencing Commission to set sentencing ranges without the interference of mandatory minimum legislation.⁵²

D. Alternatives to Incarceration for Drug Offenders

So much of modern sentencing and criminal justice policy revolves around drug policy. Much of the growth in the federal prison population can be attributed to the “war on drugs” and the ever longer sentences handed down to drug offenders. In 1970, only 16.3% of federal prisoners were incarcerated for drug offenses.⁵³ Today, drug offenders make up 53.8% of federal prisoners.⁵⁴ While these sentences take these individuals off the streets during their period of incarceration, it is far from clear that increasing sentences for drug offenders is the best strategy for reducing drug use. Drug prices for heroin and cocaine

670 (requiring de novo review of all downward departures); *id.* § 401(m)(2)(A) (requiring Commission to promulgate Guidelines amendments to reduce downward departures); Defending America’s Most Vulnerable: Safe Access to Drug Treatment and Child Protection Act, H.R. 1528, 109th Cong. § 12 (2005) (dramatically limiting grounds on which downward departures are permissible).

51. Indeed, Congress recognized these shortcomings when it passed the Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. §§ 801-971 (2005), which repealed most of the mandatory minimum sentences that existed at that time. This legislation enjoyed the support of liberals and conservatives alike.

52. In this vein, Congress should reject the recently proposed H.R. 1528 that would effectively turn the floor of the Guidelines range into a mandatory minimum.

53. *United States v. Chavez*, 230 F.3d 1089, 1092 (8th Cir. 2000) (Bright, J., concurring).

54. FED. BUREAU OF PRISONS, U.S. DEP’T OF JUSTICE, QUICK FACTS ABOUT THE BUREAU OF PRISONS, <http://www.bop.gov/news/quick.jsp> (last visited Sept. 21, 2005).

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have decreased since 1980,⁵⁵ indicating that incarceration does not seem to be having an appreciable effect on the supply of drugs.

A wiser strategy seems to be targeting the demand, and one way to lessen the demand for drugs is to treat individuals with substance-abuse problems.⁵⁶ Several states have seen the value in this approach and have approved treatment alternatives for nonviolent drug offenders.⁵⁷ Drug courts are sweeping the nation—backed in part by congressional funding—and early indications suggest that many of these programs are working. At the very least, Congress should study this approach and make greater use of the most successful programs in the federal system.

E. Back-End Flexibility

When it passed the Sentencing Reform Act of 1984,⁵⁸ Congress not only established the Sentencing Commission and authorized the Guidelines, it also adopted a policy of “truth-in-sentencing” that eliminated the discretionary scheme of parole that dominated the pre-Guidelines era. Although the prior parole system was in need of reform, it is possible that Congress went too far in the opposite direction. Under current law, individuals must serve at least eighty-five percent of their sentence.

Many states have retained indeterminate sentencing or have allowed parole after a shorter period of time than the federal system. Similarly, many states have more generous policies for good-time credits. These approaches may or may not be more effective at achieving punishment goals and facilitating penal administration, but they at least merit further study to see if any of the state approaches should be adopted at the federal level. Again, the focus should be on studying the best practices in the states and setting policy from the bottom up through the use of sound data instead of from the top down through edicts that are not grounded in empirical information.

F. Considering a Broad Array of Crimes

States, as noted, are responsible for setting the sentences for a wide range of conduct. This, in turn, allows states to adopt a coherent approach to

55. Matthew Yglesias, *The Research Wars*, AM. PROSPECT, Dec. 2003, at 5, 6.

56. There are obviously other ways to address drug abuse, such as employment programs and educational opportunities, but those social policies fall outside the immediate scope of this project and its emphasis on federal sentencing policy.

57. As Nora Demleitner’s contribution to this Issue explains, other nonprison sentences also warrant further study. See Nora V. Demleitner, *Smart Public Policy: Replacing Imprisonment with Targeted Nonprison Sentences and Collateral Sanctions*, 58 STAN. L. REV. 339 (2005) (in this Issue).

58. Pub. L. No. 98-473, 98 Stat. 1987 (1984) (codified in scattered sections of 18 and 28 U.S.C.).

sentencing. Congress, too, should pay attention to the sentences for all crimes, including state crimes, when setting federal sentences. This approach is particularly important for drug crimes, where federal sentences are often disproportionate to the sentences for violent offenses in the states. As noted, this may create dangerous incentives for drug offenders to turn to violence to avoid detection because the penalties for violent crimes are not much higher (and are often lower) than those of the underlying drug offense. This disparity sends a message that drug offenses are worse than crimes of rape or murder. The criminal law maintains its legitimacy by reflecting the values of the community. It is difficult to imagine that this allocation of punishment reflects the beliefs of the majority of the American people.

CONCLUSION

The virtue of our federal system is that it allows the federal and state governments to divide responsibilities so that each occupies the sphere in which it has an edge. The states have many advantages when it comes to regulating criminal conduct, and the nation's interests are well served by a limited federal role. Even in the limited sphere in which the federal government properly asserts jurisdiction over criminal conduct, it has much to learn from the states.