

12. Crime

Crime is a serious problem in the United States. Each year about 1 person in 40 is the victim of a violent crime and 1 household in 7 is subject to a burglary or theft. Of more concern, crime rates are much higher in some communities than in others. Blacks and Hispanics are especially vulnerable to violent crime, and both violent and property crime rates are unusually high in the inner cities and other pockets of high unemployment and poverty. The total number of most crimes is much higher than that reported to police. And by any comparable measure, the violent crime rate in the United States is much higher than in other high-income countries.

The Case for Defederalization

For a number of reasons, the federal government should *not* do very much about crime. First, the Constitution provides explicit federal authority to punish only a few crimes (counterfeiting, piracies, and felonies on the oceans; offenses against the law of nations; violation of rules established for the armed forces; and treason), reserving general police powers to the states. Most crime legislation by Congress, by extension of the constitutional principle, has been limited to crimes against or by federal employees or by criminal organizations operating in international or interstate commerce.

Second, state and local governments have adequate incentives and resources to address local crime. More police or tougher sanctions in California, for example, do not reduce the crime rate in New York. Moreover, to the extent that criminals are mobile, states may have too strong an incentive to spend on public safety—reducing the local crime rate at the expense of increasing the crime rate in other jurisdictions. In the aggregate, contrary to the deceptive rationale for much federal domestic policy, the federal government has no more resources than are available to the aggregate of the states. For the most part, moreover, the states with the highest crime rates have a higher than average per capita income.

Third, crime is still a serious problem, but state and local governments must be doing something right. Contrary to popular perceptions and most

media reports, the violent crime rate has been roughly steady for 20 years and the property crime rate has declined sharply since 1980.

Fourth, the preferred mix of public safety activities and other measures to reduce crime differs substantially among jurisdictions, reflecting the preferences, composition, and distribution of the population. One size does not fit all jurisdictions. Increased federal funding and control would lead to a mix of policies different from that preferred by most local voters.

Fifth, there is surprisingly little evidence about what policies are effective in reducing crime. In this case, it is especially important not to make the same policy mistakes everywhere. Our federal system provides a continuous natural policy experiment if the federal government stays out of the way except to protect our basic rights. State and local governments make their own policy mistakes, but the scope of their mistakes is inherently limited, and the experiment with different policies provides a way of learning more about what policies are effective. The most difficult discipline for politicians is to resist demands to do something about problems of shared concern. For federal politicians, the best general rule about crime is, "When in doubt, do nothing."

First Step

Congress, in a frenzy of competitive machismo and with little regard for the Constitution or common sense, recently passed another election-year crime bill. The **Violent Crime Control and Law Enforcement Act of 1994** substantially broadened the scope of federal criminal law, increased sentences for a wide range of crimes, banned some semiautomatic rifles, and authorized about \$30 billion of additional spending for police, prisons, and a range of exotic social programs.

That act illustrates most of what is wrong with recent federal crime legislation:

- o Some of the provisions are inconsistent with the Constitution and with the historical limits on the powers of the federal government. The act, for example, **establishes** federal penalties for a wide range of crimes **already** subject to state law.
- o Some of the provisions are violations of civil liberties. For cases involving sexual assault or child molestation, for example, the rules of evidence are changed to permit evidence on the **defendant's** prior behavior.

- o Some of the provisions are counterproductive. Increasing the penalties for less serious offenses, for example, reduces the incremental penalty on more serious offenses. The large high-crime states will receive a smaller share of the earmarked funds than their share of federal taxes.
- o The ban on some semiautomatic weapons is purely symbolic (and may also be unconstitutional). The banned weapons are not functionally different from hundreds of still legal rifles, the total of which are used in a tiny share of crimes involving the use of a gun.
- o Most of the social programs financed by this act are likely to be worth less than their cost and have no significant effect on crime.

The Republican Contract with America pledges to amend the 1994 act by reducing spending for the social programs, increasing spending for police and prisons, and strengthening the sentencing provisions. Such actions may or may not be appropriate for specific states. There is no cause for the federal government to mandate or subsidize such decisions by all states. The first step toward a constitutionally focused federal crime policy would be to repeal the Violent Crime Control and Law Enforcement Act of 1994.

Next Steps

The most important next steps would be to *reverse* some of the changes in criminal law over the past few decades. Some of those changes have been counterproductive, some have been inherently unjust, and some have weakened the effectiveness of state criminal law.

The capacity of prisons and jails in the United States has more than doubled in the past 15 years; we have the largest imprisonment program in the history of a democratic government. For all that, the average prison system is more than 15 percent overcrowded, prison violence has increased sharply, the average time served for most violent crimes has *declined*, and there are more than 2.5 million persons on probation and parole.

The primary reason for that combination of conditions is the rapid increase in the number of people imprisoned for drug offenses. About 60 percent of federal prisoners are drug offenders, up from 22 percent in 1980. About one-third of new commitments to state prisons are drug offenders, up from 7 percent in 1980. The average drug sentence more than tripled in the past five years.

The war on drugs has been counterproductive in reducing violent crime and has had no significant effect on drug use. However the larger issues

of drug policy are sorted out, eliminating the use of incarceration for nonviolent drug offenses is the most effective way to open prison space for violent offenders.

Two recent developments in federal criminal law have led to considerable abuse by the civil authorities. The Racketeer Influenced and Corrupt Organizations Act was passed in 1970 to strengthen the authority of government to prosecute interstate criminal organizations. Its primary application, however, has been in prosecuting white-collar professionals for actions that would not be crimes if undertaken in only one state. The use of RICO powers in civil offenses should be terminated.

A 1984 federal law permits police to seize assets that are "tainted" by a suspicion of criminal activity, even if there is no conviction on a criminal charge. Once the assets are seized, the owner bears the burden of proof to recover them. Police are unusually prone to abuse that authority, because their departments keep assets that are not returned to owners. Since 1984 federal agencies have netted \$3.6 billion in assets with about \$1.7 billion in the pipeline, and state and local police have probably seized as much. Bills that would substantially restrict the authority for civil forfeiture have been introduced by Reps. Henry Hyde (R-Ill.) and John Conyers (D-Mich.) and merit early attention.

For several decades, two court-initiated doctrines have limited the effectiveness of criminal law. The exclusionary rule prohibits the introduction of evidence obtained, even in good faith, without a warrant or in some violation of the conditions of the warrant. That rule contributes to enforcement of the Fourth Amendment protection against unreasonable search and seizures, but it has prevented the prosecution of many criminals, and it is not an effective sanction on improper police behavior. Supporters of the exclusionary rule assert that it is the only or the most effective means of enforcing the Fourth Amendment. Critics would permit a good faith exception combined with stronger sanctions for improper police behavior.

The habeas corpus rules have been interpreted to permit almost endless appeals of convictions for major offenses, often causing those convicted to spend many years on death row. Whatever one's views on the death penalty, this issue merits attention.

The House Republican contract endorses both a good faith exception to the exclusionary rule and reform of the habeas corpus rules, neither of which were included in the 1994 crime bill. There are important civil liberties issues on each side of those two issues, but both issues are a proper focus of a Congress concerned about reducing crime.

Drug Prohibition

As noted above, stepped-up enforcement of our drug laws has been responsible for much of the increase in the number of people imprisoned as well as the increasing congestion of our courts. More and more people—from Baltimore mayor Kurt Schmoke to Milton Friedman and William F. Buckley Jr.—have argued that the policy of drug prohibition actually causes more crime than it prevents and is thus counterproductive.

The argument is clear: Millions of Americans want to use such drugs as marijuana, cocaine, and heroin and continue to do so despite the legal prohibition. Prohibition does not eliminate drugs or drug use, but it does make drugs 10 to 100 times more expensive than they would be in a legal market. The higher price means that users often commit crimes to pay for a habit that would be easily affordable if drugs were legal. It has been estimated that at least half the property crimes in major cities are the result of drug prohibition.

An even more frightening level of crime results from the simple fact that participants in the drug trade have no peaceful way of settling disputes between buyer and seller or between rival sellers. A few years ago, as the Washington, D.C., murder rate soared to unprecedented levels, police estimated that 60 to 80 percent of the city's murders were prohibition related. It is hard to imagine that we will ever see peaceful inner cities until drug prohibition is repealed.

Drug abuse is a problem, for those involved in it and for their family and friends. But it is better dealt with as a medical than as a criminal problem—"a problem for the surgeon general, not the attorney general," as Mayor Schmoke puts it. Prohibition does not stop drug use; rather, it forces drug users to become part of a criminal subculture and causes them to fear arrest if they seek treatment for their addiction.

The United States is a federal republic, and Congress should address ending drug prohibition in a way similar to the way it dealt with ending the prohibition of alcohol. The Twenty-First Amendment, which repealed alcohol prohibition, did not actually legalize the sale of alcohol; it simply repealed the federal prohibition and returned to the several states the authority to set alcohol policy. States took the opportunity to design diverse liquor policies that were in tune with the preferences of their citizens. After 1933 three states and hundreds of counties continued to practice prohibition. Other states chose various forms of alcohol legalization.

Congress should amend the Controlled Substances Act of 1970 to eliminate the federal prohibition of psychoactives. Then the states could

set their own policies with regard to currently illegal drugs. They would do well to consider treating marijuana, cocaine, and heroin **the** way most states now treat alcohol: It should be legal for licensed stores to sell such drugs to adults. Drug sales to children, like alcohol sales to children, should remain illegal. Driving under the influence of drugs should be illegal. Such a **reform** would take the astronomical profits out of the drug business and destroy the drug kingpins that terrorize parts of our cities. We would expect crime to drop even more dramatically than it did after the repeal of alcohol prohibition. Not only would there be less crime; reform would also free police to **concentrate** on robbery, burglary, and violent crime.

In short, as with crime in general, the best thing the federal government can do about drug-related crime is to allow the states and communities to make decisions about this very local problem.

Suggested Readings

Benjamin, Daniel K., and Roger Leroy **Miller**. *Undoing Drugs: Beyond Legalization*. New York: Basic Books, 1991.

Hyde, Henry. *Forfeiting Our Property Rights*. Washington: Cato Institute, 1995.

Kopel, David B. "Prison Blues: How **America's** Foolish Sentencing Policies Endanger Public Safety." Cato Institute Policy Analysis no. 208, May 17, 1994.

Niskanen, William A. "Crime, Police, and Root Causes." Cato Institute Policy Analysis no. 218, November 14, 1994.

Reed, **Terrance** G. "American Forfeiture Law: Property Owners Meet the Prosecutor." Cato Institute Policy Analysis no. 179, September 29, 1992.

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