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# Federalizing "Gang Crime" Is Counterproductive and Dangerous

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Gang crime is a serious problem, but making it a federal crime is not the answer. In fact, bad federal laws could detract from effective anti-gang strategies. The Gang Prevention and Effective Deterrence Act of 2005 (S.155) attempts to address gang crime by defining a new federal crime and boosting federal criminal penalties for gang crimes. Although the bill raises fewer concerns than previous federal anti-gang legislation, it is still replete with serious problems. S.155 is vague, overbroad, and likely unconstitutional, and it disregards the constitutional framework underlying the state and federal criminal justice systems, risking myriad unforeseen consequences. If Congress is serious about addressing gang crime, it should consider narrower, more focused policies that build upon, rather than undermine, federalism.

S. 155 is a well-meaning but misguided attempt to address the growing problem of gang crime in the United States. The bill has garnered bipartisan supporters ranging from Senator Diane Feinstein (D-CA) to Senators Orin Hatch (R-UT), John Cornyn (R-TX), Charles Grassley (R-IA), and Jon Kyl (R-AZ). Even though the bill has not yet been reported out of the Senate Judiciary Committee, some senators hope to attach it to other legislation so that it can be brought to conference this session with the House's Gang Deterrence and Community Protection Act of 2005 (H.R. 1279), which passed the House but shares all of the defects of S. 155.

## Constitutional Problems

It might seem like a good idea for the national government to increase the number of criminal laws in an effort to battle gangs. However, Members of Congress need to think more carefully about the likely unintended consequences of hasty action on a draft bill that has not even emerged from committee in the Senate. Like H.R. 1279, S. 155 is vague and overbroad and disregards the constitutional framework underlying America's state and federal criminal justice systems. Among the likely unintended consequences of federalizing yet another set of state and local crimes is the further erosion of state and local law enforcement's primary role in combating common street crime.

There are also serious constitutional questions about S.155 (and H.R. 1279). Congress's power to "regulate Commerce . . . among the several States" does not include the authority to federalize most non-commercial street crimes, whether interstate or not. Although expansive readings of the Commerce Clause over the last century allowed the federal government to regulate more and more *economic* activity, the Supreme Court has limited Congress's attempts to federalize common street crimes, even ones that clearly have some interstate impact.[1] For this reason, S. 155 is likely outside of Congress's Commerce Clause power and unconstitutional.

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## Overbroad and Vague

Attempting to identify the conduct that they would prohibit, S. 155 and H.R. 1279 use overbroad and vague definitions that cover too much conduct and too many persons. For example, S.155's definition of a "criminal street gang" does not effectively distinguish between Los Angeles's notorious Crips and any five people involved in a legitimate business in downtown L.A. if any one of those five allegedly committed certain crimes. The bill names specific factors, such as a common name, insignia, symbol, leadership structure, method of operation, and specialty, to identify the existence of a gang, but these factors exist in almost every business organization. The bill's "criminal street gang" definition also covers many fraternal organizations that require membership, qualifications, or initiation rites. The definition could even fit a religious organization, because a common belief, creed, or structure can be evidence of the existence of a gang. The heavy weight of federal criminal enforcement should not be available for use against such groups that are clearly not dangerous street gangs.

In addition, the bill's extensive and unfocused list of predicate crimes has little to do with ending the most serious gang activity and further broadens the bill's application. The Rotary Club, a religious or charitable organization, and even a Fortune 1000 company, for example, could all be vulnerable under the bill's overbroad definitions of gang crimes. The list of predicate offenses that would give rise to prosecution under the new federal gang statute is long and well beyond the scope of the crimes that are at the heart of the street gang problem. It includes many non-violent offenses, such as the misuse of a passport, harboring aliens, and illegal gambling. Such conduct, regardless of its unlawfulness, has little to do with gang crime. Including these offenses in S. 155 and H.R. 1279 is an unfocused and dangerous use of federal criminal law. For example, under S.155, the members of an association of sports coaches that creates a small sports betting pool could be charged as members of a criminal street gang.

Including such offenses also increases the danger that guilt may be imputed to an entire group for the actions of only one member if those actions arguably benefit the group. The bill's definition of a "pattern of criminal street gang activity," which must be found for the gang statute to be applicable, requires only that one member of the group engage in the predicate offenses. Thus guilt may be imputed by association. If, unbeknownst to the members of a group or business venture, one or two of their colleagues independently engage in criminal activity, all could be held responsible. Consider the case of a publicly traded company or a securities firm under this legal regime. If one employee engages in several instances of insider trading over a five-year period, the whole organization and all of its employees could be prosecuted.

The proposed law's overbreadth and vagueness are serious flaws. Although the bill's definitions could be narrowly tailored to address the interstate activities of criminal youth gangs, doing so would risk making the bill ineffective. If, for example, the language of the bill were modified to require the participation of more group members for the new law to apply, criminal gangs could get around that requirement by carefully coordinating their members' activities. Other narrowing elements, such as increasing the number of predicate offenses required, would be improvements but could be similarly circumvented. The fact is that gang crime cannot be effectively defined without an unacceptably high risk of criminalizing those outside the scope and intent of the bill. This kind of legislation is inherently problematic.

Moreover, all of the predicate gang crimes listed in the bill are already illegal. If any member of a gang commits any of the crimes listed as predicate offenses, he can be prosecuted and punished under state law and often under federal law, as well. To address group participation in criminal acts, conspiracy laws accomplish most, if not all, of what supporters hope to accomplish with the new legislation.

1. *United States v. Morrison*, 529 U.S. 598 (2000); see also *United States v. Lopez*, 514 U.S. 549 (1995) (striking down the federal Gun-free School Zone Act as beyond Congress's Commerce power to enact).

## Undermining Federalism and Local Law Enforcement

Even if it were easy to craft narrow new criminal offenses to target street gangs, this is not something that the federal government should attempt. Federal crimes should combat problems reserved to the national government in the Constitution—such as treason, conduct that is primarily interstate in nature, and specific offenses that require proof of an actual interstate nexus as one of their necessary elements. These categories of crime either are expressly identified in the Constitution as not being state responsibilities or cannot be effectively addressed by a single state. Other crimes that are appropriately federalized include currency counterfeiting and wiring proceeds of criminal acts across state lines. The fact that armed robberies committed by gang members may (rarely) involve interstate travel does not justify federal involvement. In fact, the vast majority of prohibited conduct under S.155 takes place within individual states. Conduct that is only rarely interstate in nature does not justify federal intervention.

More broadly, Congress should discontinue its habit of expanding federal criminal law. The phenomenon of overfederalization of crime undermines state and local accountability for law enforcement, undermines more cooperative and creative efforts to fight crime (that is, allowing the states to act as "laboratories of democracy"), and injures America's federalist system of government.

One of the more concrete problems that comes with federal overcriminalization is the misallocation of scarce federal law enforcement resources, which results in selective prosecution. New demands distract the Federal Bureau of Investigation, the U.S. Attorneys, and other federal law enforcers from national problems that undeniably require federal attention, such as the investigation and prosecution of espionage and terrorism. Moreover, federal prosecution is more expensive than state-level prosecution.

Traditionally, local and state officials have been responsible for investigating crime and prosecuting most criminals under the state police power. About 95 percent of all crime is handled at the state level.[2] The lesson from New York City in the 1990s is that when accountability is enhanced at the state and local levels, local police officials and prosecutors can make gains against crime that no one dreamed possible. But federalization of crime reduces the accountability of local officials because they can pass the buck to federal enforcement authorities. The result of this drop in accountability may be rising crime rates.

The House and Senate gang crime bills pose all these risks but promise no clear benefit. Even if federal prosecutors bring no significant cases to trial, the new law would force state and local law enforcement to yield and allow federal officials to preempt their investigations. Undermining local officials is not the way to enhance the effectiveness of America's primary law enforcement agents. Congress should restrain itself from extending federal laws against gang activity just to be on record as doing something.

## More Unintended Consequences

S.155's penalties and sentencing provisions are also problematic. For example, by amending 18 U.S.C. § 2119, the bill would quadruple the five-year penalty for violation of the general federal conspiracy statute. This increase is unwarranted because the statute covers conspiracies to engage in non-violent crimes. With this increase, conspiracy to commit over the Internet a questionable business practice, later determined to be fraudulent, could result in a twenty-year sentence. This enhanced penalty would apply to business "gangs" convicted under the federal mail and wire fraud provisions, which are extremely broad. Those statues have already resulted in convictions of business enterprises and executives for conduct that is not clearly criminal and does not merit a twenty-year penalty. S.155 would make this overcriminalization problem even worse.

2. See, e.g., Ed Meese and Robert Moffit, *Making America Safer: What Citizens and Their State and Local Officials Can Do to Combat Crime*, The Heritage Foundation, Washington D.C. (1997) pg. XIV.

The bill also contains a provision prohibiting an individual from accepting income from gang activities. Like the rest of the bill, this provision may be logical and reasonable if narrowly applied to real street gangs, but the practical result may be unjust and far removed from the original goal. Under S. 155, a person who works for a small business with a gang member—even a gang member whose only "crime" is belonging to the gang—could be charged and prosecuted for using any money he received from the gang member, whether or not he knew that the money came from a gang or gang-related activities.

## Conclusion

Gang crime is a problem in many states, but so is all crime. The existence of a problem does not necessarily justify congressional intervention. Even though many gangs may have interstate connections, S. 155 does not specifically target them and does almost nothing to enhance cooperation among state and local officials, who retain primary responsibility for battling gangs. Congress must tread very carefully when bringing federal criminal law to bear on problems at the state and local level because doing so risks many unexpected consequences.

If Congress carefully studies the problems that states are facing with interstate street gangs and determines that some interstate aspects of gang crime are particularly difficult for individual states to address, it should confine its involvement to those areas. It could do this in several ways. Under the Constitution, Congress may participate in interstate compacts that increase cooperation among the states and the federal government. Alternatively, Congress could grant money and resources to assistance programs that target, track, and investigate such interstate connections. Such narrowly tailored assistance would not undermine state responsibility for fighting street crime and would provide state and local officials with valuable evidence they could use in the state prosecutions that will always remain the most important weapon against criminal street gang activity.

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