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# Federalization’s Folly

STEPHEN F. SMITH\*

## TABLE OF CONTENTS

I.	INTRODUCTION .....	31
II.	THE FEDERALIZATION OF CRIMINAL LAW .....	34
	A. <i>The Explosive Growth of Federal Criminal Law</i> .....	34
	B. <i>Extreme Severity in Federal Sentences</i> .....	39
III.	THE COSTS AND BENEFITS OF FEDERALIZATION .....	42
	A. <i>The Illusory Benefits of Federalizing Criminal Law</i> .....	43
	B. <i>Federalization Causes Serious Problems</i> .....	47
	1. <i>Arbitrary Prosecutorial Discretion</i> .....	48
	2. <i>Interference with State-Level Enforcement</i> .....	55
	3. <i>Negative Externalities</i> .....	64
IV.	CONCLUSION .....	69

## I. INTRODUCTION

Insanity is said to be doing the same thing, over and over again, expecting different results. By that definition, the federal government’s approach to crime and punishment surely qualifies. For decades, the federal government has responded to the crime problem with *more*: more criminal laws, more enforcement, and more prisoners serving long sentences. As a result of this “federalization of criminal law,” “the distinction between Federal and State law is effectively dead.”<sup>1</sup> Consequently, for all but the

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\* © 2019 Stephen F. Smith. Professor of Law, University of Notre Dame. Special thanks to Sara Sun Beale for characteristically helpful and insightful comments and suggestions. Any errors are mine alone.

1. Daniel C. Richman, *The Changing Boundaries Between Federal and Local Law Enforcement*, 2 BOUNDARY CHANGES CRIM. JUST. ORGANIZATIONS 81, 90 (2000).

most trivial of crimes, a determined federal prosecutor today could find a basis for federal charges, and garden-variety criminal cases are now commonplace in federal court.

This Article seeks to go beyond the usual objections to overcriminalization<sup>2</sup> by considering the distinct problems that the federalization of criminal law presents for the task of rationalizing the exercise of criminal jurisdiction and, ultimately, safeguarding the public. My claim is that even if *state* criminal codes and penalties have been appropriately expanded in recent decades, the enlarged scope of *federal* criminal jurisdiction remains troubling because of the unusual severity of federal punishments. Harsh federal sentencing policies give federal prosecutors incentives to pursue offenses which would otherwise receive less severe punishment in state court. This results in unfairness to offenders whose incremental punishment turns on an arbitrary factor—the decision to proceed in federal instead of state court—as opposed to the severity of their crimes. Worse still, it undermines effective crime control by causing federal prosecutors to duplicate or even interfere with the efforts of their state-level counterparts.

There is indeed a vital federal role in criminal law, but it is not to duplicate or countermand the efforts of state enforcers. In areas of overlapping authority, federal enforcement must be limited to crimes that cannot adequately be addressed by states acting alone. This simply will not happen without a streamlined, better defined federal criminal code, more strategic and nationally uniform federal enforcement, and comprehensive federal sentencing reform.

The remainder of this Article proceeds as follows. Part II briefly canvasses the familiar story of the federalization of criminal law. This story involves not only an ever-expanding number of broadly defined criminal laws—“overcriminalization”—but also dramatic increases in the length of federal sentences—“overpunishment.” As a result of these features of federal criminal law, federal enforcement is not limited to offenses that are especially worthy of attention by the federal government, and federal prosecutors have virtually limitless discretion to play district attorney by pursuing the same types of offenses that typically are handled within the state court system.

Part III assesses the relative costs and benefits of federalization. The federalization of criminal law has been defended as a necessary step to reduce crime, yet the available evidence suggests the greatly expanded federal footprint in the war on crime has accomplished precious little in terms of

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2. See generally DOUGLAS HUSAK, *OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW* (2008); John C. Coffee, Jr., *Does “Unlawful” Mean “Criminal”?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. REV. 193 (1991); Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U.L. REV. 703 (2005); Stephen F. Smith, *Overcoming Overcriminalization*, 102 J. CRIM. L. & CRIMINOLOGY 537 (2012).

public safety. Nowhere is this clearer than the nation's failed "war on drugs." After trillions of dollars in federal spending and ramped-up enforcement that has swelled federal prisons with low-level drug offenders, the drug problem remains as serious as ever, measured by the availability and pricing of illegal drugs nationwide, the scope of drug addiction, and the number of fatal overdoses annually.<sup>3</sup> Apart from drug crimes, the nation has recently witnessed a stunning drop in crime, but that welcome development cannot be chalked up as a "win" for law enforcement. To the contrary, there is a growing consensus among criminologists that the recent crime drop almost certainly would have happened *without* the policing and sentencing changes that produced mass incarceration.<sup>4</sup>

In addition to having failed to deliver on its central promise of reducing crime, federalization has imposed serious costs on the nation. The federalization of criminal law has swelled federal prisons to capacity and beyond, resulting in crowded dockets in federal courts, skyrocketing costs to taxpayers, and prisons that are more dangerous and less effective. Less obviously, federalization has resulted in massive federal resources being diverted to low-level drug offenders—not the drug kingpins Congress undoubtedly had in mind in enacting tough mandatory minimums—and other garden-variety offenses better suited to state court enforcement. Finally, overlapping authority to prosecute drug offenses and forfeit assets seized by state and local police has allowed federal prosecutors to interfere with state-level efforts to protect against the harms associated with illegal drug use and the phenomenon known as "policing for profit."<sup>5</sup>

This Article concludes with two sets of proposed legislative reforms to address the problems associated with the overfederalization of criminal law.

*First*, Congress must no longer give federal prosecutors carte blanche to determine how to deploy the wide array of enforcement tools at their disposal. Restricting the roster of federal crimes and the use of appropriated funds to areas where state law enforcement is unavailable or inadequate to the task will keep federal enforcers focused, as they ought to be, on the nation's most serious crimes. If the federal government desires added enforcement in other areas, Congress should grant states the funds necessary for expanded enforcement in the state system rather than enacting additional

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3. See *infra* Section III.A.

4. See *infra* notes 47–51 and accompanying text.

5. See *infra* pp. 60–62.

criminal laws enforceable in a federal system that can only handle a small fraction of the nation's total criminal caseload. A considerably smaller federal footprint in criminal law would mean better crime control and greater freedom for continued innovation by states in response to evolving public safety needs.

*Second*, in addition to narrowing the reach of federal criminal law, Congress should reform the features of federal law that tend to produce arbitrary exercises of prosecutorial discretion and prison overcrowding. The primary culprits here are mandatory minimums and other unusually severe federal sentencing laws. Such laws should be repealed because—in addition to producing needlessly long sentences at great cost to taxpayers—they incentivize federal prosecutors to pursue the offenses that generate the highest sentences, as opposed to the offenses most deserving of federal attention. Also, given the enormous discretion that federal prosecutors wield with little or no transparency, Congress should require the Department of Justice (DOJ) to operate in the same law-like manner that other executive branch agencies do by promulgating and adhering to binding enforcement guidelines and an articulated national crime-fighting strategy. A carefully considered, nationally uniform approach to crime reduction will bring much-needed transparency and coordination to the enforcement of federal criminal law, and facilitate closer legislative oversight of how federal law is enforced.

## II. THE FEDERALIZATION OF CRIMINAL LAW

### A. *The Explosive Growth of Federal Criminal Law*

From the founding until the Civil War, two bedrock constitutional principles constrained federal criminal law enforcement. The first principle was that, unlike the states, the federal government lacked the “police power,” understood as the power to protect the health, welfare, and morals of citizens against the predation of criminals.<sup>6</sup> The second constitutional principle, closely related to the first, was that the federal government had no inherent power but only limited, enumerated powers.<sup>7</sup> Together, these constitutional principles left the federal government only a limited role in criminal law. Federal enforcers “confined [their] prosecutions to less than a score of offenses” involving crimes that either occurred outside of state jurisdiction or

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6. See *United States v. Lopez*, 514 U.S. 549, 566 (1995).

7. See U.S. CONST. amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”).

uniquely threatened the operations, property, or personnel of the federal government.<sup>8</sup> All other matters were left entirely to state-court enforcement.<sup>9</sup>

Those days, of course, are long gone. With Congress having cast off the shackles of federalism and self-restraint in recent generations, it comes as no surprise that the loose collection of statutes known as “federal criminal law” is sprawling and virtually limitless in its reach into the domain of state criminal law.<sup>10</sup> It is, however, remarkable just how large and inaccessible the resulting collection of statutes—which, strictly speaking, is not properly referred to as a “code” at all—has become after more than a century of statute-by-statute accumulation.<sup>11</sup>

Amazingly, no one—not the DOJ, scholars in the field, or blue-ribbon task forces that spent years studying the subject—has even a rough idea of how many federal criminal laws there are. The American Bar Association’s (ABA) Task Force on Federalization, for instance, abandoned its own years-long counting effort as futile given how “large . . . the present body of federal criminal law” is.<sup>12</sup> Even defenders of the federalization of criminal law concede that its scope is “potentially infinite”: “Current federal criminal law is set forth in forty-eight titles of the United States Code, encompassing roughly 27,000 pages of printed text, as interpreted in judicial opinions found in over 2,800 volumes, containing approximately 4,000,000 printed pages.”<sup>13</sup>

8. JAMES A. STRAZZELLA, TASK FORCE ON THE FEDERALIZATION OF CRIMINAL LAW, AM. BAR ASS’N, *THE FEDERALIZATION OF CRIMINAL LAW* 5 (1998).

9. See Sara Sun Beale, *Federalizing Crime: Assessing the Impact on the Federal Courts*, 543 ANNALS AM. ACAD. POL. & SOC. SCI. 39, 40 (1996).

10. See *infra* notes 12–13 and accompanying text.

11. As a leading authority on white-collar crime put it:

Any discussion of federal penal law must begin with an important caveat: There actually is no federal criminal “code” worthy of the name. A criminal code is defined as “a systematic collection, compendium, or revision’ of laws.” What the federal government has is a haphazard grab-bag of statutes accumulated over 200 years, rather than a comprehensive, thoughtful, and internally consistent system of criminal law.

Julie R. O’Sullivan, *The Federal Criminal “Code” Is a Disgrace: Obstruction Statutes as Case Study*, 96 J. CRIM. L. & CRIMINOLOGY 643, 643 (2006) (emphasis omitted) (footnote omitted) (quoting Robert H. Joost, *Federal Criminal Code Reform: Is It Possible?*, 1 BUFF. CRIM. L. REV. 195, 210 (1997)).

12. STRAZZELLA, *supra* note 8, at 9.

13. Susan R. Klein & Ingrid B. Grobey, *Debunking Claims of Over-Federalization of Criminal Law*, 62 EMORY L.J. 1, 15 (2012). The potential scope of federal criminal liability is broader still given that many crimes are defined in vague terms and contain inadequate

Several factors combine with the sheer number of federal criminal laws to make it exceedingly difficult to determine how many actually exist. Federal criminal statutes are not contained in any one volume of the U.S. Code—not even Title 18, the one volume specifically entitled “Crimes and Criminal Procedure”<sup>14</sup>—but rather are scattered throughout almost fifty different volumes, without useful indexing and cross-references.<sup>15</sup> In addition to being difficult to find, federal criminal statutes are often quite complex and multifaceted in structure, with a single provision creating an array of separately enforceable criminal prohibitions.<sup>16</sup>

The difficulty of the Herculean—or, more accurately, Sisyphean—effort to count the number of federal criminal laws is further compounded by the fact that many regulations issued by federal agencies can result in criminal punishment.<sup>17</sup> Given that many administrative regulations are criminally enforceable, the number of federal criminal statutes alone cannot adequately convey the true scope of available punishment; criminally enforceable agency rules and regulations must also be taken into account. Efforts to do so put the number of federal criminal prohibitions at anywhere from 10,000, on the low side, to a staggering 300,000.<sup>18</sup>

The daunting size and utter chaos in federal criminal law resulted principally from the fact that new criminal laws are continuously enacted by Congress year after year without periodic review and revision. On average,

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mens rea requirements, which allow prosecutors even greater power to charge and convict. *See Smith, supra note 2, at 565–74.*

14. *See generally* 18 U.S.C. §§ 1–6005 (2012).

15. *See* Ronald L. Gainer, *Federal Criminal Code Reform: Past and Future*, 2 *BUFF. CRIM. L. REV.* 45, 66–67 (1998).

16. *See* STRAZZELLA, *supra* note 8, at 9–10. As an example of how complexity bedevils efforts to count the number of federal criminal statutes, consider the Racketeer Influenced and Corrupt Organizations Act (RICO). *See generally* 18 U.S.C. §§ 1961–1968. RICO could be counted as just one criminal law because only one provision imposes criminal penalties. *See id.* § 1963. On closer inspection, however, the head count is not nearly so simple. Section 1963 authorizes punishment but does not define the RICO offense. The offense is defined in four different provisions of § 1962, and each of those subsections provides separate bases for conviction. *See id.* § 1962(a)–(d). This might make four, rather than one, the proper count for RICO. Nevertheless, even four might understate the true number of RICO crimes. Subsections 1962(a)–(c) each provide two or more ways of violating each subsection. For example, subsection (c) makes it a crime for a “person employed by or associated with” a RICO enterprise to “conduct [its] affairs through a pattern of racketeering activity” or to “participate . . . in the conduct of [the] enterprise’s affairs through [such] a pattern.” *Id.* § 1962(c). Combined with the conspiracy provision of § 1962(d)—which makes it a separate offense to conspire to violate subsections (a)–(c)—§ 1962(c) might be viewed as creating four different crimes: (1) conducting; (2) participating; (3) conspiring to conduct; and (4) conspiring to participate. So viewed, there are at least twelve separate RICO crimes.

17. *See* O’Sullivan, *supra* note 11, at 649.

18. *See id.* (citations omitted).

Congress passed fifty-six new criminal laws annually from 2000 to 2008.<sup>19</sup> Even though crime rates were uncommonly low during that period,<sup>20</sup> Congress continued passing new criminal statutes at roughly the same rate as it did during the two prior decades.<sup>21</sup> In recent decades, Congress has added so many new criminal prohibitions that, according to the ABA's Federalization Task Force, "[m]ore than 40% of the federal criminal provisions enacted since the Civil War have been enacted since 1970."<sup>22</sup>

To be sure, federal prosecutors have not enforced these laws anywhere near the frequency they could under current law. Now, as in the prior era when federal criminal law was much smaller in scope, the vast majority of enforcement activity continues to take place in state courts nationwide.<sup>23</sup> Nevertheless, it would be a mistake to conclude that the steady expansion in the size and scope of federal criminal law has been inconsequential. Two of the areas of most frequent federal enforcement activity—firearms

19. See JOHN S. BAKER, JR., REVISITING THE EXPLOSIVE GROWTH OF FEDERAL CRIMES 3, 5 (2008) (estimating the number of federal criminal offenses to be "at least 4,450").

20. According to one recent account,

In the mid-1990s, crime rates plummeted all across America (in cities, suburbs, exurbs, and rural areas), across all demographic groups (rich and poor, black and white, young and old), [and] in every crime category. By 2007, the latest year for which systematic data are available . . . , rape, robbery, homicide, burglary, larceny, and motor vehicle theft were all down nearly 40 percent from the peak of the US crime wave in 1991.

Vanessa Barker, *Explaining the Great American Crime Decline: A Review of Blumstein and Wallman, Goldberger and Rosenfeld, and Zimring*, 35 LEGAL & SOC. INQUIRY 489, 490 (2010) (citations omitted). The 1990s crime drop lasted over sixteen years, and was so steep that in 2000 "homicide rates reached levels last reported in the mid-1960s." *Id.*

21. See BAKER, *supra* note 19, at 2, 5.

22. STRAZZELLA, *supra* note 8, at 7 (emphasis omitted). Congress and the Executive Branch may be the prime culprits, but the federal courts share responsibility for the extreme breadth and severity of federal criminal law today. As I have argued in separate work,

Far from being innocent bystanders in the federalization of criminal law, federal judges have been all too willing to construe federal crimes expansively, without regard to the often dramatic effects expansive interpretations will have on the punishment federal defendants face. . . . The inevitable result of how courts approach their interpretive tasks is a broader and more punitive federal code.

Stephen F. Smith, *Proportionality and Federalization*, 91 VA. L. REV. 879, 884 (2005).

23. See Klein & Grobey, *supra* note 13, at 18 ("[F]rom 1994–2006, federal court felony convictions consistently comprised 5% to 6% of all felony convictions in the country annually . . ."). The federal share would be considerably smaller if state misdemeanor prosecutions were considered. See NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, MINOR CRIMES, MASSIVE WASTE: THE TERRIBLE TOLL OF AMERICA'S BROKEN MISDEMEANOR COURTS 11 (2009) (finding that there were more than 10 million state misdemeanor prosecutions in 2006 alone).



and drug offenses—involve statutes passed in the 1960s and 1970s, not laws of more ancient origin: the Omnibus Crime Control and Safe Streets Act of 1968<sup>24</sup> and the Comprehensive Drug Abuse Prevention and Control Act of 1970.<sup>25</sup> This fact alone refutes any suggestion that the dizzying array of new statutes enacted in recent decades are enforced so rarely as to be of little or no consequence in debates over federalization.

In any event, focusing on aggregate numbers of prosecutions alone unduly minimizes the federal role in certain enforcement areas. For example, judging from the small number of criminal prosecutions brought annually against corporations in federal court, one might think articles of incorporation serve as “get out of jail free” cards for corporations. That conclusion, however, would be mistaken.

Of course, the federal government rarely indicts corporations, due no doubt in part to the potentially serious collateral consequences for innocent corporate stakeholders.<sup>26</sup> Even so, the DOJ has nonetheless played an aggressive role in the area of corporate crime since the collapse of Enron. It has done so principally by using the threat of prosecution to compel corporations to pay billions of dollars in penalties and change their corporate structures to ensure greater future legal compliance.<sup>27</sup> The fact that the DOJ has largely relied on negotiated means, as opposed to actual prosecutions, hardly means the government does little to hold corporations accountable for their crimes.<sup>28</sup>

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24. Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 91-351, 82 Stat. 197 (codified as amended in scattered sections of 34 U.S.C.).

25. Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236 (codified as amended in scattered sections of 21 U.S.C.).

26. See U.S. DEP’T. OF JUSTICE, JUSTICE MANUAL § 9-28.1100(B) (2018) (stating that prosecuting corporations may “seriously harm[] innocent third parties who played no role in the criminal conduct”).

27. The results of this enforcement strategy have been dramatic. As a recent Manhattan Institute report notes, such arrangements are so “commonplace” that they “might be characterized as a ‘shadow regulatory state’ over business.” JAMES R. COPLAND & ISAAC GORODETSKI, *THE SHADOW LENGTHENS: THE CONTINUING THREAT OF REGULATION BY PROSECUTION*, at iii (2014). Since 2014, federal prosecutors have reached approximately 300 deferred or non-prosecution agreements with major corporations, including ten Fortune 100 companies. *Id.* The almost seventy agreements reached during 2014–2016 alone netted the government roughly \$12 billion in fines and penalties. *Id.* See generally Sara Sun Beale, *The Development and Evolution of the U.S. Law of Corporate Criminal Liability and the Yates Memo*, 46 STETSON L. REV. 41 (2016); Brandon L. Garrett, *Structural Reform Prosecution*, 93 VA. L. REV. 853 (2007).

28. Even looking solely at actual criminal prosecutions, however, it is clear that the federal government does indeed play a significant enforcement role in certain areas of concurrent state and federal jurisdiction. For example, in 2006, almost one in five felony firearms offenses was prosecuted in federal court. See Klein & Grobey, *supra* note 13, at 19. In the first year of the Trump Administration, the number of defendants charged with federal firearms offenses jumped by almost 23% from the prior year. Office of Pub.

*B. Extreme Severity in Federal Sentences*

By virtue of the nearly complete overlap between federal and state criminal law, most federal enforcement activity involves conduct that is regularly prosecuted in state court. If federal sentencing policies mirrored those available in state court, it would be of limited significance (except of course to taxpayers) whether offenders are prosecuted in federal or state court. In fact, however, there are substantial differences between the two forums, and so it matters greatly whether or not a prosecution takes place in federal court.

The most important difference between federal and state prosecution is sentencing. Federal sentences are typically far more severe than state sentences for parallel offenses<sup>29</sup>—which is to be expected given that, as Congress well knows, its harsh laws will only be applied against a small subset of available offenders, with the overwhelming majority left for state prosecution. This means that the severity of sentence the defendant receives for the same crime will vary dramatically if charged in federal court or left to state authorities.

The sentencing difference is at its starkest in first-degree murder cases. In almost half the states and the District of Columbia, the death penalty has either been abolished or is subject to gubernatorial moratorium.<sup>30</sup> In these states, the maximum punishment for murder is effectively life imprisonment, yet, in each state, a murder prosecution in federal court can result in the death penalty.<sup>31</sup> Thus, the decision as to state or federal prosecution can literally make the difference between life and death—as seen most recently in the successful capital prosecution of the Boston Marathon bomber in

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Affairs, *Federal Gun Prosecutions up 23 Percent After Sessions Memo*, U.S. DEP'T JUST. (Nov. 8, 2017), <https://www.justice.gov/opa/pr/federal-gun-prosecutions-23-percent-after-sessions-memo> [https://perma.cc/W2DV-C23D].

29. See generally Ronald F. Wright, *Federal or State? Sorting as a Sentencing Choice*, CRIM. JUST., Summer 2006, at 16, 17–18.

30. See *States With and Without the Death Penalty*, DEATH PENALTY INFO. CTR. (Oct. 11, 2018), <http://www.deathpenaltyinfo.org/states-and-without-death-penalty> [https://perma.cc/WC7S-DS49].

31. See 18 U.S.C. § 3591 (2012).

U.S. District Court in Massachusetts,<sup>32</sup> a state that abolished the death penalty more than thirty years ago.<sup>33</sup>

Harsher federal sentences are also handed down in noncapital cases. “[S]ome federal laws, most notably those dealing with drug trafficking and weapons offenses, require imposition of harsh statutory mandatory *minimum* sentences which can be as long as or longer than the *maximum* sentences permitted under some state laws.”<sup>34</sup> This is by no means an exceptional situation applicable only to persons who are unusually dangerous or blameworthy. As Professor Sara Sun Beale convincingly explains,

The sentences available in a federal prosecution are generally higher than those available in state court—*often ten or even twenty times higher*. For example, in one drug case the recommended state sentence was eighteen months, while federal law required a mandatory minimum sentence of ten years, and the applicable federal sentencing guidelines range was 151 to 188 months for one defendant and 188 to 235 months for the other. Another defendant . . . who received a diversionary state disposition to a thirty-day inpatient drug rehabilitation program, followed by expungement of his conviction upon successful completion of the program and follow-up, was subject to forty-six to fifty-seven months of imprisonment under the applicable federal guidelines.<sup>35</sup>

Two main features of federal sentencing policy combine to produce these comparatively severe results. The first is mandatory minimums, which are much more prevalent—and much harsher—at the federal level than in most states.<sup>36</sup> The second is the rigid sentencing guidelines applicable in

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32. See Ann O’Neill et al., *Boston Marathon Bomber Dzhokhar Tsarnaev Sentenced to Death*, CNN (May 17, 2015, 3:46 PM), <http://www.cnn.com/2015/05/15/us/boston-bombing-tsarnaev-sentence/> [<http://perma.cc/PDD8-H4FL>]. This was no isolated case. As one commentator has noted, the last couple of decades has seen “a precipitous increase in the number of federal capital prosecutions brought against defendants in states that have abolished the death penalty.” John Jason Krieger, Note, *Disapproving Death: Amending the Interstate Agreement on Detainers in Light of United States v. Pleau*, 87 S. CAL. L. REV. 111, 133 (2013). The suggestion is that federal prosecutors are using federal law to override state decisions to abolish the death penalty within their borders and, in effect, treating the unavailability of the death penalty in a given state as a factor warranting federal prosecution for a death-eligible crime.

33. See *Commonwealth v. Colon-Cruz*, 470 N.E.2d 116, 128–29 (Mass. 1984).

34. Steven D. Clymer, *Unequal Justice: The Federalization of Criminal Law*, 70 S. CAL. L. REV. 643, 674 (1997) (first emphasis added) (footnote omitted).

35. Sara Sun Beale, *Too Many and Yet Too Few: New Principles to Define the Proper Limits for Federal Criminal Jurisdiction*, 46 HASTINGS L.J. 979, 998–99 (1995) (emphasis added) (footnotes omitted) (citations omitted).

36. See Erik Luna & Paul G. Cassell, *Mandatory Minimalism*, 32 CARDOZO L. REV. 1, 1 (2010) (stating it is “well known” that mandatory minimum sentences promote “unduly harsh punishment”). As I have explained elsewhere: “There are approximately one hundred different provisions in the federal criminal code imposing mandatory minimum sentences, and a number of these provisions concern the frequently prosecuted areas of drug and weapons offenses.” Smith, *supra* note 22, at 895 (citing U.S. SENTENCING COMM’N, REPORT ON MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 11, 11

federal prosecutions. To be sure, the U.S. Sentencing Guidelines no longer have the force and effect of law after *United States v. Booker*.<sup>37</sup> Still, the punitive influence of the guidelines has remained stable in the leading areas of federal enforcement: immigration, drug, and firearm offenses.<sup>38</sup>

By virtue of these distinctive features of federal sentencing, “[i]t is not unusual for codefendants whose conduct is identical to receive radically different sentences, depending upon whether they are prosecuted in state or federal court.”<sup>39</sup> These differences are especially pronounced now that states are dramatically changing their sentencing policies in an effort to curb mass incarceration in favor of more effective and humane crime-fighting strategies. As Professor E. Lea Johnston has noted,

Following the lead of trailblazers such as Texas, Kansas, and Missouri, states have instituted various reforms to reduce prison populations and correctional spending, including increased use and diversity of early-release measures. Specifically, recent reports show that states are expanding their use of good-time credits, enlarging parole eligibility, and authorizing the “compassionate release” of costly and low-risk ill or elderly inmates.<sup>40</sup>

Despite recent bipartisan legislation trimming federal sentences, the move is merely a first step toward reform, as its title declares.<sup>41</sup> Absent further,

n.40 (1991)). As of September 2016, “more than half (55.7%) of federal inmates in custody . . . were convicted of an offense carrying a mandatory minimum penalty.” WILLIAM H. PRYOR, JR. ET AL., U.S. SENTENCING COMM’N, AN OVERVIEW OF MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 6 (2017).

37. See 543 U.S. 220, 264 (2005).

38. See PATTI B. SARIS ET AL., U.S. SENTENCING COMM’N, REPORT ON THE CONTINUING IMPACT OF UNITED STATES V. BOOKER ON FEDERAL SENTENCING 62–66 (2012), [https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/booker-reports/2012-booker/Part\\_A.pdf](https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/booker-reports/2012-booker/Part_A.pdf) [<http://perma.cc/64RM-SGEL>].

39. Beale, *supra* note 35, at 999.

40. E. Lea Johnston, *Modifying Unjust Sentences*, 49 GA. L. REV. 433, 437 (2015) (footnotes omitted). It therefore is incorrect to say that critiques of “the severity of [federal] sentencing schemes . . . are not directly relevant to the over-federalization debate; rather, they are criticisms that apply to state and federal drug enforcement schemes alike.” Klein & Grobey, *supra* note 13, at 25. The unusual harshness of federal sentences, particularly for drug offenses, is a—if not *the*—foundational plank in modern criticisms of the federalization of criminal law. See *generally* Beale, *supra* note 35 (arguing that federalization has led to similarly situated federal and state offenders receiving radically different sentences); Clymer, *supra* note 34 (arguing that the unusually severe punishment meted out to federal offenders may be the most troubling aspect of federalization); Smith, *supra* note 22 (arguing that federalization has led to disproportionately severe punishment).

41. The President recently signed into law compromise legislation, known as the “First Step Act,” that would allow an estimated 7,000 current prisoners to obtain immediate release, trim future sentences through good-time credits and limited relief from mandatory

more sweeping changes to existing law, the federal government will continue to lag far behind states in the move toward more effective and humane sentencing policies.

### III. THE COSTS AND BENEFITS OF FEDERALIZATION

As the discussion so far indicates, the federalization of criminal law has required enormous and sustained effort for generations. Congress has repeatedly passed new criminal laws and increased the penalties for existing offenses.<sup>42</sup> Apart from a dip in recent years attributable to the Obama Administration's short-lived reform efforts, federal prosecutors have substantially increased the number of federal criminal prosecutions brought annually as compared to past decades.<sup>43</sup> The resulting glut of federal prisoners serving long sentences has come at great cost to taxpayers, who now are saddled with a roughly \$7 billion bill each year to incarcerate approximately 200,000 prisoners.<sup>44</sup>

Have these considerable expenditures of effort and resources been worth it? Unfortunately, the answer would seem to be no. Whatever the benefits associated with the federalization of criminal law, they would appear to

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minimum penalties, and increase funding for anti-recidivism programs. Erin McCarthy Holliday, *President Trump Signs Criminal Justice Reform First Step Act into Law*, JURIST (Dec. 21, 2018, 3:30 PM), <https://www.jurist.org/news/2018/12/president-trump-signs-criminal-justice-reform-first-step-act-into-law/> [<https://perma.cc/59ST-26FY>]. The legislation is valuable mostly for its symbolism; in terms of actual effect, it is very modest, especially in comparison to predecessor proposals backed by then-President Obama. See, e.g., Zak Cheney-Rice, *The First Step Act Deserves Your Skepticism*, N.Y. INTELLIGENCER (Dec. 20, 2018), <http://nymag.com/intelligencer/2018/12/first-step-act-skepticism.html> [<https://perma.cc/8N6C-DXWP>] (“That it took years of wrangling and negotiation to secure a compromised echo of an already-modest reform bill Republicans killed in 2016 bodes poorly for the future improvements—which many senators already acknowledge are necessary.”).

42. See BAKER, *supra* note 19, at 5.

43. As the Sentencing Commission has noted, the total number of federal cases “almost tripled” from fiscal year 1990 to fiscal year 2010. U.S. SENTENCING COMM’N, 2011 REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 66 (2011) [hereinafter U.S. SENTENCING COMM’N, MANDATORY MINIMUM]. Over the next six fiscal years, the annual number of prosecutions declined by an average of a few percentage points each year, resulting in a 22.4% decline by fiscal year 2017. GLENN R. SCHMITT & CASSANDRA SYCKES, U.S. SENTENCING COMM’N, OVERVIEW OF FEDERAL CRIMINAL CASES: FISCAL YEAR 2017, at 1 (2018). The recent declines resulted from now-repudiated policy changes by the Obama DOJ, such as the “Smart on Crime” initiative described *infra* notes 86–87 and accompanying text. Despite the lingering effect of these policy changes, the 66,873 criminal cases filed in fiscal year 2017 far exceeded the 29,011 cases brought in fiscal year 1990. U.S. SENTENCING COMM’N, MANDATORY MINIMUM, *supra*.

44. NATHAN JAMES, CONG. RESEARCH SERV., R42937, THE FEDERAL PRISON POPULATION BUILDUP: OPTIONS FOR CONGRESS 2 (2016); see also PEW CHARITABLE TRS., FEDERAL PRISON SYSTEM SHOWS DRAMATIC LONG-TERM GROWTH 1 (2015).

be slight in comparison to their detrimental impact on the overall effectiveness of America's criminal justice system.

*A. The Illusory Benefits of Federalizing Criminal Law*

The federalization of criminal law was accomplished in the name of public safety—the “crime problem” evidently was simply too large to be left for states alone—and it would therefore be natural to defend federalization on crime-reduction grounds. After all, for a public concerned with violent crime and illegal drugs, the best possible argument in favor of a robust federal crime-fighting role would be that it has meaningfully reduced the social harms associated with violence and drug abuse. The available data, however, rule out any such argument.

Although crime rates have been surprisingly low in recent decades, there is scant evidence that law enforcement—state *or* federal—played a significant role in that welcome development. As the National Research Council has explained, there is “no clear trend” connecting mass incarceration during prior decades and more recent crime rates: “over the four decades when incarceration rates steadily rose, . . . the rate of violent crime rose, then fell, rose again, then declined sharply.”<sup>45</sup> In light of this observed “lack of correspondence between rates of incarceration and rates of violent crime and crime rates more generally,”<sup>46</sup> it comes as no surprise that many—if not most—empirical studies find little or no support for the view that mass incarceration caused the recent crime drop.<sup>47</sup> Indeed, even scholars who do believe that dramatically increased imprisonment may have contributed to the crime drop concede that the vast majority of the reduction in crime would have occurred *without* mass incarceration.<sup>48</sup>

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45. NAT'L RESEARCH COUNCIL, THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 3, 130–31 (Jeremy Travis et al. eds., 2014).

46. *Id.* at 131.

47. See, e.g., OLIVER ROEDER ET AL., WHAT CAUSED THE CRIME DECLINE? 79 (2015) (finding that mass incarceration had “no effect on violent crime” in the 1990s and 2000s and only a “minimal effect” on property crime); NAT'L RESEARCH COUNCIL, *supra* note 45, at 337 (“There is only weak evidence that increased prison populations from the 1970s to the 2000s led to large aggregate reductions in crime rates . . .”); Graham Farrell et al., *Why the Crime Drop?*, 43 CRIME & JUST. 421, 444 (2014) (finding no empirical support for claims that policing and mass imprisonment caused the crime drop).

48. See, e.g., William Spelman, *The Limited Importance of Prison Expansion*, in THE CRIME DROP IN AMERICA 97, 123 (Alfred Blumstein & Joel Wallman eds., rev. ed. 2006) (estimating that roughly 75% of the crime drop cannot be attributed to mass incarceration);

The parallel experience of other industrialized nations suggest even greater skepticism of the causal impact of mass incarceration on the American crime drop. As Professor Franklin Zimring has explained, Canada experienced an “almost perfectly matched” crime drop during the same period, yet “an explosive expansion of incarceration, [and] added police”—two of the leading potential causes of the crime drop in the United States—“didn’t happen in Canada.”<sup>49</sup> The same dynamic has unfolded across Europe: “[S]entencing policies in Europe as a whole are considerably less punitive than in the USA and yet crime is falling just as steeply in Europe as it is in the USA.”<sup>50</sup> In light of the larger international context, criminologists have dismissed as “somewhat parochial” efforts to explain the crime drop in terms of mass incarceration, stricter law enforcement, or other factors unique to the United States.<sup>51</sup>

Moreover, even if mass imprisonment as a whole contributed to some degree to the American crime drop, it strains credulity to think *federal* enforcement efforts were a significant factor given the size of the federal footprint in criminal law enforcement. The overwhelming majority of American prisoners are in *state* correctional facilities; “only 11% of US prisoners are in the federal system.”<sup>52</sup> The potential public-safety impact of such a small share of the national prison population is even smaller given how little federal enforcement activity is directed against violent crime—including crimes as serious as terrorism and murder. In 2011, for example, *less than 5%* of offenders prosecuted in federal court were charged with crimes of violence, broken down as follows: “murder (0.1%), assault (1%), kidnapping (0.1%), robbery (1%), carjacking (0.1%), and terrorism

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Steven D. Leavitt, *Understanding Why Crime Fell in the 1990s: Four Factors that Explain the Decline and Six that Do Not*, 18 J. ECON. PERSP. 163, 178–79 (2004) (“[T]he increase in incarceration over the 1990s can account for a reduction in crime of approximately 12 percent for [homicide and violent crime] and 8 percent for property crime, or about one-third of the observed decline in crime.”)

49. FRANKLIN E. ZIMRING, *THE GREAT AMERICAN CRIME DECLINE 199–200* (2007).

50. Jan van Dijk & Andromachi Tseloni, *Global Overview: International Trends in Victimization and Recorded Crime*, in *THE INTERNATIONAL CRIME DROP: NEW DIRECTIONS IN RESEARCH* 11, 23 (2012) (“No relationship between the severity of sentencing of countries and trends in national levels of crime is therefore in evidence.”).

51. Farrell et al., *supra* note 47, at 423. For an intriguing argument that crime rates have risen and fallen throughout Western nations in tandem for centuries, making country-specific crime policy “pretty much beside the point in terms of crime rates and patterns,” see Michael Tonry, *Why Crime Rates Are Falling Throughout the Western World*, 43 CRIME & JUST. 1, 3 (2014).

52. John F. Pfaff, *The War on Drugs and Prison Growth: Limited Importance, Limited Legislative Options*, 52 HARV. J. LEGIS. 173, 180 n.12 (2015).

(0%).”<sup>53</sup> Similarly, the percentage of federal inmates incarcerated for crimes of violence has hovered at or near 7% for the last few years; it has not cracked 10% in the last sixteen years.<sup>54</sup> In light of such small numbers, it is highly unlikely that federal prosecution played any role in the recent drop in violent crime.

Furthermore, the so-called war on drugs undermines any suggestion that the greater federal presence has made much of a difference in reducing crime as a whole. Today, the federal government alone spends \$15 billion annually on drug control, for a total of \$1 trillion since 1971.<sup>55</sup> Illegal drugs remain the single largest area of federal criminal enforcement, accounting for approximately 30% of the prosecutions in fiscal 2017.<sup>56</sup> Not surprisingly, given the severity of federal drug penalties, drug offenders have occupied 50% to almost 60% of the spaces in federal prisons over the last decade, showing that the war on drugs has indeed been a leading driver of mass incarceration at the federal level.<sup>57</sup>

Despite these enormous efforts at the federal level to eradicate illegal drug use, few outside observers would contend the war on drugs has been anything but a monumental failure. According to a RAND Corporation report, “[t]he overall trend in cocaine and heroin retail prices during most of the past two decades has been downward (after adjusting for potency),” which “suggests *greater* availability of drugs on the street in the United States, not less.”<sup>58</sup> As one would expect, access to illegal drugs at cheaper prices—not to mention a national drug-control strategy that heavily prioritizes

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53. Klein & Grobey, *supra* note 13, at 21. The vast majority of today’s federal prosecutions involve immigration, drug, and fraud offenses, which together account for almost three-quarters of the annual caseload. *See id.* at 21.

54. E. ANN CARSON, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, NCJ 24782, PRISONERS IN 2013, at 17 tbl.16 (2014). The data here may not tell the full story, insofar as sentences for immigration, weapons possession, or other nonviolent offenses can serve to incapacitate persons who might otherwise commit violent crimes. The point is that federal enforcers simply do not target violent crime, and the vast majority of prisoners in federal correctional facilities are not being detained for crimes of violence.

55. THE WAR ON DRUGS: WASTING BILLIONS AND UNDERMINING ECONOMIES 3 (2013), <http://www.countthecosts.org/sites/default/files/Economics-briefing.pdf>.

56. SCHMITT & SYCKES, *supra* note 43, at 2.

57. *See* CARSON, *supra* note 54; *see also* MARC MAUER & RYAN S. KING, THE SENTENCING PROJECT, A 25-YEAR QUAGMIRE: THE WAR ON DRUGS AND ITS IMPACT ON AMERICAN SOCIETY 7–9 (2007) (discussing harsh federal sentencing rules for drug offenders and their impact).

58. JONATHAN P. CAULKINS ET AL., RAND DRUG POLICY RESEARCH CTR., HOW GOES THE “WAR ON DRUGS”? AN ASSESSMENT OF U.S. DRUG PROBLEMS AND POLICY 7 (2005).



punishment over treatment—has resulted in increased drug use, even among minors, and drug-abuse rates that dwarf those of other nations.<sup>59</sup> The war on drugs, in short, is no nearer to victory than when it was declared decades ago.

The failure of the drug war shows the folly of the federalization of criminal law. For decades, the federal government has devoted enormous resources and enforcement efforts to the drug problem and filled federal prisons with traffickers and users of illegal drugs, yet illegal drug use remains rampant nationwide, if not worse than ever.<sup>60</sup> If such sustained federal attention and enormous resources have failed to achieve any meaningful progress toward the stated goal of a drug-free America, there is every reason to doubt the effectiveness of federal enforcement efforts to make a dent in violent crime—which, despite an abundance of available federal laws, federal enforcers do little to prevent.<sup>61</sup>

That said, there is a vital role for federal criminal law to play in protecting the public against the predation of criminals. To be impactful, federal enforcers should *complement*, not *duplicate*, state enforcement efforts. In areas of overlapping enforcement authority, federal prosecutors should stop “playing district attorney,” which they do when pursuing the same kinds of offenses and offenders as state prosecutors and police. Instead, federal enforcers should focus on crimes that are not being, or by their nature cannot be, handled

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59. As Professor Alex Kreit has explained,

Perhaps the starkest evidence that our current strategy has failed came in the first comparison of drug use rates across countries, which was undertaken by the World Health Organization . . . [D]espite having the most punitive policies, the United States had the highest rates of illegal drug use of the seventeen countries included in the study.

Alex Kreit, *Beyond the Prohibition Debate: Thoughts on Federal Drug Laws in an Age of State Reforms*, 13 CHAP. L. REV. 555, 558 (2010) (citing Louisa Degenhardt et al., *Toward a Global View of Alcohol, Tobacco, Cannabis, and Cocaine Use: Findings from the WHO World Mental Health Surveys*, 5 PLOS MED. 1053, 1057 tbl.2, 1062 (2008)). The 2014 National Survey on Drug Use and Health found that the percentage of Americans, aged twelve or older, who used an illicit drug in 2014 was higher than in every year between 2002 and 2013, driven primarily by increased heroin and marijuana use and widespread opiate abuse. See CTR. FOR BEHAVIORAL HEALTH STATISTICS AND QUALITY, RESULTS FROM THE 2015 NATIONAL SURVEY ON DRUG USE AND HEALTH tbl.1.1B (2016).

60. See CAULKINS ET AL., *supra* note 58, at 7.

61. See, e.g., 18 U.S.C. § 81 (2012) (arson); *id.* § 36 (drug-related murders); *id.* §§ 245, 249 (hate crimes); *id.* § 875 (threats related to interstate communications); *id.* § 924(c) (use of firearms during crimes of violence or drug trafficking); *id.* § 1201 (kidnapping); *id.* § 1951 (robbery, extortion, and violence in furtherance thereof); *id.* § 1958 (murder for hire); *id.* § 1959 (violence in aid of racketeering); *id.* § 2113 (bank robbery); *id.* § 2119 (carjacking); *id.* § 2251 (murder involving sex offenses against children); *id.* §§ 2261, 2261A (domestic violence and stalking). *But see* Pfaff, *supra* note 52, at 180 n.12 (asserting that “the federal system disproportionately targets drug offenders due to its limited criminal jurisdiction”).

appropriately at the state level—such as terrorism, major international drug trafficking, corruption, and civil-rights violations by police.<sup>62</sup> The band-aid solution of new federal criminal laws and increased penalties and enforcement does nothing except allow publicity-seeking federal officials to take unwarranted credit for being responsive to genuine public-safety needs.

### *B. Federalization Causes Serious Problems*

In addition to producing little discernible public-safety benefit, the federalization of criminal law has created serious problems that tend to be overlooked in a field characterized by endless moral condemnation of criminals and blind faith in the power of criminal punishment to solve even the most intractable social problems. As a direct result of federalization, badly needed federal enforcement resources have been, and continue to be, squandered in areas state authorities can handle effectively on their own. This serial misallocation of federal enforcement resources has come at the expense of areas where federal resources could be more effectively deployed.

This “ready-fire-aim!” enforcement approach—“strategy” would be too strong of a word—is driven by three factors inherent in a “federalized” system of criminal law. The first is the virtually limitless scope of federal criminal law, which enables federal prosecutors to pursue all but the most localized and trivial of crimes.<sup>63</sup> The second factor is the availability of considerably higher sentences in federal court for offenses that otherwise would receive more appropriate sentences within the state system.<sup>64</sup> The third factor is uncontrolled prosecutorial discretion allowing individual federal prosecutors nationwide the flexibility to pursue and decline the

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62. Organized crime illustrates the positive impact that a wise deployment of federal resources can have for public safety. Because of the international nature of the mafia and other large-scale organized criminal syndicates, not to mention their penchant to use bribery, extortion, and other illegal means to corrupt state and local officials, the DOJ made it a priority in the 1960s to eradicate organized crime. See John C. Jeffries, Jr. & John Gleeson, *The Federalization of Organized Crime: Advantages of Federal Prosecution*, 46 HASTINGS L.J. 1095, 1125–26 (1995); see also Smith, *supra* note 22, at 911 n.77. These efforts achieved “enormous successes” because federal prosecutors “are peculiarly well equipped to combat organized crime.” Jeffries & Gleeson, *supra*, at 1126. The federal government has no such comparative advantage when it comes to street crime or low-level drug offenses.

63. See *supra* Section II.A.

64. See *supra* Section II.B.

cases they wish, without checks from other branches or adherence to binding guidelines constraining the exercise of discretion.<sup>65</sup>

As explained below, these features of our federalized system combine to produce a variety of adverse effects. First, they invite arbitrariness by federal prosecutors in making their all-important charging decisions. Second, and relatedly, instead of complementing the crime-fighting efforts of state enforcement officials, boundless charging authority at the federal level will sometimes be used to *undermine* state public-safety efforts. Third, federalization allows prosecutors to impose negative externalities on the federal judiciary and prison system in the form of significant increases in federal caseloads and prisoner volume, increases that simultaneously threaten the quality of justice meted out in the federal courts and undermine the safety and effectiveness of federal prisons. Thus, in addition to offering an illusory upside, federalization has important downsides—downsides that warrant a considerably narrower, better defined federal criminal code, more defensible sentencing policies, and a more transparent and coordinated approach to federal enforcement discretion.

### *1. Arbitrary Prosecutorial Discretion*

A regime such as ours, in which federal prosecutors have virtually limitless discretion to charge suspects who committed crimes cognizable under state law, invites arbitrariness. By virtue of the substantial difference in the severity of sanctions available in federal court as compared to most state courts,<sup>66</sup> the few offenders targeted for federal prosecution will typically be punished far more severely than their many similarly situated counterparts in the state system. The incremental, stringent punishment convicted federal offenders receive is due entirely to a federal prosecutor's charging decision, not the severity of the offender's crime or criminal history.

It goes without saying that harsher federal sanctions would be warranted if the persons selected for federal prosecution were categorically more dangerous or blameworthy than prisoners sentenced in state court. That,

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65. As Professor Rachel Barkow has explained, In the current era dominated by pleas instead of trials, federal prosecutors are not merely law enforcers. They are the final adjudicators in the vast majority of cases. . . . In a national government whose hallmark is supposed to be the separation of powers, federal prosecutors are a glaring and dangerous exception. They have the authority to take away liberty, yet they are often the final judges in their own cases.

Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 871 (2009) (footnotes omitted).

66. See Smith, *supra* note 22, at 893–96.

however, is not the case. Many federal prisoners are no worse than those who committed similar offenses yet were lucky enough to escape federal prosecution. Indeed, many federal prisoners may well be *less* culpable than their counterparts in the state system.

To begin with, federal prisoners are far less violent, as a class, than state prisoners. The percentage of federal offenders in prison for violent offenses is in the single digits and has been for years.<sup>67</sup> By contrast, state prisons are mostly filled with seriously violent offenders, such as murderers, rapists, and robbers.<sup>68</sup> This is significant because the public tends to view crimes of violence as more serious than nonviolent offenses.

Moreover, contrary to popular belief, many drug traffickers convicted in federal court are nonviolent, relatively small-time dealers—not “drug kingpins” or career criminals.<sup>69</sup> U.S. Sentencing Commission data from fiscal year 2017 is instructive here. Only 19.4% of federal drug cases involved a weapon.<sup>70</sup> Almost two-thirds of persons convicted of offenses involving powder cocaine (63.8%) and marijuana (63.3%) had the lowest criminal history possible under the Sentencing Guidelines: Category I.<sup>71</sup> Additionally, 21% of defendants convicted of drug trafficking were sentenced below the applicable guidelines range based on a judicial finding that they played only a “minor or minimal” role in the drug offense.<sup>72</sup> Finally, of the approximately

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67. See *supra* notes 45–49 and accompanying text.

68. See E. ANN CARSON & ELIZABETH ANDERSON, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 250229, PRISONERS IN 2015, at 14 tbl.9 (2016), <https://www.bjs.gov/content/pub/pdf/p15.pdf> [<https://perma.cc/8YAR-VZHB>].

69. See *id.* at 7–9. See generally PEW CHARITABLE TRS., FEDERAL DRUG SENTENCING LAWS BRING HIGH COST, LOW RETURN (2015), [https://www.pewtrusts.org/-/media/assets/2015/08/federal\\_drug\\_sentencing\\_laws\\_bring\\_high\\_cost\\_low\\_return.pdf](https://www.pewtrusts.org/-/media/assets/2015/08/federal_drug_sentencing_laws_bring_high_cost_low_return.pdf) [<https://perma.cc/6S5K-R4WH>].

70. SCHMITT & SYCKES, *supra* note 43, at 8. There is no empirical support for the notion that drug use and trafficking are inherently correlated with violence. See Shima Baradaran, *Drugs and Violence*, 88 S. CAL. L. REV. 227, 271–72 (2015) (marshalling empirical and social science data showing that there is no causal link between drug crimes and violence). As with many of the other negative social and economic costs government officials attribute to illegal drug use, the violence surrounding the drug trade would appear to be the result of drug *criminalization*. *Id.* at 288–90. See generally STEVEN B. DUKE & ALBERT C. GROSS, AMERICA'S LONGEST WAR: RETHINKING OUR TRAGIC CRUSADE AGAINST DRUGS (1993); Jeffrey A. Miron, *Violence, Guns, and Drugs: A Cross-Country Analysis*, 44 J.L. & ECON. 615 (2001).

71. See SCHMITT & SYCKES, *supra* note 43, at 9.

72. *Id.* According to a 2015 report, nearly half (48.1%) of federal drug offenders in 2009 were “street-level dealers” or below, with the highest-level traffickers (“high-level suppliers” and “importers”) comprising only 11%. PEW CHARITABLE TRS., *supra* note 69,

19,000 defendants convicted of federal drug offenses, 32.3% had such strong grounds for leniency that they qualified for reduced sentences under the “safety valve” statute.<sup>73</sup>

In light of the above data, federal offenders are not categorically worse than those in the state system. Many criminal cases are filed in federal court not because they truly deserve to be based on the seriousness of the defendant’s offense or criminal history. Instead, they are apparently in federal court simply because federal prosecution will generate more severe punishment than would be imposed in state court. Indeed, the importance of the penalty available under federal law is apparent on the face of longstanding DOJ charging policies. Those policies specifically direct prosecutors considering federal charges to weigh, among other factors, the “nature and seriousness of the offense” as well as “the probable sentence . . . if the person is convicted [in federal court]”—directives which make both the maximum and likely punishments significant factors bearing on the exercise of charging discretion.<sup>74</sup>

The relevance of comparatively severe federal sentencing policies to the exercise of federal criminal jurisdiction is confirmed by the fact that many cases are referred to federal prosecutors by state authorities precisely *because* federal law affords much stiffer penalties than state law. Most federal cases in areas of overlapping federal-state authority begin with arrests by state and local police. Referrals from local authorities are critical because federal prosecutors “generally will lack the informational resources to pursue offenses in these areas without State assistance.”<sup>75</sup> This results in local

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at 6 fig.4. Fully two-thirds of federal marijuana convicts in 2009 “were ‘couriers’ or ‘mules,’ the lowest-level trafficking roles.” *Id.* at 5.

73. U.S. SENTENCING COMM’N, 2017 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 115 tbl.44 (22d ed. 2018) [hereinafter U.S. SENTENCING COMM’N, 2017 SOURCEBOOK] (noting that 13% of drug offenders faced a mandatory minimum but qualified for safety-valve relief under 18 U.S.C. § 3553(f) (2012) and that another 19.3% qualified for safety-valve relief but faced no mandatory minimum). The fact that Congress saw the need to enact the safety valve provision in 1994 shows that *even Congress* recognizes that federal prosecutors routinely misuse against low-level offenders harsh drug penalties intended for major players in the drug trade. This phenomenon, of course, is hardly unique to drug crimes, which is one reason the Sentencing Commission has long opposed mandatory minimums. See U.S. SENTENCING COMM’N, SPECIAL REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 30–31 (1991).

74. U.S. DEP’T. OF JUSTICE, *supra* note 26, § 9-27.230 (setting forth principles of federal prosecution). Once cases are selected for federal prosecution, the DOJ requires prosecutors to charge and seek to convict on the offenses that would result in the highest sentence. See Stephen F. Smith, *Proportional Mens Rea*, 46 AM. CRIM. L. REV. 127, 153–54 (2009) (discussing longstanding policy mandates concerning charging and sentencing). Although the Obama Administration had rescinded the policy as part of its “Smart on Crime” initiative, the Trump Administration has reinstated it. See Rebecca R. Ruiz, *Sessions Tells Prosecutors To Seek Harsher Penalties*, N.Y. TIMES, May 12, 2017, at A15.

75. Richman, *supra* note 1, at 93.

authorities “shopping” their cases to federal prosecutors in many situations where federal law would provide greater punishment than state law.<sup>76</sup> Seen in this light, it is unsurprising that drug and firearms offenses, which carry unusually harsh punishments—including strict mandatory minimums—are perennially at or near the top of federal enforcement activity.<sup>77</sup>

To be sure, penalties will not always be determinative of the charging decision in areas of overlapping criminal jurisdiction. There are categories of cases where federal prosecution is more or less certain, irrespective of penalty, based on the nature or gravity of the offense. Obvious examples include foreign terrorist plots, massive corporate frauds on the scale of Enron,<sup>78</sup> or large-scale drug-trafficking operations.<sup>79</sup> Similarly, there are categories of offenses, such as carjacking, failure to pay child support, drug-induced rape, and theft of cellular phone service—and, yes, there are federal criminal laws on each of these subjects—that could be brought federally but almost invariably will be left to state prosecution.<sup>80</sup>

76. See Lisa L. Miller & James Eisenstein, *The Federal/State Criminal Prosecution Nexus: A Case Study in Cooperation and Discretion*, 30 LAW & SOC. INQUIRY 239, 244–54 (2005) (discussing the role of local police and state prosecutors in the filing of federal charges). As a police command officer from Richmond, Virginia memorably described the decisional process concerning keeping cases or sending them to federal court: “It’s like buying a car: we’re going to the place we feel we can get the best deal. We shop around.” Richman, *supra* note 1, at 95 (citing Bonner, Charles D. Bonner, Comment, *The Federalization of Crime: Too Much of a Good Thing?*, 32 U. RICH. L. REV. 905, 927, 930 (1998)).

77. See, e.g., Miller & Eisenstein, *supra* note 76, at 243 (“[T]he federal criminal justice system is widely regarded as imposing longer sentences than the states for certain types of crimes, particularly firearms and drug offenses . . . .”) (citation omitted).

78. See *supra* p. 38.

79. See Lauren M. Ouziel, *Legitimacy and Federal Criminal Enforcement Power*, 123 YALE L.J. 2236, 2251–52 nn.50–51 (2014) (discussing examples of federal drug and gun prosecutions in exceptional situations where state law afforded higher penalties).

80. See William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 531–33 (2001) (discussing the plethora of “symbolic” federal crimes that are almost never enforced). Unless, of course, a federal prosecutor with too much spare time (and not enough common sense) rolls the dice on a creative legal theory transforming a minor offense into a major federal felony. See generally, e.g., *Yates v. United States*, 135 S. Ct. 1074 (2015) (reversing conviction under Sarbanes-Oxley’s document-preservation provision of a commercial fisherman who cast overboard undersized fish taken in violation of federal fish size rules); *Bond v. United States*, 134 S. Ct. 2077 (2014) (reversing conviction under federal law prohibiting chemical weapons of a jilted lover who put a mild irritant on the doorknob of her husband’s paramour). The fact that the federal government ultimately lost on these abusive charges does nothing to redress the substantial costs and burdens imposed on the accused and the court system of prolonged trials and appeals concerning baseless charges which should never have been brought.

Between these polar extremes, however, are many thousands of cases nationwide that could easily go either way. These include cases involving low-level drug offenses, small-time frauds,<sup>81</sup> corporate wrongs,<sup>82</sup> and drug sales.<sup>83</sup> It is in *these* cases that comparatively severe federal penalties—such as strict mandatory minimums, the enhanced sentencing rule for “crack” cocaine offenses,<sup>84</sup> and unusually broad forfeiture rules that have been graded as “among the nation’s worst”<sup>85</sup>—can and often do tilt the balance in favor of federal prosecution.

Attorney General Eric Holder’s 2013 “Smart on Crime” initiative, recently reversed by the Trump Administration, recognized that, as this Article contends, the public interest demands “a significant change in [the federal

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81. In 2017, slightly more than 6,000 fraud cases were prosecuted federally, making fraud the fourth-largest area of enforcement activity behind drugs, immigration, and firearms offenses. SCHMITT & SYCKES, *supra* note 43, at 2–3. Although some were large-scale frauds with enormous losses, 170 cases involved *no loss whatsoever*. *Id.* at 11. With a “median loss amount of \$246,553,” it is clear that many involved fairly small losses to victims. *Id.* Indeed, almost a quarter (23.7%) of fraud defendants were not required to pay any restitution. *See* U.S. SENTENCING COMM’N, 2017 SOURCEBOOK, *supra* note 73, at 36 tbl.15.

82. Of the 131 organizational defendants (corporations and partnerships) sentenced in federal court in fiscal year 2017, almost three-quarters (93) were not required to pay restitution to victims, and 17 paid *neither* restitution nor even a fine. SCHMITT & SYCKES, *supra* note 43, at 11; U.S. SENTENCING COMM’N, 2017 SOURCEBOOK, *supra* note 73, at 133 tbl.53. Only 29 of the 131 convicted organizations were ordered to implement compliance or ethics programs. *See* U.S. SENTENCING COMM’N, 2017 SOURCEBOOK, *supra* note 73, at 133. This is significant given the recent emphasis on using federal prosecution of corporations as a mechanism for reforming corporate cultures believed to facilitate ongoing criminal activity by corporate officers and employees. *See* Garrett, *supra* note 27, at 854–55.

83. Almost half of the persons convicted of federal drug offenses in 2009 were “street-level dealers” or below; the highest-level traffickers (“high-level suppliers” and “importers”), by contrast, comprised only 11%. *See supra* note 72.

84. Even though both involve the same drug, for decades federal law mandated that judges treat each gram of “crack” cocaine at sentencing as equivalent to one hundred grams of powder cocaine, a mandate which subjected federal “crack” offenders (who are mostly black) to considerably longer sentences than those convicted of offenses involving powder cocaine (who are predominately white). *See* U.S. SENTENCING COMM’N, SPECIAL REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 1–2 (1995). The 100-to-1 powder-to-crack sentencing ratio was lowered to a less draconian (but equally arbitrary and discriminatory) 18-to-1 ratio in 2010. *See* Fair Sentencing Act of 2010, Pub. L. No. 111-220, § 2, 124 Stat. 2372, 2372 (2010) (codified as amended at 21 U.S.C. § 841(b)(1) (2012)).

85. DICK M. CARPENTER ET AL., INST. FOR JUSTICE, POLICING FOR PROFIT: THE ABUSE OF CIVIL FORFEITURE 6 (2d ed. 2015). The DOJ uses forfeiture actions in federal court to assist (it is tempting to say “aid and abet”) their state-system counterparts in getting around state law limits on a troubling phenomenon known as “policing for profit”—and to get a piece of the action in the process. Euphemistically termed “equitable sharing,” the DOJ initiates proceedings to have assets seized by participating state and local police agencies declared forfeited based on federal criminal violations and then returns the proceeds to the arresting agency, minus the DOJ’s 20% “skim.” *Id.* at 25–31.

government's] approach to enforcing the nation's laws."<sup>86</sup> The proposal called upon federal prosecutors to develop more-restrictive charging guidelines, limit their use of drug mandatory minimums against lower-level offenders, and pursue alternatives to imprisonment in suitable cases.<sup>87</sup> Though a step in the right direction, only drastic, long-overdue statutory revision and comprehensive sentencing reform can guarantee a more effective redeployment of federal crime-fighting resources in the face of opposition from ideologues who prefer to be tough—rather than *smart*—on crime.

Although the present state of affairs of disproportionately severe federal penalties results in unequal treatment of similarly situated offenders,<sup>88</sup> far more is at stake than mere fairness. In a system of incredibly broad laws and uncontrolled, decentralized exercises of prosecutorial discretion, it is exceedingly difficult to achieve the optimal mix of federal and state enforcement when unusually severe federal penalties incentivize federal prosecutors to duplicate the work of state prosecutors. Federal prosecutors can best promote public safety in areas of overlap with state criminal law by focusing their efforts on offenses that defy adequate response within the state system.<sup>89</sup> The value added of federal prosecution can no longer be regarded as higher penalties, especially for low-level drug and other comparatively minor offenses, in situations where local authorities are perfectly willing and able to act.

Counterintuitive though it may seem to defenders of the status quo, the position that federal enforcers should focus on distinctly national threats should be obvious to all after the terrorist attacks of September 11, 2001, claimed the lives of thousands of innocent Americans. During the 1990s, the local offices of the Federal Bureau of Investigation (FBI) prioritized “traditional crimes such as white-collar offenses and those pertaining to drugs and gangs” over counterterrorism, and “very little of the sprawling U.S. law enforcement community was engaged in countering terrorism.”<sup>90</sup> Congress likewise focused attention and resources on fighting the last

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86. U.S. DEP'T OF JUSTICE, SMART ON CRIME: REFORMING THE CRIMINAL JUSTICE SYSTEM FOR THE 21ST CENTURY 1–2 (2013).

87. *Id.* 2–4.

88. *See supra* notes 40, 66.

89. By way of example, such offenses would include crimes involving terrorism, organized-crime syndicates, large-scale trafficking in illegal drugs and firearms, massive frauds, violations of federal civil rights, and public corruption.

90. NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT 74, 82 (2004).



war—the so-called “war” on crime—and did not see, until it was much too late, that global terrorists had declared war against the United States and were poised to strike at our homeland.<sup>91</sup> Even when terrorism finally came into focus as a serious threat, FBI leaders in Washington were “unwilling to shift resources to terrorism from other areas such as violent crime and drug enforcement” and allowed local offices to continue with their emphasis on crimes where progress can be measured—and careers advanced—in terms of “numbers of arrests, indictments, prosecutions, and convictions.”<sup>92</sup>

Then 9/11 happened. After the Twin Towers came tumbling down and the Pentagon stood in flames just outside the nation’s capital, the work of a highly organized and well-financed global terrorist network, Attorney General John Ashcroft had an epiphany: “We cannot do everything we once did because *our lives now depend on us doing a few things very well . . .* The [DOJ] will not be all things to all people.”<sup>93</sup>

Although the FBI changed considerably after 9/11 to give priority to disrupting terrorist plots against U.S. interests worldwide,<sup>94</sup> old habits die hard elsewhere in the government. Reminiscent of Nero fiddling as Rome burned, the federal government continues to spend precious time and resources racking up scores of easy convictions in relatively minor drug, gun, and fraud cases, not to mention cases involving asylum-seekers and others apprehended attempting to enter the United States illegally through Mexico.<sup>95</sup> All the while, impoverished minority residents of Chicago and other major cities endure unimaginable levels of gun

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91. See *id.* at 104–07.

92. *Id.* at 74, 76.

93. Jess Bravin & Chris Adams, *Ashcroft Unveils Restructuring of FBI, Immigration Agencies*, WALL ST. J. (Nov. 9, 2001, 12:01 AM), <https://www.wsj.com/articles/SB1005238264725888360> (emphasis added).

94. See DAVID M. WALKER, U.S. GEN. ACCOUNTING OFFICE, GAO-03-759T, FBI REORGANIZATION: PROGRESS MADE IN EFFORTS TO TRANSFORM, BUT MAJOR CHALLENGES CONTINUE 2–18 (2003) (explaining the internal changes made within the FBI to better defend the public against the threat of terrorism).

95. In April 2018, the Attorney General announced a policy of “zero tolerance” for illegal entry across the Southwest border, promising to visit upon offenders “the full prosecutorial powers of the Department of Justice.” *Attorney General Announces Zero-Tolerance Policy for Criminal Illegal Entry*, U.S. DEP’T OF JUST. (Apr. 6, 2018), <https://www.justice.gov/opa/pr/attorney-general-announces-zero-tolerance-policy-criminal-illegal-entry> [<https://perma.cc/K65K-KB6N>]. The immediate result was an almost 45% jump in the number of illegal-entry prosecutions filed the previous month, with 9,216 new immigration prosecutions filed in May 2018. “Zero Tolerance” at the Border: Rhetoric vs. Reality, TRAC IMMIGR. (July 24, 2018), <https://trac.syr.edu/immigration/reports/520/> [<https://perma.cc/QRN8-R2FN>]. Given that U.S. Customs and Border Protection detained more than 40,000 people illegally crossing the Southwest border in May 2018 alone, it is clear that the “zero tolerance” policy would vastly expand the federal criminal docket and prison population if fully implemented. *Id.*

violence,<sup>96</sup> and the nation reels not only from an unprecedented opioid epidemic<sup>97</sup> but also a growing terrorist threat from white supremacists and other far-right extremists within the United States.<sup>98</sup> This essential disconnect between the nation's most pressing public-safety needs and federal enforcement activity will continue as long as Congress allows federal prosecutors to bring the cases that generate the highest sentences with the least amount of effort, instead of the cases where federal prosecution is truly essential to safeguard the public.

## 2. Interference with State-Level Enforcement

In light of the above discussion, it is difficult to contend that the federalization of criminal law has done much to make the nation safer. Nevertheless, it might be possible to defend the broad scope of federal criminal law if it bolsters the effectiveness of *state* enforcement. Episodic and comparatively rare though it may be in light of the total number of prosecutions nationwide, the argument would go, federal prosecution of

96. See Aamer Madhani, *Chicago, After Trump's 'Carnage' Comment: Show Us the Money*, USA TODAY (Jan. 26, 2017, 4:53 PM), <https://www.usatoday.com/story/news/2017/01/25/chicago-trump-send-money-vioence/97045356/> [<https://perma.cc/U8CE-9YL7>] (reporting Chicago had 762 murders and 4,300 shootings in 2016—the most “in nearly two decades”).

97. See Rose A. Rudd et al., *Increases in Drug and Opioid-Involved Overdose Deaths—United States, 2010–2015*, 65 MORBIDITY & MORTALITY WKLY. REP. 1445, 1445 (2016) (“During 2015, drug overdoses accounted for 52,404 U.S. deaths, including 33,091 (63.1%) that involved an opioid.”). By the end of 2017, the number of fatal overdoses had jumped to 70,237. See HOLLY HEDEGAARD, ET AL., NAT'L CTR. FOR HEALTH STATISTICS, DRUG OVERDOSE DEATHS IN THE UNITED STATES, 1999–2017 2 (2018), <https://www.cdc.gov/nchs/data/databriefs/db329-h.pdf> [<https://perma.cc/37PN-F2V5>].

98. See generally SETH G. JONES, CTR. FOR STRATEGIC & INT'L STUDIES, THE RISE OF FAR-RIGHT EXTREMISM IN THE UNITED STATES (2018). For all the attention devoted to Islamic terrorism since 9/11, *almost two-thirds* of terror attacks carried out domestically over the last decade were committed by U.S. citizens on the far-right. As a recent news account explains,

White supremacists and other far-right extremists have killed far more people since Sept. 11, 2001, than any other category of domestic extremist. The Anti-Defamation League's Center on Extremism has reported that 71 percent of the extremist-related fatalities in the United States between 2008 and 2017 were committed by members of the far right or white-supremacist movements. Islamic extremists were responsible for just 26 percent.

Janet Reitman, *U.S. Law Enforcement Failed to See the Threat of White Nationalism. Now They Don't Know How to Stop It*, N.Y. TIMES MAG. (Nov. 3, 2018), <https://www.nytimes.com/2018/11/03/magazine/FBI-charlottesville-white-nationalism-far-right.html> [<https://perma.cc/LZ3E-ZMA3>].

cases involving drugs and guns can be a useful means of relieving resource constraints on an overloaded state system and encouraging suspects to plead guilty in state court to avoid federal prosecution.

The potential defense of resource-conservation is surprisingly weak. Federal prosecution on the order of roughly 67,000 cases a year—the number brought in federal court in the most recent fiscal year—would be of little use in conserving the resources of state enforcers.<sup>99</sup> Divided over fifty states, the reduced caseload for each state would be an average of 1,340 cases at most, and, realistically, considerably less given that roughly a third of the federal prosecutions last year involved immigration and other crimes within the exclusive jurisdiction of the federal government.<sup>100</sup> It is true that federal prosecution might help relieve state prison congestion at the margin, but the simple fact is that state prison systems are better able to absorb the additional volume than the perennially overcrowded federal system.<sup>101</sup> No matter how resource-constrained state criminal justice may be, taking such a small number of cases and prisoners into the federal system each year will be of little or no consequence to states—and, in any event, the most logical federal response to inadequate state resources would be to provide additional funding.<sup>102</sup>

The argument that the effectiveness of state law enforcement depends on the *in terrorem* effect of draconian federal penalties fares no better. Strict federal mandatory minimum penalties for drug and gun offenses were not enacted until the 1980s; previously, federal mandatory minimums were quite modest and mostly restricted to crimes of peculiar federal concern.<sup>103</sup> The trend toward sky-high guilty plea rates in the state system, however,

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99. See SCHMITT & SYCKES, *supra* note 43.

100. The single largest category of exclusive federal jurisdiction—immigration cases—accounted for almost 31% of the federal criminal docket in fiscal year 2017. See *id.* at 2.

101. The federal prison system has worse levels of overcrowding than all but four states. See CARSON & ANDERSON, *supra* note 68, at app. tbl.1. Moreover, the kinds of nonviolent offenses that result in significant terms of imprisonment in the federal system might well result in little or no prison time in the state system because of more flexible sentencing policies and an overriding emphasis on conserving space in state prisons for violent offenders.

102. Although the funding for state and local law enforcement overwhelmingly comes from states, supplemental federal funding is both substantial and longstanding. See Rachel A. Harmon, *Federal Programs and the Real Costs of Policing*, 90 N.Y.U. L. REV. 870, 876–91 (2015).

103. See U.S. SENTENCING COMM’N, MANDATORY MINIMUM, *supra* note 43, at 23–26 (tracing the enactment of strict drug and gun mandatory minimums to key legislation passed during the 1980s). As the Sentencing Commission has explained, before 1951, Congress adhered to a “policy of disfavoring mandatory minimum penalties to combat . . . drug trafficking and related crime,” and “mandatory minimum penalties typically punished offenses concerning treason, murder, piracy, rape, slave trafficking, internal revenue collection, and counterfeiting.” *Id.* at 22. Indeed, legislation passed in 1970 “repealed nearly all mandatory minimum penalties for drug offenses.” *Id.*

took root—and, indeed, reached stratospheric levels—long before the federal government's adoption of harsh sentencing policies. As Professor Stephen Schulhofer has explained, guilty-plea rates nationwide had already reached ninety percent by the 1950s, and “any increase [since the 1960s] seems to be on the order of a 5% shift (roughly from 90% to 95%).”<sup>104</sup> Thus, strict federal penalties cannot be defended as essential leverage for police and state prosecutors to obtain guilty pleas in state court.

The more fundamental response to the line of argument that the federalization of criminal law promotes effective state enforcement is that federal involvement can actually *undermine* the efforts of state-level enforcers. Once this point is understood, it can no longer be assumed that the two systems operate independently of one another, with seamless cooperation in the wide areas of overlapping authority. The expansive reach of federal criminal law, combined with the potential for robust enforcement at the federal level, can operate as an impediment to important public-safety efforts at the state level.

The clearest example of federal interference in state enforcement involves marijuana. Without question, there is a strong trend at the state level to decriminalize marijuana. More than thirty states have legalized marijuana use in some form.<sup>105</sup> Within the last few years, at least four states—California, Maine, Massachusetts, and Nevada—completely legalized marijuana, even for purely recreational use.<sup>106</sup> In place of black markets controlled by criminal elements, these reformist states have brought the manufacture and sale of marijuana out into the open, where it can be regulated for the protection of the public.

At the very least, state laws liberalizing marijuana policy can be understood as signals that police should switch their interdiction efforts away from marijuana to the kind of drugs that pose serious risks of overdoses and addiction. Potentially, these laws represent the first step toward a comprehensive harm-reduction approach to drug control, substituting a more promising

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104. Stephen J. Schulhofer, *Criminal Justice, Local Democracy, and Constitutional Rights*, 111 MICH. L. REV. 1045, 1064 (2013). As Schulhofer notes, scholarly complaints about “vanishing” criminal trials because of widespread guilty pleas date back to the 1920s. *See id.*

105. *See* ROBERT A. MIKOS, MARIJUANA LAW, POLICY, AND AUTHORITY 3 fig. 1.1 (2017).

106. Ben Gilbert, *4 States Just Voted to Make Marijuana Completely Legal—Here's What We Need to Know*, BUS. INSIDER (Nov. 9, 2016, 8:52 AM), <http://www.businessinsider.com/marijuana-states-legalized-weed-2016-11> [<https://perma.cc/EUU7-YKJH>].

approach based on treatment and regulation for failed prohibition.<sup>107</sup> Left to their own devices, states could continue these experiments with legalized, government-regulated marijuana, easing the suffering of terminally ill patients who use marijuana for medical purposes, and possibly paving the way for more promising drug-control strategies that might eventually extend to other controlled substances.

Although a principal virtue of federalism is that it allows states to function as social laboratories,<sup>108</sup> the federal government remains determined to keep the entire nation mired in its failed drug war. After an initial period of deference to state experiments with medicinal marijuana, the Obama Administration ultimately gravitated toward the same hostile approach taken during the prior two administrations.<sup>109</sup> As Professor Erik Luna has explained:

[D]rug enforcers took an aggressive approach to interpreting the U.S. government's drug war prerogative, arguing successfully in court that there were no exceptions or limitations to federal prosecutions involving medical marijuana. Federal law enforcement conducted hundreds of raids on medical marijuana dispensaries, and sought criminal prosecution of medical marijuana providers even when they were in full compliance with local and state law. One particularly pathetic raid involved a collective hospice, located on a farm in Santa Cruz, California, that had "approximately 250 member-patients who suffer from HIV or AIDS, multiple sclerosis, glaucoma, epilepsy, various forms of cancer, and other serious illnesses."<sup>110</sup>

After the most recent change in presidential administrations, the DOJ was headed by an attorney general, Jeffrey B. Sessions, who believes that marijuana is "only slightly less awful" than heroin.<sup>111</sup> Then-Attorney General

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107. See GLOB. COMM'N ON DRUG POLICY, WAR ON DRUGS 2 (2011) (calling for a harm-reduction approach to drugs and an end to the war on drugs).

108. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

109. See Robert A. Mikos, *A Critical Appraisal of the Department of Justice's New Approach to Medical Marijuana*, 22 STAN. L. & POL'Y REV. 633, 635–40 (2011).

110. Erik Luna, *Drug War and Peace*, 50 U.C. DAVIS L. REV. 813, 880–81 (2016) (footnotes omitted). "Although the federal government has not criminally prosecuted many medical marijuana users in the past decade, it has aggressively targeted suppliers (e.g., the DEA has raided nearly 200 medical marijuana cooperatives in California alone), their landlords, and physicians who recommend the drug to patients in order to disrupt essential components of state marijuana programs." Robert A. Mikos, *On the Limits of Supremacy: Medical Marijuana and the States' Overlooked Power to Legalize Federal Crime*, 62 VAND. L. REV. 1421, 1443 (2009) (footnotes omitted).

111. Alexandra Sifferlin, *Jeff Sessions Says Marijuana Is Only 'Slightly Less Awful' than Heroin. Science Says He's Wrong*, TIME (Mar. 16, 2017, 3:36 PM), <http://time.com/4703888/jeff-sessions-marijuana-heroin-opioid/> [<https://perma.cc/735C-2RQB>]. Session's successor as attorney general, William Barr, agrees that it would be a "mistake" to legalize marijuana at the federal level but has promised not to interfere with marijuana distributed in compliance with state law. See Glenn Fleishmann, *States Hold Breath as Trump's Attorney*

Sessions issued a memorandum in early 2018 rescinding the Obama Administration's prior guidance on legalized marijuana, prompting fears of a broader federal crackdown on legalized marijuana.<sup>112</sup> Although Attorney General Barr has pledged to stay his hand for the moment, he believes that, unless Congress legalizes marijuana (which he believes would be a "mistake"), federal enforcement should eventually resume.<sup>113</sup> Absent further action by Congress, the plight of state experiments with legalized marijuana will continue to be impeded by the looming threat of prosecution at the discretion of the individual United States Attorney offices nationwide.<sup>114</sup>

Even apart from the widening gulf between federal and state policy on marijuana, federal drug laws create substantial problems for states. The culprits here are statutes authorizing asset forfeiture for property tied

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*General Nominee Says He Won't Prosecute Pot in Marijuana-Legal States*, FORTUNE (Jan. 15, 2019), <http://fortune.com/2019/01/15/barr-marijuana-pot-cole-memo-legal-states/> [<https://perma.cc/TNG9-KZRR>].

112. See, e.g., Jill Beathard, Comment, *Keep Calm and Follow State Law: Marijuana Attorneys React to Sessions Memo*, 95 DENV. L. REV. 112, 112–13 (2018) (noting concerns that current charging policies "will not only create more confusion for federal prosecutors but also for cannabis attorneys, businesspeople, and consumers"). These fears were confounded by the Attorney General's 2017 request that Congress drop the appropriations rider, passed in 2014, barring the use federal funds to prosecute medical marijuana grown and dispensed in accordance with state law. See Letter from Jefferson B. Sessions III, Attorney Gen., to Mitch McConnell, Majority Leader, Senate Charles Schumer, Minority Leader, Senate, Paul Ryan, Speaker, House of Representatives & Nancy Pelosi, Minority Leader, House of Representatives (May 1, 2017) (urging repeal of the Rohrabacher-Farr amendment, Pub. L. No. 113-235, § 538, 128 Stat 2130, 2217 (2014)), <https://www.jennifermcgrath.com/wp-content/uploads/Jeff-Sessions-Letter-Medical-Marijuana-5.1.2017.pdf> [<https://perma.cc/8WYY-KXZ8>].

113. See Fleishmann, *supra* note 111.

114. Note that the existing conflict between federal and state law on marijuana policy is not solved by federal preemption doctrine. Properly understood, the sound notion that state laws in conflict with valid federal law are, to that extent, preempted under the Supremacy Clause has no application to state laws legalizing marijuana. States are under no constitutional obligation to treat marijuana as illegal simply because the federal government has chosen to do so. To conclude otherwise would allow the federal government to conscript states as unwilling foot soldiers in the federal drug war, a result at odds with the Tenth Amendment's anti-commandeering principle. See *Printz v. United States*, 521 U.S. 898, 935 (1997) ("The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program."); see also *Murphy v. NCAA*, 138 S. Ct. 1461, 1478–82 (2018) (striking down a federal law prohibiting states from authorizing sports gambling). For extended arguments along these lines in defense of state laws legalizing marijuana, see, for example, Erwin Chemerinsky et al., *Cooperative Federalism and Marijuana Regulation*, 62 UCLA L. REV. 74, 100–13 (2015); Mikos, *supra* note 110, at 1445–60.

somehow to violations of federal drug laws. Many state legislatures have feared that economics may lead to “policing for profit”—namely, police diverting scarce enforcement resources to the search for crimes that will generate revenue for the arresting agency through asset forfeiture.<sup>115</sup> Understandably fearing this perverse incentive might jeopardize public safety by leading to underenforcement in other important but unremunerative areas—not to mention threaten the security of property rights of innocent third parties—more than two dozen states have imposed limits on the ability of local police agencies to retain the proceeds of asset forfeitures.<sup>116</sup>

Enter the DOJ. Eager to secure greater cooperation from local police in the war on drugs, the federal government essentially buys their assistance through aggressive use of federal forfeiture laws. Under the federal “Equitable Sharing Program,” participating police agencies bypass state forfeiture laws, invoking the assistance of federal enforcers.<sup>117</sup> Federal prosecutors obtain forfeiture in federal proceedings and then return the proceeds—minus a 20% cut for the DOJ—to the arresting agencies for their own use, free and clear of state-law limits on police retention of forfeiture proceeds.<sup>118</sup>

The Equitable Sharing Program seriously complicates efforts within the state system to keep state and local police focused on preventing and solving all crimes instead of profiting from drug crimes. Apart from the federal intrusion into local policing, the dangers of policing for profit would be reduced or eliminated in states with restrictive forfeiture laws, with some or all of the proceeds received as a result of drug enforcement going to the state treasury or other designated uses. Through the complicity of federal enforcers, however, money produced through seizures carried out under the authority of state law is instead redirected back to the arresting agency for its use alone, irrespective of contrary state law.<sup>119</sup> The ability to end-run state laws limiting police retention of forfeiture proceeds gives police

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115. See Eric Blumenson & Eva Nilsen, *Policing for Profit: The Drug War's Hidden Economic Agenda*, 65 U. CHI. L. REV. 35, 44 (1998) (citing 21 U.S.C. § 881 (1994)).

116. See CARPENTER ET AL., *supra* note 85, at 14 fig.6. Consider two examples: the District of Columbia and New Hampshire. Under D.C. law, the proceeds of local forfeiture actions must go into a fund for drug prevention and treatment. LEONARD W. LEVY, *A LICENSE TO STEAL: THE FORFEITURE OF PROPERTY* 149–50 (1996). New Hampshire caps at 10% the amount of state forfeiture proceeds that law enforcement can keep. *Id.* Similar laws limiting how much police agencies can retain from asset forfeitures exist in at least twenty-six states; the limits range, on the low side, from 0% (in states such as Maine, New Mexico, North Carolina, and Wisconsin) all the way up to 95% (South Carolina), with many states scattered between those extremes. CARPENTER ET AL., *supra* note 85, at 14 fig.6.

117. CARPENTER ET AL., *supra* note 85, at 6, 25.

118. See *id.*

119. See *id.* at 28. As one critical review notes, “not only does federal law allow forfeiture proceeds to be spent by law enforcement, but equitable sharing rules actually mandate that funds go to law enforcement. . . . If state law directs proceeds elsewhere, the Justice Department will cut off the flow of funds.” *Id.*

departments incentives to overinvest in traffic stops—which, in addition to being the easiest way to find drugs and drug proceeds, involve automobiles that can be seized and sold—as well as other drug interdiction efforts, small and large.

Although advocates of strict drug prohibition may not fret about over-enforcement problems, the perverse incentives equitable sharing creates for police on the front lines of the drug war are troubling. Quite simply, equitable sharing gives police strong incentives to target major *assets* instead of major *crimes*. As a senior Customs Service official memorably put it, if police had “a guy with a ton of marijuana and no assets versus a guy with two joints and a Lear jet, I guarantee you they’ll bust the guy with the Lear jet.”<sup>120</sup> As bad as targeting minor drug crimes in the interest of obtaining major forfeitable assets is, forfeiture is also used to target cash *not derived from illegal activity*. When fairly large sums of money are discovered during traffic stops, “it is presumed to be drug money, seized, and handed over to the federal government for forfeiture,” putting the burden on the owner to retain counsel and prove it was legally obtained.<sup>121</sup>

The concern over policing for profit is far from theoretical only. Consider, for example, how asset forfeiture distorts standard police tactics. Conventional sting operations target dealers, with undercover police acting as buyers. Ideally, police would arrest dealers as soon as possible to prevent the distribution and use of illegal drugs, but seizing the drugs before sales take place provides no financial benefit to the police. Asset forfeiture, however, dramatically changes the enforcement calculus.

With forfeiture in the picture, police may *allow* illegal drug transactions they might otherwise have prevented. By postponing arrests until dealers have accumulated large amounts of cash, the police can ensure the resulting arrests will generate significant assets for forfeiture and retention by the arresting agency.<sup>122</sup> Police have the same incentive to redirect interdiction efforts toward the export of drug proceeds and away from the import of illegal drugs: pursuing proceeds nets the police cash and other valuable assets for seizure to a much greater degree than stopping the drugs.<sup>123</sup> Similarly,

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120. LEVY, *supra* note 116, at 152 (citation omitted).

121. CARPENTER ET AL., *supra* note 85, at 29.

122. See Blumenson & Nilsen, *supra* note 115, at 67–73 (discussing examples of how the pursuit of forfeitable assets has changed police drug enforcement tactics).

123. See, e.g., *id.* at 68 (quoting testimony of former New York City police commissioner concerning the advantages to police of targeting proceeds instead of drugs); Conor Friedersdorf, *Police Ignore Illegal Drugs, Focus on Seizing Cash*, ATLANTIC (May 24, 2011), [https://](https://www.theatlantic.com/...)



instead of targeting dealers, who may often have only drugs, police frequently conduct “reverse sting” operations targeting *buyers*.<sup>124</sup> This tactic allows police to choose the buyers and locations involving major assets to seize, such as residences and automobiles.

Seen in this light, asset forfeiture does not merely ensure that crime does not pay. Instead, it leads to policing for profit, which causes police to “make business judgments that can only compete with, if not wholly supplant, their broader law enforcement goals.”<sup>125</sup> This is what state laws limiting asset forfeiture seek to prevent—and what the DOJ’s Equitable Sharing Program allows police to do, in violation of state law.<sup>126</sup> Even the alluring euphemism of “sharing” cannot mask a perverse state of affairs in which the funding wishes of individual law enforcement agencies trump public safety and the authority of the states from which those agencies derive their authority.

There are other examples in which broad federal criminal law interferes with the effective functioning of the state system. One concerns what Professor Robert Mikos terms “federal supplemental sanctions” attaching adverse collateral consequences, such as deportation or disqualification to carry firearms, to certain kinds of state criminal convictions.<sup>127</sup> States cannot effectively combat gang-related murders and other violent crimes if undocumented victims or witnesses cannot call the police for help or participate in state court proceedings without exposing themselves or their loved ones to deportation or federal prosecution.<sup>128</sup>

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[www.theatlantic.com/national/archive/2011/05/police-ignore-illegal-drugs-focus-on-seizing-cash/239349/](http://www.theatlantic.com/national/archive/2011/05/police-ignore-illegal-drugs-focus-on-seizing-cash/239349/) [<https://perma.cc/U7ZJ-EU6K>] (citing investigation finding that police in Tennessee conducted ninety percent of their seizures on westbound traffic routes through which drug proceeds flow back to Mexican importers instead of eastbound traffic routes bringing drugs to U.S. markets).

124. Blumenson & Nilsen, *supra* note 115, at 67–68.

125. *Id.* at 78. Importantly, prosecutors are hardly immune to the perverse incentives of asset forfeiture. As Blumenson and Nilsen explain: “Forfeiture laws promote unfair, disparate sentences by providing an avenue for affluent drug ‘kingpins’ to buy their freedom. This is one reason why state and federal prisons now confine large numbers of men and women who had relatively minor roles in drug distribution networks, but few of their bosses.” *Id.* at 71.

126. As one might expect, police agencies in states with laws combatting “policing for profit” receive the biggest payouts from the Equitable Sharing Program. *See* CARPENTER ET AL., *supra* note 85, at 26.

127. Robert A. Mikos, *Enforcing State Law in Congress’s Shadow*, 90 CORNELL L. REV. 1411, 1414 (2005).

128. Similar complications arise if convicting an abusive spouse in state court will cause him to lose his job as a police officer because federal law precludes persons convicted of domestic violence from possessing firearms. *See id.* at 1444–74 (describing five areas where federal supplemental sanctions complicate the enforcement of state law).

An even broader example of the mischief that limitless federal criminal laws can produce for the state system involves empowering state and local police to sidestep state limits on law enforcement. Equitable sharing is but one instance of state and local police using federal criminal law to evade state-system controls on their authority. Others include breaking down the “bilateral monopoly” that would otherwise give higher state authorities—legislatures, prosecutors, and courts—the power to regulate and control the police.<sup>129</sup> Without the ability to hand off their arrests and seizures to the federal government, state and local police would have to comply with state legislative and judicial limits on their authority and investigative methods, not to mention the priorities and concerns of state prosecutors. Federalization, however, allows police to disregard these limits by using federal criminal law to achieve their local objectives, flouting the very state authority from which their powers derive.<sup>130</sup>

There is an important lesson here for state officials. States have been, for the most part, complicit in the federalization of criminal law, evidently in the belief that greater federal involvement could only aid their own crime-fighting efforts. This blind faith in federal involvement is unjustified in light of recent high-profile conflicts between federal and state enforcers. Using the broad tools at their disposal, federal authorities have obstructed state experiments with legalized marijuana, as well as state efforts to eliminate incentives for police departments to use forfeiture laws to pad their budgets at the expense of the public interest in addressing more pressing enforcement needs or of competing funding priorities. Similar conflicts have arisen in recent high-profile efforts by the Trump Administration to commandeer state and local police to serve as de facto federal immigration agents<sup>131</sup> despite well-founded concerns that doing so will undermine their ability to maintain

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129. Richman, *supra* note 1, at 97–98.

130. *See id.* at 98–99.

131. The Trump Administration has tried to compel so-called “sanctuary” states and localities to notify federal immigration authorities when they come across undocumented aliens and assist in their deportation, on pains of losing their federal funding. Exec. Order No. 13,768, 82 Fed. Reg. 8799 (Jan. 30, 2017). So far, federal courts have questioned the constitutionality of the Administration’s crackdown on sanctuary jurisdictions. *See, e.g.*, *City & Cty. of San Francisco v. Trump*, 897 F.3d 1225, 1234–35 (9th Cir. 2018); *New York v. U.S. Dep’t of Justice*, 343 F. Supp. 3d 213, 245 (S.D.N.Y. 2018); *City of Philadelphia v. Sessions*, 280 F. Supp. 3d 579 (E.D. Pa. 2017).

law and order and provide justice for crime victims within immigrant communities.<sup>132</sup>

Particularly now, as they have consistently proven themselves more innovative and responsive than their federal counterparts, states should realize that, in many areas, federal involvement is far from costless. Even apart from possible interference with the pursuit of important public safety goals by the states, the funds spent on federal involvement could often be more effectively utilized at the state level, where the vast majority of enforcement activity inevitably takes place. Investing in greater capacity within the state system to deal with violence and other antisocial conduct is a far better way of protecting the public than expanding a costly, one-size-fits-all federal system that, of necessity, can deal only with a small fraction of the offenders prosecuted nationwide. A more tightly constrained body of federal criminal law limited to the nation's most serious public-safety threats would translate into greater autonomy for states as they continue to innovate with more effective ways of protecting their citizens.

### 3. *Negative Externalities*

The best remaining potential defense of the federalization of criminal law is that the virtual overlap between federal and state criminal law merely sets the stage for negotiations concerning how the two bodies of law should be enforced. As Professor Daniel Richman correctly notes, limitless federal criminal laws do not compel limitless enforcement; rather, they leave “the precise boundaries of Federal and State responsibility” to be determined “through explicit or tacit negotiation among enforcement agencies.”<sup>133</sup> Presumably, federal and state enforcers, with their specialized knowledge of the public-safety needs in their respective jurisdictions, are well-positioned to get together and determine where state responsibility should end and federal responsibility should begin.

The obvious problem with this line of argument—as Richman himself notes—is that it ignores agency costs.<sup>134</sup> All other things being equal, it can be assumed that the deals federal and state enforcers strike amongst themselves will serve their own interests. There is, however, no reason to assume those deals will advance (or even take into account) the interests of third parties. Indeed, the risk is that the parties to the negotiations will

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132. See Christopher N. Lasch et al., *Understanding “Sanctuary Cities,”* 56 B.C. L. REV. 1703, 1761–64 (2018) (describing public-safety objections to state and local police acting as de facto immigration agents).

133. Richman, *supra* note 1, at 92.

134. *Id.* at 96–99.

sacrifice the interests of others for their own benefit, creating what is known in economics as “negative externalities.”<sup>135</sup>

Asset forfeiture through equitable sharing is an illustration of federal and state enforcers striking deals benefiting themselves at the expense of other important interests. In the dozens of states that bar police from keeping the proceeds of forfeited assets for their own use or impose limits on the retention of such proceeds,<sup>136</sup> equitable sharing means more funding for police than state law would permit. The DOJ benefits, too, by getting a 20% cut of the forfeited assets,<sup>137</sup> plus more vigorous drug enforcement by police on the front lines of the war on crime.

This, however, is no “win/win” scenario when outside interests are taken into account. States necessarily lose in the process because forfeiture proceeds they would have received and been able to spend for broader public purposes instead go back to the arresting agency.<sup>138</sup> Ultimately, of course, the public loses. Equitable sharing incentivizes police to engage in less effective policing in a variety of ways, such as by prioritizing the capture of lucrative proceeds of past drug sales over stopping the flow of illegal drugs.<sup>139</sup> As the equitable-sharing example demonstrates, the ability of federal and state enforcers to agree on the use of overlapping enforcement authority does not guarantee optimal results for society as a whole.

Another cautionary tale in the story of negotiated federal-state boundaries in criminal law comes from the plight of federal courts and prisons, whose resources have been stretched to the breaking point. “The total number of federal [criminal] cases has almost tripled from 29,011 in fiscal year 1990 to 83,946 in fiscal year 2010.”<sup>140</sup> After a slow but steady decline in federal prosecutions and the prison population since 2011 because of now-repudiated

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135. See R.H. COASE, *THE FIRM, THE MARKET, AND THE LAW* 24 (1988) (defining the concept of “externality”).

136. See *supra* note 116 and accompanying text.

137. See *supra* text accompanying note 118.

138. See *supra* note 116.

139. See *supra* pp. 60–62.

140. U.S. SENTENCING COMM’N, *MANDATORY MINIMUM*, *supra* note 43, at 66 (footnotes omitted). Although the average prison sentence decreased from sixty-two months to fifty-four months from 1991 to 2010, the prison population grew nonetheless because “the size of the federal docket ha[d] tripled over the same time period, and the proportion of offenders sentenced to prison ha[d] increased.” *Id.* at 70; see also CARSON & ANDERSON, *supra* note 68, at 3 tbl.1 (showing 2010–2015 increases in federal prison population).

Obama-era reformed charging and sentencing policies, almost 70,000 criminal cases were filed in 2017.<sup>141</sup>

As criminal filings increased, so, too, did the number of federal prisoners. According to a recent report by the Congressional Research Service, the last three decades have seen “a *historically unprecedented increase* in the federal prison population.”<sup>142</sup> Starting in 1980—which marked the beginning of a “nearly unabated, three-decade increase” in the federal prison population—the number of federal inmates increased from approximately 25,000 to over 205,000 in 2015, with an annual influx of almost 6,000 prisoners.<sup>143</sup> Even though the number of annual federal prosecutions has declined by 22.4% since 2011, the prison population has proven far more resilient, shrinking by only 8.2% since 2007.<sup>144</sup> As of 2017, the federal prison population stood at 183,261.<sup>145</sup>

Overworked federal trial judges have struggled to keep pace with their swollen criminal dockets. Because of disparate funding for federal judges and prosecutors, increased caseloads put greater pressure on the judiciary than on U.S. Attorneys’ offices. As an ABA task force has noted: “Federal justice personnel almost doubled between 1982 and 1993, but the number of authorized federal judgeships in the district courts increased by only 26%.”<sup>146</sup> The resulting strain on federal judicial resources has been described as “one of the most serious problems facing [the judiciary] today”—problems that, according to the late Chief Justice William H. Rehnquist, ultimately stem from “[t]he trend to federalize crimes that traditionally have been handled in state courts.”<sup>147</sup>

The impact on federal correctional facilities has been even more profound. Ever since the prisoner build up began in 1980, the Bureau of Prisons (BOP) has housed more prisoners than its rated capacity despite a “massive” prison construction effort.<sup>148</sup> As of December 31, 2015, the rated capacity for

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141. See SCHMITT & SYCKES, *supra* note 43.

142. JAMES, *supra* note 44 (emphasis added).

143. *Id.* By comparison, with few fluctuations, the number of federal prisoners “remained at approximately 24,000” from 1940–1980. *Id.*

144. SCHMITT & SYCKES, *supra* note 43; see also OLIVER HINDS ET AL., VERA INST. OF JUSTICE, PEOPLE IN PRISON IN 2017, at 2 (2018).

145. HINDS ET AL., *supra* note 144.

146. STRAZZELLA, *supra* note 8, at 35.

147. WILLIAM H. REHNQUIST, THE 1998 YEAR-END REPORT OF THE FEDERAL JUDICIARY (1998), as reprinted in 11 FED. SENT’G REP. 134, 135 (1998). Rehnquist was far from alone in this view. See STRAZZELLA, *supra* note 8, at 38 (“Nearly all of those who have examined the impact of federalization have concluded that the federal courts are being overburdened with cases traditionally handled in state courts.”).

148. CHARLES COLSON, TASK FORCE ON FED. CORR., TRANSFORMING PRISONS, RESTORING LIVES: FINAL RECOMMENDATIONS OF THE CHARLES COLSON TASK FORCE ON FEDERAL CORRECTIONS 15–16, 16 fig.9 (2016). The capacity limit is no arbitrary number; rather, it reflects the maximum number of prisoners existing facilities were designed to house safely

the entire federal prison system was 134,461, putting the federal system at 119.7% of capacity.<sup>149</sup> To put that number into perspective, all but four states have less overcrowding.<sup>150</sup> The persistently high prisoner volume has required the BOP to resort to extreme measures to expand capacity within federal prisons (such as triple- and even quadruple- bunking and housing prisoners in television rooms and other common areas) and, since 1997, to transfer inmates to private prisons.<sup>151</sup> Despite these heroic measures, “crowding in BOP-run institutions increased from 36 to 39 percent systemwide” from fiscal years 2006–2011; the overcrowding rate was projected to reach 44% by 2015.<sup>152</sup> Thus, as a congressional blue-ribbon commission recently concluded, federal prisons are not only full but “badly overcrowded.”<sup>153</sup>

The actual situation is even worse than that. Overcrowding is not evenly distributed throughout the federal system; instead, it is most severe at the institutions containing the most dangerous inmates.<sup>154</sup> By way of example, “[o]vercrowding across all BOP facilities was at 20 percent at the end of calendar year 2015, but the figure was 45 percent at high-security institutions.”<sup>155</sup>

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and securely, with prisoners having adequate access to the services and programs necessary for them to avoid reoffending after release. See GOV'T ACCOUNTABILITY OFFICE, GAO-12-743, BUREAU OF PRISONS: GROWING INMATE CROWDING NEGATIVELY AFFECTS INMATES, STAFF, AND INFRASTRUCTURE 8 (2012).

149. CARSON & ANDERSON, *supra* note 68, at app. tbl.1.

150. See *id.* (listing the overcrowding statistics for the federal and state correctional systems).

151. GOV'T ACCOUNTABILITY OFFICE, *supra* note 148, at 18 (“To increase available bed space, BOP reports double bunking in excess of the percentages included in a facility’s rated capacity; triple and quadruple bunking; or converting common space, such as a television room, temporarily to housing space.”). As of 2015, 12% of federal prisoners were held in private correctional facilities. OFFICE OF THE INSPECTOR GEN., U.S. DEP’T OF JUSTICE, REVIEW OF THE FEDERAL BUREAU OF PRISONS’ MONITORING OF CONTRACT PRISONS 1 (2016). The Trump Administration favors expanded use of private prisons and has slashed funding for new federal prisons. See Eric Katz, *Leaked Memo: Trump Admin to Boost Use of Private Prison While Slashing Federal Staff*, GOV’T EXECUTIVE (Jan. 25, 2018), <https://www.govexec.com/management/2018/01/trump-administration-looks-boost-use-private-prisons-while-slashing-federal-staff/145496/> [<https://perma.cc/AZ4B-74RX>]; *President Trump’s 2018 Budget Cuts \$1 Billion in Prison Construction*, CORRECTIONAL NEWS (Mar. 29, 2017), <http://correctionalnews.com/2017/03/29/president-trumps-2018-budget-cuts-1-billion-prison-construction/> [<https://perma.cc/6BKH-X8HU>].

152. GOV’T ACCOUNTABILITY OFFICE, *supra* note 148, at 17, 53.

153. COLSON, *supra* note 148, at 17.

154. *Id.* at 15–16 (“[I]t is particularly disturbing that the BOP’s most overcrowded institutions tend to be those housing those who pose the greatest security risk.”).

155. *Id.* at 16; see also GOV’T ACCOUNTABILITY OFFICE, *supra* note 148, at 15 (“From fiscal years 2006 through 2011, the percentage crowding in male medium security facilities

Especially with higher-risk inmates, overcrowding makes it increasingly more difficult for prison staff to maintain good order, resulting in more dangerous conditions for staff and prisoners alike. Studies have long shown that prisoner volume in excess of rated capacity results in more violence and other disciplinary violations.<sup>156</sup> The BOP estimates that “every [percentage] point increase in overcrowding results in an increase of 4.1 assaults per 5,000 people in prison.”<sup>157</sup>

Overcrowding has produced federal prisons that are more dangerous and less effective in their mission. According to 2015 congressional testimony by the BOP director, “[t]he federal inmate-to-staff ratio . . . runs significantly higher than the ratios in the five states with the largest state prison populations.”<sup>158</sup> As prisoners are crammed into overcrowded spaces with inadequate supervision, inmates with a higher risk of violence are brought together for longer periods of time, “resulting in inmate idleness, which can lead to additional tension and fighting between inmates.”<sup>159</sup> To maintain order in this hazardous climate, staff who are supposed to provide medical, educational, or other needed inmate services are instead forced to assume correctional duties, temporarily filling the void in correctional staffing but at a serious cost to their own safety and the rehabilitative and other services inmates receive.<sup>160</sup> The GAO was thus correct that “the growth of the federal

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increased from 37 percent to 51 percent and from 53 percent to 55 percent in high security level facilities.”). Though greatest in high-security facilities, the safety risk of overcrowding also exists in facilities with low-risk inmates “because of the high gang presence in these facilities.” GOV’T ACCOUNTABILITY OFFICE, *supra* note 148, at 27 (noting that even inmates at lower-security facilities “may still be a high risk for problems because of frustrations resulting from crowded conditions”).

156. See generally Terence P. Thornberry & Jack E. Call, *Constitutional Challenges to Prison Overcrowding: The Scientific Evidence of Harmful Effects*, 35 HASTINGS L.J. 313, 331–36 (1983).

157. COLSON, *supra* note 148, at 17. BOP found that the number of guilty findings for inmate misconduct generally rose from fiscal years 2006 through 2009 although the most serious inmate infractions (including homicides) began to decline in fiscal year 2010 as other prison staff were temporarily required to assume correctional duties. GOV’T ACCOUNTABILITY OFFICE, *supra* note 148, at 26.

158. Joe Davidson, *Too Many Inmates, Too Few Correctional Officers: A Lethal Recipe in Federal Prisons*, WASH. POST (Sept. 1, 2015), <https://www.washingtonpost.com/news/federal-eye/wp/2015/09/01/too-many-inmates-too-few-correctional-officers-a-lethal-recipe-in-federal-prisons/> [https://perma.cc/94NA-K56B]. As one 2010 study found, “nearly all BOP facilities had fewer correctional staff on board than needed, with a BOP-wide staffing shortage in excess of 3,200.” See GOV’T ACCOUNTABILITY OFFICE, *supra* note 148, at 23. Even if all authorized positions correctional vacancies were filled, “the shortage would [still] exceed 1,800.” *Id.*

159. See GOV’T ACCOUNTABILITY OFFICE, *supra* note 148, at 18, 21.

160. See *id.* at 24. Through a process known as “augmentation,” prison staff are diverted from their primary duties to serve as correctional officers as the need arises. *Id.* Augmentation has been sharply criticized because it puts staff in dangerous situations for which they lack proper training and experience. See, e.g., Kevin Johnson, *As Federal Prisons Run Low on*

inmate population and related crowding have negatively affected inmates housed in BOP institutions, institutional staff, and the infrastructure of BOP facilities, and have contributed to inmate misconduct, which affects staff and inmate security and safety.”<sup>161</sup>

That these serious problems continue to exist in federal prisons is all the more remarkable in light of the enormous sums that have been spent on building new prisons and contracting with private prisons. The skyrocketing federal prison population has required an additional \$7 billion in annual expenditures on corrections over the last generation, from \$330 million in fiscal 1980 to almost \$7.5 billion in fiscal 2015.<sup>162</sup> To put these figures in perspective,

From 1980 to 2013, federal prison spending increased 595 percent, from \$970 million to more than \$6.7 billion in inflation-adjusted dollars. Taxpayers spent almost as much on federal prisons in 2013 as they paid to fund the *entire* U.S. Justice Department—including the Federal Bureau of Investigation the Drug Enforcement Administration, and all U.S. Attorneys—in 1980, after adjusting for inflation.<sup>163</sup>

The federalization of criminal law is thus not just an abstract problem, or a problem only for those who are “soft on crime”—whatever that might mean—or pine for earlier days of limited federal power. It is a real problem that should trouble *everyone* who truly wants effective public protection through the most cost-effective and humane means possible.

#### IV. CONCLUSION

To correct the many problems associated with the overfederalization of criminal law, and more effectively achieve the vital goal of public safety, sweeping reforms are necessary:

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*Guards, Nurses and Cooks Are Filling In*, USA TODAY (Feb. 13, 2018, 5:39 PM), <https://www.usatoday.com/story/news/politics/2018/02/13/ill-equipped-and-inexperienced-hundreds-civilian-staffers-assigned-guard-duties-federal-prison-secur/316616002/> [<https://perma.cc/T72Y-9TCK>] (“Hundreds of secretaries, teachers, counselors, cooks and medical staffers were tapped last year to fill guard posts across the Bureau of Prisons despite repeated warnings that the assignments placed unprepared employees at risk.”). Nevertheless, BOP finds it necessary to continue augmentation because of longstanding shortages in correctional officer positions. See GOV’T ACCOUNTABILITY OFFICE, *supra* note 148, at 23–26.

161. GOV’T ACCOUNTABILITY OFFICE, *supra* note 148, at 18.

162. JAMES, *supra* note 44, at 2.

163. PEW CHARITABLE TRS., *supra* note 69, at 2 (emphasis added) (footnotes omitted) (citing PEW CHARITABLE TRS., *supra* note 44, at 1 fig.1).



**1. Congress must chart a new, more effective path to protecting public safety.** In a federalized system of criminal law enforcement, Congress gives prosecutors unchecked power to determine the scope of federal criminal law and to select from the large universe of potential defendants the few who will face unusually harsh federal sentences. Prosecutors, however, have shown little restraint in the use of these awesome powers. The result has been dramatic increases in federal criminal filings and prisoners over the last three decades—and skyrocketing costs to American taxpayers. Meaningful, long-lasting reform will not occur unless Congress boldly reasserts its institutional prerogatives by concentrating federal power and resources exclusively on the nation’s most serious criminal threats. The 2014 Rohrabacher-Farr amendment barring the DOJ from interfering with marijuana legalized under state law is a rare but important example of the kind of congressional leadership that is sorely needed to rein in the unrestrained use of federal enforcement authority.<sup>164</sup>

**2. Congress should sharply reduce the number and scope of existing federal criminal laws and pass new criminal statutes only as a last resort.** Instead of limiting their attention to offenses that can be effectively addressed only at the federal level, prosecutors make the proverbial “federal case” out of a surprising number of comparatively minor, small-time crimes each year—crimes that could be easily and more economically handled in the state system. Restricting the roster of federal crimes to areas of exclusive federal jurisdiction and areas where state law enforcement has proven inadequate will keep federal enforcers focused, as they ought to be, on the nation’s more serious crimes instead of needlessly duplicating—or even interfering with—state enforcement efforts. New federal crimes should be created sparingly, and only in areas that both defy adequate response within the state system and are not effectively addressed by existing federal laws and regulations.

**3. Congress should repeal unusually severe federal sentencing laws because they distort the exercise of prosecutorial discretion and prevent wise exercises of judicial sentencing discretion.** Congress has enacted harsh statutory mandatory minimums, sweeping asset forfeiture laws, and other unusually severe sentencing policies in the expectation that prosecutorial discretion would restrict them to the nation’s most blameworthy offenders. Such confidence is unfounded: federal prosecutors pursue the offenses that generate the highest sentences, as opposed to the worst offenders, and they seek the highest supportable sentences instead of the sentences that “fit” the crime. Congress has repeatedly addressed itself to these problems in

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164. See Consolidated and Further Continuing Appropriations Act of 2015, Pub. L. No. 113-235, § 538, 128 Stat. 2130,

the past, with passage of laws repealing the controversial 100/1 crack cocaine sentencing rule<sup>165</sup> and authorizing judges to sentence minor drug offenders below applicable mandatory minimums.<sup>166</sup> The recently signed First Step Act, providing further relief from needlessly severe sentencing policies, is the latest example.<sup>167</sup> The time has come for Congress to address itself more comprehensively to the serial misuse of strict federal sentencing policies and the many distortions they create in the proper functioning of the criminal justice system.

**4. Congress should use conditional federal funding to states, not new criminal laws, in situations where greater enforcement is desired.** Overfederalization resulted from the belief that enacting more federal criminal laws would expand upon existing levels of state enforcement. This view is mistaken. The vast majority of laws Congress has enacted are enforced rarely, if at all, and such low-level enforcement invites arbitrariness in charging while producing no real public-safety gains. Of even greater concern, federal enforcement is often wasted on comparatively minor offenses that are vigorously prosecuted by states, squandering resources that might have been better expended on prosecutions more deserving of federal attention. The most effective way for Congress to expand enforcement of crimes prosecuted at the state level is to grant states the funding necessary for increased enforcement. Expanded authority in an already overburdened federal system, one that necessarily reaches only a small fraction of total prosecutions nationwide, will be inefficient at best, if not wholly ineffective.

**5. Congress should require the Attorney General to formulate binding, publicly available enforcement guidelines and to publish an annual national crime-fighting strategy with measurable goals and cost estimates.** When Congress delegates lawmaking power to executive branch agencies, it typically requires them to develop rules, regulations, or other authoritative guidance concerning their interpretation and intended use of delegated authority. This promotes rule-of-law values by giving notice to the regulated public and enabling oversight to ensure congressional objectives are pursued in a faithful and responsible manner. Unfortunately, the DOJ does not operate in the law-like manner that other executive branch agencies do. Uncontrolled discretion exercised by line prosecutors results in substantial variation and

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165. See Fair Sentencing Act of 2010, Pub. L. No. 111-220, § 2, 124 Stat. 2372, 2372 (2010) (codified as amended at 21 U.S.C. § 841(b)(1) (2012)).

166. See *supra* note 73 and accompanying text.

167. See Formerly Incarcerated Reenter Society Transformed Safely Transitioning Every Person Act, H.R. 5682, 115th Cong. (2d Sess. 2018).

arbitrariness in the enforcement of federal law nationwide—which, in turn, makes it difficult to have a coordinated, nationally uniform approach to crime reduction. Binding enforcement guidelines, coupled with an articulated crime-fighting strategy with benchmarks and cost estimates, are necessary to bring much-needed transparency and coordination to the enforcement of federal criminal law.<sup>168</sup>

**6. Congress should eliminate perverse incentives for federal enforcers to give inadequate attention to pressing public-safety needs.** In a system of overfederalization, enforcers have wide latitude to pursue their own interests at the expense of the public interest committed to their charge. Broad asset forfeiture laws are a case in point. Forfeiture laws create powerful financial incentives to (a) pursue major *assets* instead of major *crimes*, (b) give severe sentences to minor players in the drug trade but not their more dangerous bosses who trade assets for undeserved lenience, and (c) prioritize crimes for which asset forfeiture is allowed (such as drug and white-collar offenses) over crimes for which forfeiture is unavailable (such as violent crime and deprivations of civil rights). Although forfeiture has netted the DOJ and local enforcers billions of dollars in additional revenue, it is not in the public interest for the pursuit of forfeitable assets to take precedence over the public safety.

To keep federal agents and prosecutors focused exclusively on the public interest, Congress should require that all federal forfeiture proceeds be paid into the Treasury instead of being retained within the seizing agency. Similarly, Congress should outlaw all sharing of federal forfeiture funds with state and local police departments—the purpose and effect of such sharing, after all, is to incentivize policing for profit at the state level, often in defiance of state law. These reforms will help ensure that public safety, not profit, is law enforcement’s foremost consideration.

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168. A number of noted scholars have endorsed prosecutorial guidelines to rationalize the exercise of prosecutorial discretion in a regime of overcriminalization. *See, e.g.*, Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959, 959 (2009); Erik Luna, *Prosecutorial Decriminalization*, 102 J. CRIM. L. & CRIMINOLOGY 785, 815–19 (2012); *see also* Barkow, *supra* note 65, at 911.