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Debunking Claims of Over-Federalization of Criminal Law

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Virtually all criminal law scholars bemoan the over-federalization of criminal law.¹ They are joined by judges,² bar review associations,³ and special interest groups.⁴ Conventional wisdom has it that our federal Congressmen and Senators curry favor with their constituents by

¹ See primarily those scholars listed *infra* in notes 5-9. See also John A. Humbach, *Returning Prosecutions to the States: A Proposal for a Criminal Justice Restoration Act*, <http://ssrn.com/abstract=1690267> (2011) (arguing that the federal justice bureaucracy has run amok and can be reduced to a fraction of its size by returning authority over criminal prosecutions to the states); J. Richard Broughton, *Congressional Inquiry and the Federal Criminal Law*, *Univ. of Richmond Law Rev.* (forthcoming 2012) (criticizing the overfederalization of criminal law and suggesting the use of congressional inquiry powers as one solution); Erik Luna, *The Overcriminalization Phenomenon*, 54 *Am. U. L. Rev.* 703 (2005) (offering libertarianism as the solution to the problem of overcriminalization at both the federal and state levels); Ellen S. Podgor, *Overcriminalization: The Politics of Crime: Forward*, 54 *Am. U. L. Rev.* 541 (2005); Rory K. Little, *Myths and Principles of Federalization*, 46 *HASTINGS L. J.* 1029, 1061-62 (1995) (arguing that the constitution authorizes the federal government to address only a limited range of criminal acts and that it should do so only when it has a definite national interest and clear textual authority); Kathleen F. Brickey, *Criminal Mischief: The Federalization of American Criminal Law*, 46 *Hastings L. J.* 1135 (1995). But see Stacy and Dayton, *The Underfederalization of Crime*, 6 *Cornell Journal of Law & Public Policy* 247, 267 (1997) (suggesting that the federal government should become more involved in combating ordinary street crime and criticizing the Lopez decision on the grounds that in the commerce work “the Commerce Clause grants Congress the power to reach essentially all intrastate activity”).

² Judicial Conference of the United States, *Long Range Plan for the Federal Courts: As Approved by the Judicial Conference* 21-28 (1995) (identifying for federal involvement only those offenses that involve unique national concerns, such as offenses against the federal government itself, corruption cases involving state actors, operations by sophisticated criminal enterprises, and criminal activity with international dimensions); *Report of The Federal Courts Study Committee* 4-10, 35-38 (1990) (reporting that the federal courts are nearing caseload crises, stemming in part from the unprecedented number of narcotics prosecutions); Sykes v. United States, 564 U. S. ____ (2011), Scalia, J. , dissenting (“Fuzzy, leave-the-details-to-be-sorted-out-by-the-courts legislation is attractive to the congressman who wants credit for addressing a national problem but does not have the time (or perhaps the votes) to grapple with the nitty-gritty.”); William H. Pryor, Jr. (Judge, 11th Cir.), *Federalism and Sentencing Reform in the Post-Blakely Era*, 8 *Ohio State Journal of Criminal Law* 515, 517 (2011) (“To restore respect for federalism, we must reverse the federalization of crime.”).

³ See, e. g., THE FEDERALIZATION OF CRIMINAL LAW, AMERICAN BAR ASSOCIATION TASK FORCE 1, 5-14 (James A. Strazzella, Reporter) (1998) [hereinafter ABA REPORT] (“Congressional activity making essentially local conduct a federal crime has accelerated greatly ... [contributing] to a patchwork of federal crimes often lacking a principled basis.”). Edwin Meese, III, who served as Attorney General of the United States under President Ronald W. Reagan, was the Chair of this task force. He also authored *Big Brother on the Beat: the Expanding Federalization of Crime*, 1 *TEXAS REV. L. & POL.* 1, 6 (1997) (suggesting that the “more crime is federalized, the more potential exists for an oppressive and burdensome federal police state”).

⁴ See, e. g., John S. Baker and Dale E. Bennett, *MEASURING THE EXPLOSIVE GROWTH OF FEDERAL CRIME LEGISLATION*, THE FEDERALIST SOCIETY FOR LAW AND PUBLIC POLICY STUDIES (2004) available at http://www.fed-soc.org/doclib/20070404_crimreportfinal.pdf [hereinafter FEDERALIST SOCIETY REPORT]; Brian M. Walsh and Tiffany M. Joslyn, *Without Intent: How Congress is Eroding the Criminal Intent Requirement in Federal Law*, The Heritage Foundation and National Association of Criminal Defense Lawyers (2010), available at www.ncdl.org/withoutintent.

making a “federal case” out of any conceivable bad behavior.⁵ On the other hand, a lawmaker who votes to repeal a criminal law, or attempts to limit its application by amendment, may find it difficult to respond to accusations that she is “soft on crime.” Thus, politics (rather than reasoned judgment) has led to the passage of upwards of approximately 4,500 federal criminal prohibitions, as many of half of these passed since 1970.⁶

The academic and professional literature addressing this phenomenon focuses primarily on the dangers of this runaway freight train and what we can do to get things back on track. Sara Sun Beale warns that the sheer number of federal criminal offenses will overwhelm the federal judicial system, and recommends that we fix over-federalization by trying a large swath of federal crimes in state courts.⁷ The late William Stuntz worried that the growth of the federal

⁵ There is general agreement that the cause of the growth is “political,” that is, that no one will vote against crime control legislation because no one who wishes to be reelected can appear soft on crime. See Donald A. Dripps, *Criminal Procedure, Footnote Four, and the Theory of Public Choice; Or, Why Legislatures Give a Damn About the Rights of the Accused?*, 44 Syracuse L. Rev. 1079, (1993); Smith, *infra* n. 9, 91 Va. L. Rev. at 881 (2005) (“the expansion of the criminal code has seemed to be driven by politics rather than by a demonstrated need for expanded coverage”); Sara Sun Beale, *The Many Faces of Overcriminalization: From Morals to Mattress Tags to Overfederalization*, 54 Am. U. L. Rev. 747, 755 (2005) (noting that the present federal criminal code contains “legislation drafted in response to whatever crime is the focal point in the media - even if that offense is already defined and punished harshly and effectively under state law”); Julie R. O’Sullivan, *The Federal Criminal ‘Code’ is a Disgrace: Obstruction Statutes as a Case Study*, 96 J. Crim. L. & Criminology 643, 654 (2006) (arguing that redundancies in the federal code “can be traced largely to the political desire to react to a given scandal . . . by enacting a ‘new’ section that simply repeats existing prohibitions (and by jacking up statutory maximum penalties to underscore congressional resolve)”) (emphasis in original).

⁶ One witness stated before a House Subcommittee in 2009 that there are now more than 300,000 regulations within the federal code that could possibly trigger criminal sanctions. See *Overfederalization of Criminal Law: Hearings Before the Subcomm. On Crime, Terrorism and Homeland Security of the H. Comm. on the Judiciary*, 111th Cong. 11 (2009) [hereinafter *House Hearings*](testimony of former Attorney General Richard Thornburgh). The last official government count of federal criminal laws took place in the early 1980s, when the government reported identifying 3,000 federal criminal laws. See Hon. Roger J. Miner, *Crime and Punishment in the Federal Courts*, 43 Syracuse L. Rev. 681, 681 (1992) (identifying 3,000 in 1992); FEDERALIST SOCIETY REPORT, *supra* n. 4, at 5, 7-10 (estimating 4,000 offenses carrying criminal punishments in 2004, and detailing the difficulties in obtaining an accurate count of federal criminal laws, due to dispersion throughout the federal code and multiple crimes embedded in single statutes). The Heritage Foundation Report likewise noted that the number of offenses “in the U. S. Code increased . . . to over 4,450 by 2008.” Overcriminalized.com (last visited 6/11/11). The ABA Report, *supra* note 3, observed that “more than a quarter of the federal criminal provisions enacted since the Civil War [through 1996] have been enacted in the sixteen year period since 1980.” *Id.* at 7, note 9.

⁷ 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 (1995); Sara Sun Beale, *Federalizing Crime: Assessing the Impact on the Federal Courts*, 543 Annals Am. Acad. Pol. & Soc. Sci. 39 (1996) (arguing that criminal cases take up a disproportionate share of judicial resources because of the complexity of the cases, the more onerous sentencing structure required by the Sentencing Reform Act of 1984, and the timing requirements of the Speedy Trial Act);

criminal code gives federal law enforcement agents and prosecutors unhealthy amounts of discretion to charge just about anyone, and suggested that the Supreme Court impose substantive limits on the definitions of crimes.⁸ Steven Clymer and Stephen F. Smith independently insist that the expansion of the federal criminal code gives federal prosecutors an opportunity to unfairly charge select defendants with controlled substance violations (according to Professor Clymer) and sex crimes, bribery, RICO, and mail fraud (according to Professor Smith) in a forum characterized by government-friendly procedural rules and draconian sentences, as compared to state courts.⁹ The American Bar Association reported that overgrowth of the federal criminal code now threatens both the efficacy of our federal court system, and the

Sara Sun Beale, *The Many Faces of Overcriminalization: From Morals to Mattress Tags to Overfederalization*, *supra* note 5 (noting the many inane activities prohibited by federal criminal law).

⁸ William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 Mich. L. Rev. 505 (2001) (arguing that the broad federal laws enacted give prosecutors discretion to target a large pool of actors). *See also* Ellen S. Podgor, *The Tainted Federal Prosecutor in an Overcriminalized Justice System*, 67 Wash. & Lee L. Rev. 1569, 1578 (2010) (“In addition to the constantly increasing number of applicable statutes, the breadth of many federal criminal statutes and the lack of *mens rea* or reduced *mens rea* in some of these statutes afford prosecutors significant power in their prosecution role.”); Julie R. O’Sullivan, *The Federal Criminal “Code” is a Disgrace: Obstruction Statutes as Case Study*, 96 J. Crim. L. & Criminology 643 (2006) (“the overbreadth, vagueness, and redundancy of the code give prosecutors power that they are not supposed to have in a decently-functioning system of justice”). *But see* Samuel W. Buell, *The Upside of Overbreadth*, 83 N. Y. U. L. Rev. 1491 (2008) (suggesting that a certain amount of overbreadth in liability rules, especially in federal criminal law, is desirable). More recently, Professor Stuntz suggested that we solve this problem by applying federal sentences only if federal criminal law is exclusive. Stuntz, *The Political Constitution of Criminal Justice*, 119 Harv. L. Rev. 780, 843-845 (2006). *See also* Daniel C. Richman and William J. Stuntz, Essay, *Al Capone’s Revenge: An Essay on the Political Economy of Pretextual Prosecution*, 105 Colum. L. Rev. 585 (2005).

⁹ Steven D. Clymer, *Unequal Justice: The Federalization of Criminal Law*, 70 S. Cal. L. Rev. 643 (1997) (noting that many federal laws, particularly those involving drug trafficking and weapons offenses, require long mandatory minimum sentences that are longer than the statutory maximum sentences at the state level, and suggesting the judges step in with an Equal Protection Clause fix if prosecutors fail to resolve the problem by internal control); Stephen F. Smith, *Proportionality and Federalization*, 91 Va. Law Rev. 879 (2005) (over-federalization leads to draconian sentences as compared to similar state crimes, but federal judges could solve this by narrowly interpreting federal crimes to ensure proportionality in punishment). *See also* Rachel E. Barkow, *Federalism and Criminal Law: What the Feds Can Learn From the States*, 109 Mich. L. Rev. 519, 579 (2011) (suggesting that “disagreement over sentencing policies goes a long way toward explaining why the federal government has intervened in a host of areas of traditional local control”); Rachel E. Barkow, *Federalism and the Politics of Sentencing*, 105 Colum. L. Rev. 1276, 1299-312 (2005) (arguing that the political process in the states is more likely to produce sound sentencing outcomes than the federal political process).

continued viability of local law enforcement.¹⁰ For the ABA, the solution is a combination of Congressional restraint and Supreme Court enforcement of federalism principles.¹¹

Rather than focus on the ever-growing size of the federal criminal code, we suggest a reevaluation of the premise underlying these reform suggestions—is there actually a problem with the sheer number of federal criminal offenses in existence, and, if so, does this problem warrant intense attention and demand radical intervention? Based upon our examination of the current federal criminal code and federal criminal caseloads, the answer at this point in time is “no.” An objective review of the evidence suggests that the number of federal proscriptions has little effect, negative or positive, in the real world of federal criminal justice enforcement.

In the following pages, we will demonstrate through empirical data that in spite of the large increase in the number of federal criminal statutes, there has been almost no impact on federal resources and on the balance of power between state and federal courts as a result of this growth in the federal criminal code.¹² The percentage of criminal justice matters heard in federal court, when viewed as a fraction of all criminal matters prosecuted at both the state and federal level, has remained relatively constant from year to year, in spite of numerous new criminal enactments at the federal level. Moreover, the few categories of cases that make up the bulk of the federal caseload are generally appropriate for federal intervention, as they reflect a careful consideration of federal interests. Furthermore, the federal law enforcement system continues to defer to states in areas of strictly local concern, such as violent crime and property crime.

To build our case, we have focused primarily on analysis of federal caseload statistics and related data (including sentencing data, prison population data, and analysis of frequently used federal criminal statutes) in order to draw conclusions about how federal prosecutorial resources are actually being expended, regardless of the size of the code. What we’ve discovered is that, for a variety of reasons discussed below, federal prosecutors tend to utilize the same limited set of familiar statutes, even as Congress continues to enact new criminal

¹⁰ The ABA task force report cautioned that “the current federalization trend . . . reflects a phenomenon capable of altering and undermining the careful decentralization of criminal law authority that has worked well for all of our constitutional history,” and threatens to bring about an “erosion of the quality of federal criminal justice.” ABA REPORT, *supra* note 3, at 37, 43.

¹¹ ABA REPORT, *supra* note 3, at 51-56. *See also* Kathleen F. Brickey, *Criminal Mischief: The Federalization of American Criminal Law*, 46 *Hastings L. J.* 1135, 1166 (1995) (“If the federal justice system is to function effectively and continue to dispense justice, the legislative and executive branches of government must exercise restraint.”).

¹² We acknowledge that federal courts, prosecutors and prisons may be experiencing straining of resources, however, we would submit that over-federalization is not the major cause of any such strain.

prohibitions. Many of the statutes which have historically generated controversy because of triviality (for example, the prohibition on using the likeness of Smokey the Bear)¹³ or federalism concerns (such as the federal carjacking statute)¹⁴ are never or very rarely used.

In Part I, we will explore the makeup of federal criminal caseloads in the United States since 1940.¹⁵ These statistics demonstrate that the vast bulk (approximately 75%) of federal criminal prosecutions pertain to one of just four offense categories: controlled substances, immigration, fraud, and weapons offenses.¹⁶ Similarly, three of these categories consume about the same percentage of federal prison resources: controlled substances, immigration, and weapons offenders currently comprise nearly 80% of the federal prison population.¹⁷ The majority of federal criminal defendants today (around 60%) fall into one of just two categories of offenses: in 2011, 30% of all federal criminal defendants were charged with drug offenses, while an additional 29% of all federal criminal defendants were charged with immigration offenses. 18 In fact, around half of all federal criminal defendants charged in 2011 were charged under just two particular laws: the conspiracy and distribution of controlled substances, 21 U. S. C.

¹³ 18 U. S. C. § 711 (enacted 1952, amended 1974). Though this statute is trotted out by many of the commentators criticizing the over-federalization of criminal law, we could find no prosecution or investigation pursuant to it.

¹⁴ The carjacking statute, 18 U. S. C. § 2119, enacted 1992, is another favorite of those arguing against over-federalization. See, e. g. , Beale, *From Morals to Mattress Tags*, *supra* n. 4, at 755-56 (Federal criminal law “contains what some have called the crime de jour - legislation drafted in response to whatever crime is the focal point in the media, - even if that offense is already defined and punished harshly and effectively under state law. For example, a high-profile carjacking in a suburb near Washington D. C., led to the rapid enactment of a federal carjacking statute.”). There were 148 defendants prosecuted for carjacking in 2010, comprising 0. 15% of federal criminal defendants that year. See Appendix, Chart of Commonly Used Federal Criminal Statutes.

¹⁵ Comparisons between state and federal data have been made where feasible; precise comparisons of state to federal data are not made for years prior to 1992 because little reliable state data exists for this period.

¹⁶ See Appendix, Table 6 for a pie chart of Federal Criminal Defendants by Offense Category, 2011. Drug offenses account for 30% of criminal defendants, immigration 29%, weapons offenses 8%, and fraud 13%. Table 6 is a summary of Table D-2, Cases Commenced in Federal Court in a 12-month Period, Federal Judicial Caseload Statistics, Administrative Office of the United States Courts, Statistics Division, Washington, D. C. 2011. For more detailed caseload statistics, view the original Table D-2, which gives more detailed information about particular offenses by category (for example, in Table 6, we combine all of the fraud offenses into one offense category, whereas Table D-2 lists 19 separate fraud offense categories.)

¹⁷ These same four offense categories combined comprise 82% of current federal prisoners (drugs 51%, immigration 11%, weapons 15%, and fraud 5%). See Appendix, Table 12.

¹⁸ See Appendix, Table 6-B.

sections 841 and 846, and Improper reentry by an alien, 8 U. S. C. section 1326.¹⁹ Aside from prosecutions of drug and immigration violators, which have increased significantly in recent years, the rate of prosecution for most other federal offenses remains low and surprisingly static from year to year.²⁰ In fact, some prominent offense categories have actually decreased as an overall percentage of the federal criminal caseload, owing primarily to the astronomical rise in the number of prosecutions for drug and immigration offenses, which now dwarf all other offense categories.²¹

What has remained relatively static in recent decades is the percentage of criminal felony matters pursued federally rather than at the state or local level. This is so in spite of the increasingly complex interstate and global nature of business and crime organizations. Crime remains as much a local matter today as it did in 1913. Overall, federal felony convictions have comprised around 5% of all felony convictions (state and federal combined) since at least 1992.²² The “action” in criminal law (95% of criminal felonies) has always been, and continues to be, at the state and local level. Unless we experience an extreme resource and cultural refocus, federal criminal law will remain a minor player outside the enclaves of direct federal interests (for example, bribery of federal officials and other administration of federal justice offenses, immigration, terrorism, tax offenses, and protection of federal programs and property), where it reigns supreme.²³

¹⁹ See Table D-2, Cases Commenced in Federal Court in a 12-month Period, Federal Judicial Caseload Statistics, Administrative Office of the United States Courts, Statistics Division, Washington, D. C. 2011. See also Appendix, Table 6. Within the Controlled Substance chapter, violations of just two provisions, 21 U. S. C. § 841 (distribution of controlled substances) and 21 U. S. C. § 846 (conspiracy to distribute controlled substances), accounted for approximately 27% of all federal criminal charges brought against defendants in 2011. Within the Immigration chapter, violations of just one provision, 8 U. S. C. § 1326 (improper reentry by alien) accounted for over 22% of all federal criminal defendants in 2010. See also Appendix, Chart of Commonly Used Federal Criminal Statutes.

²⁰ See Appendix, Tables 7 and 8.

²¹ See Appendix, Table 6.

²² See Appendix, Tables 9 and 10.

²³ That is, federal criminal law in general, and the number of such laws “on-the-books” in particular, has very slight measurable effect on criminal charges brought at the state and local level. It may be, as one colleague has suggested to me, that we should be concerned as a philosophical matter with legislators using the criminal law as a vehicle for scoring political points. We are not bothered by this; the public has a short memory, and the “points,” if any, appear to be evenly distributed across Democratic and Republican players. There is probably a larger, yet non-quantifiable, symbolic effect of federal criminal enactments that might be copied by state legislators.

In the remainder of Part I, we will explain why the “explosion” in federal criminal law (at least in terms of the sheer number of federal criminal proscriptions) is largely irrelevant to the actual charging decisions made by federal prosecutors. Many of these new federal crimes are virtually ignored or overlooked by prosecutors. Immigration and drug offenses,²⁴ the most frequently charged offenses in the criminal code, are brought primarily under statutes enacted decades ago,²⁵ and few scholars, judges, practitioners, or citizens would suggest, at least in the case of immigration enforcement, that such enforcement lacks a federal nexus and is therefore inappropriate for federal pursuit.²⁶ While a plausible argument has been made that some if not all of those controlled substances banned federally (and at the state level) should be decriminalized,²⁷ once the policy choice is made to engage in a “war on drugs,” few would disagree that such a fight can be won without federal involvement, at least in the key areas of importation and national and international drug trafficking. Ultimately, the compelling arguments in favor of de-federalizing the war on drugs are actually arguments against the propriety of using any criminal justice system, state or federal, to combat drug use. Such arguments, therefore, go not to the heart of the over-federalization debate, but rather aim for a different target, that is, over-regulation of controlled substances.

This is not to deny that there are some glaring problems with the criminal justice system at the federal level,²⁸ but these problems do not stem from the enactment of too many (and

²⁴ Immigration offenses constituted just 7% of Federal Criminal Defendants in 1980, and this rose to 29% in 2010. Defendants prosecuted for Controlled Substance Offenses constituted 19% of all federal criminal felony defendants in 1980, and rose to 30% in 2010. *See* Appendix, Tables 2 and 6.

²⁵ *See* 21 U. S. C. § 841 *et. seq.* (enacted 1970) (West 2010) and 8 U. S. C. §§ 1324 *et. seq.* , (enacted 1952) (West 2010). *See also* Appendix, Chart of Commonly Used Federal Criminal Statutes.

²⁶ *See* note 73, *infra*. However, some actors believe that immigration enforcement need not be solely a federal pursuit, and that federal law does not preempt every state law in this area. *See, e. g.* , *Chicanos Por La Causa, Inc. v. Candelaria*, 558 F. 3d 856 (9th Cir. 2010), *aff'd*, *Chamber of Commerce of the United States v. Whiting*, 563 U. S. ___, 131 S. Ct. 1968 (2011) (Arizona Senate Bill 1030, denying licenses to businesses that hire undocumented workers, not preempted by federal Immigration Reform & Control Act); M. Isabel Medina, *Symposium on Federalism at Work: State Criminal Law, Noncitizens and Immigration Related Activity - an Introduction*, 12 Loyola Journal of Public Interest Law 265 (forthcoming 2011).

²⁷ For example, the Global Commission on Drug Policy, a 19-member group which includes a former U. N. secretary general and past presidents of Mexico, Brazil, and Colombia, reported in June of 2011 that the global war on drugs has failed and recommends that governments explore legalizing, regulating, and taxing marijuana and other controlled substances. Austin American Statesman, 6/2/11, A2. *See also* Abrams, Beale, and Klein, Federal Criminal Law and Its Enforcement, 5th ed. (West 2010), 319 - 323 (collecting arguments on alternate approaches to the issue of controlled substances).

²⁸ We believe that the worst injustices in the administration of criminal justice today occur at the state and local and not the federal level. As Prof. Klein argued over a decade ago, the most pressing problem for criminal

sometimes just plain silly) federal criminal proscriptions. Rather, as we detail in Parts II and III, the problems which scholars and judges most frequently blame on over-federalization are either not problems at all, or are problems attributable to independent causes such as legitimate concurrent federal and state jurisdiction over the same sphere of behavior (as in drug trafficking), or vague and overbroad federal criminal proscriptions (such as obstruction and mail fraud) many of which have been on the books for decades. As one of us has argued elsewhere, concurrent federal and state jurisdiction over the same misconduct is relatively benign. Those very few defendants who commit fraud or drug offenses and receive harsher federal rather than state sentences have little cause for complaint.²⁹ First, each independent sovereign has its own independent interest in convicting and punishing misbehavior within its borders or by its citizens.³⁰ Second, the evidence we do have suggests that federal prosecutors rationally select cases for federal rather than state prosecution in areas of concurrent jurisdiction based upon such neutral reasons as value of loss (in fraud and property crimes cases) and quantity (in drug cases), recidivism, sophistication of means, number of jurisdictions involved, and the value of information defendants may possess to substantially assist the prosecution with other important

defendants in this country is lack of adequate representation, a non-federal phenomenon. This, in turn, can lead to conviction of the innocent. See Susan R. Klein, *Enduring Principles and Current Crises in Constitutional Criminal Procedure*, 24 Law & Soc. Inquiry 533 (1999). We now note that not one of the 271 defendants exonerated by DNA evidence were convicted of federal offenses. See www.ncjrs.gov/pdffiles1/nij/225761.pdf (DOJ statistics); www.innocenceproject.org/Content/Edward_Green.php and www.innocenceproject.org/Content/Donald_Eugene_Gates.php (Innocence Project) (noting that the two exonerations of defendants convicted by the federal government had actually been one murder/rape conviction and one assault with intent to rape conviction in the D. C. Superior Court, prosecuted under the District of Columbia and not the federal code); The Washington Post, 11/18/10, A-4 (reporting that AG Holder decided to overturn the federal practice of seeking “DNA waivers” in plea agreements after Gates was exonerated). In the federal system, the most pressing problems in our opinion stem from unequal bargaining power at plea negotiations, draconian and mandatory minimum sentences, and lack of adequate and timely discovery to criminal defendants, problems wholly unrelated to the burgeoning number of federal criminal proscriptions. See Susan R. Klein, *Enhancing the Judicial Role in Criminal Plea and Sentencing Bargaining*, 84 Tex. L. Rev. 2023, 2027, 2042-52 (2006) (suggesting that changes to Federal Rules of Criminal Procedure 11 and 16 could improve many of these issues); Susan R. Klein and Jordan M. Steiker, *The Search for Equality in Criminal Sentencing*, 2002 Supreme Court Rev. 223 (2003) (arguing that unfairness in federal sentencing in non-capital cases is not due to mandatory sentencing guidelines, but rather is due to mandatory minimum penalties and other limits on judicial discretion).

²⁹ See *infra* Part II. There were slightly over 27,000 federal drug convictions in 2006 compared with almost 380,000 state court drug convictions that year. There were less than 10,000 federal fraud convictions in 2006 compared with almost 100,000 at the state court level. See Appendix, Table 11.

³⁰ *Barkus v. Illinois*, 359 U. S. 121 (1959) (permitting Illinois to prosecute for robbery after defendant was acquitted in federal prosecution); *Heath v. Alabama*, 474 U. S. 82 (1985) (dual-sovereignty doctrine permits Alabama to execute defendant for murder after he pled guilty to murder in Georgia).

cases.³¹ We should be more concerned with concurrent jurisdiction only when the federal government criminalizes behavior that some states regard as morally neutral or beneficial.³² The problem of federal regulation of such activity, such as the use of medicinal marijuana by patients in many states, is a real but not intractable one.³³

The worst excesses regarding overbroad and vague federal criminal statutes, as well as the injustices associated with federal strict liability regulatory offenses, have actually been curbed rather well, particularly in the last few decades, by the United States Supreme Court. The absolute number of prosecutions for regulatory violations initiated by the Department of Justice has steadily decreased over the last few decades, and defendants charged with federal regulatory offenses now make up just 2% of all federal criminal defendants, down from 7% in 1980.³⁴ Moreover, the Court has implied a mens rea in those federal offenses that might otherwise appear to be strict liability offenses.³⁵ Vague and sweeping federal offenses, such as obstruction of justice and mail fraud, have likewise been trimmed significantly by the Court's narrow statutory interpretation to clear instances of what we would all recognize as criminal misbehavior.³⁶

³¹ Richard S. Frase, *The Decision to File Federal Criminal Charges: A Quantitative Study of Prosecutorial Discretion*, 47 U. Chi. L. Rev. 246 (1980); Daniel C. Richman, *The Changing Boundaries Between Federal and Local Law Enforcement*, 2 Criminal Justice Organizations 91, 91 (2000).

³² Susan R. Klein, *Independent-Norm Federalism in Criminal Law*, 70 Cal. Law Rev. 1541, 1556 (2002) (“Because 90 to 95% of felony offenders are prosecuted in state rather than federal criminal-justice systems, local experimentation as to the method of achieving shared federal and state law-enforcement goals has flourished.”).

³³ Ekow N. Yankah, *A Paradox in Overcriminalization*, 14 New Criminal Law Review 1, 4 (2011) (suggesting that marijuana decriminalization has been successful because of agreement across a broad span of philosophical frameworks).

³⁴ Appendix, Tables 2 through 6.

³⁵ See *infra* Part III; John Shepard Wiley, Jr., *Not Guilty by Reason of Blameworthiness: Culpability in Federal Criminal Interpretation*, 85 Val. L. Rev. 1021 (1999). A few of those Supreme Court cases were subsequently overridden by Congress. See William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decision*, 101 Yale Law Journal 331, 450 - 455 (1991). Since Professor Eskridge's article, however, many more federal criminal statutes have been narrowed by the Court, and many of the Congressional overrides have been themselves subsequently overridden. See, e. g., mail fraud statute narrowly interpreted by Court in *McNally v. United States*, 483 U. S. 350 (1987), then overridden by Congressional enshrinement of honest services theory in 18 U. S. C. § 1346 (1988), then narrowly interpreted by the Court again in *Skilling v. United States*, 2010 WL 2518587, 87 CrL 511 (2010) (limiting honest services theory to bribes and kickbacks). It is possible that *Skilling* will be partially nullified by the “Public Corruption Prosecution Improvements Act,” S. 401, H. R. 2573, 89 CrL 697 (8/10/11).

³⁶ See, e. g., *Skilling v. United States*, 561 U. S. ____ (2010) (mail fraud); *Cuellar v. United States*, 553 U. S. 550 (2008) (money laundering); *Arthur Anderson, LLP v. United States*, 544 U. S. 696 (2005) (obstruction); *United States v. Aguilar*, 515 U. S. 593 (1995) (obstruction); *Bronston v. United States*, 409 U. S. 352 (1973)

Federal criminal defendants plead guilty at an astonishing 97% rate³⁷ not because there are too many federal criminal proscriptions, but instead because the current criminal justice system incentivizes federal prosecutors to charge only rock solid cases (as they can decline most cases safe in the knowledge that state and local actors must pursue them),³⁸ and because the federal sentencing system generously rewards guilty pleas and cooperation agreements.³⁹

I. The Numbers: An Exploration of the Federal Criminal Code and Annual Caseloads

A. Enactment of Federal Criminal Statutes, 1790 – present

Federal criminal jurisdiction has, as Professor Beale noted, “expanded dramatically in the 200 years since the drafting of the Constitution.”⁴⁰ The First Congress in 1790 enacted 22 federal criminal felony offenses, covering such direct federal interests as treason, bribery of federal officials, perjury in federal court, theft of government property, crimes on the high seas, forts, and other places of sole and exclusive federal jurisdiction, and revenue fraud.⁴¹ Other early federal criminal enactments covered areas of interest committed to the national government via the constitution, such as immigration, counterfeiting, and bankruptcy.⁴² In 1872, Congress

(perjury); Williams v. United States, 485 U. S. 279 (1982) (false statement); Liparota v. United States, 471 U. S. 419, 426 (1985) (fraud). These cases are discussed further in Part III, infra.

³⁷ See Table D-4, 2011. Of the 90,210 defendants whose cases were disposed of in federal court in 2011 by means other than dismissal, 87,432 opted to plead guilty, while just 2,778 went to trial.

³⁸ Daniel C. Richman and William J. Stuntz, *Al Capone’s Revenge: An Essay on the Political Economy of Pretextual Prosecution*, 105 Colum. L. Rev. 583, 600 - 605 (2005) (noting that state and local prosecutor’s offices must pursue every violent crime, serious theft, and distribution of hard drug offense committed in their jurisdiction if they desire reelection, whereas federal prosecutors have vast jurisdiction but little responsibility).

³⁹ Abrams, Beale, & Klein, Federal Criminal Law 911 - 960; Susan R. Klein and Sandra Guerra Thompson, *DOJ’s Attack on Federal Judicial Leniency, The Supreme Court’s Response, and the Future of Criminal Sentencing*, 44 Tulsa L. Rev. 101 (2009).

⁴⁰ See Sara Sun Beale, *Federalizing Crime*, *supra* n. 7, at 40-47, for an excellent summary of federal criminal jurisdiction from 1903 to 1995. See also Abrams, Beale, & Klein, Federal Criminal Law and Its Enforcement 18 - 75, 5th ed. (West 2010).

⁴¹ 1 Stat. 112 (1790) (treason; murder, maiming, larceny, or robbery within a fort or any other place under the sole and exclusive jurisdiction of the United States; piracy or mutiny on the high seas; stealing, perjury, or falsifying a record in any court of the United States; bribery of judge of the United States (fine and imprisonment at discretion of court); obstruction of officer of the United States; violence against foreign ambassador).

⁴² Offenses concerning immigration include passport fraud, 1902, impersonating a citizen, 1940, false citizenship or nationalization paperwork, 1948, and alien smuggling and re-entry after deportation, 1952 (8 U. S. C. §§ 1253 -1428). Congressional authority to regulate Naturalization is contained in Article I, section 8, clause 4 of the U. S. Constitution. The first counterfeiting offenses were enacted prior to 1909 (18 U. S. C. §§ 470 - 514),

enacted the mail fraud statute in response to multi-state fraudulent schemes targeting large numbers of victims. This might be viewed as the first federal criminal statute protecting individual victims,⁴³ rather than protecting the interests of the federal government.⁴⁴ After the Civil War, Congress enacted a series of statutes in response to the growth in interstate transportation and commerce, such as the Sherman Antitrust Act (1890), the Federal Food, Drug, and Cosmetic Act (1906, first criminal proscription 1907), transporting lottery tickets (1902), the Mann Act (transportation for illegal sexual activities, 1910), and theft in interstate shipments (1913). This marks the point in time at which the bulk of the federal criminal code began to concern conduct also subject to similar regulation under the states' general police powers. The federal jurisdictional hook in such statutes is interstate transport. During the New Deal, when the role of the federal government expanded in all matters, Congress enacted federal criminal legislation concerning kidnapping (1932), Securities and Exchange Fraud (1933 and 1934), interstate transportation of stolen property (1934), bank robbery (1934), Social Security fraud (1935), interference with commerce by threats, violence, or extortion (Hobbs Act, 1946), and the first federal firearms prohibitions (1938, 1954, 1968), and restrictions on labor unions (1947).

The so-called "explosion" of federal criminal offenses in the 1970s and 1980s brought us legislation against credit card fraud (1970) and explosives and arsons (1970), the Medicare-Medicaid Anti-Kickback Act (1972), the Controlled Substances Act (1970, 1986), Hazardous Waste, Treatment, Disposal and Storage offenses (1972), the Racketeered Influenced and Corrupt Organizations Act (1970), Game and Conservation prohibitions (1970s-1990s, though an early statute was enacted in 1934), the Bank Secrecy Act (currency reporting requirements, 1970), Money Laundering and Structuring prohibitions (1986), Identification Document fraud (1982), and Violent Crime in Aid of Racketeering (1984). The 1990s and first decade of the new century brought most of the federal anti-terrorism legislation (1986 and 1994), carjacking (1992), interstate domestic violence prohibitions (1994), health care fraud (1996), Freedom of Access to

pursuant to Article I, section 8, clause 6 of the U. S. Constitution. Bankruptcy-related offenses were also enacted quite early (concealing assets, 1898, 18 U. S. C. §§ 152 - 158), pursuant to Article I, section 8, clause 4 of the U. S. constitution. Federal tax fraud offenses included misdemeanor failure to pay FIT, 1913, The 1918 Revenue Act, 40 Stat. 1085, federal tax felonies formerly contained in 26 U. S. C. §§ 1260 - 1272, 1924, and our present 26 U. S. C. §§ 7201 - 7217, 1954, in response to the Sixteenth Amendment authorizing a federal income tax (1913). Those statutes too clearly fall into the category of offenses that are clearly the exclusive province of the federal government.

⁴³ Except for garden-variety criminal statutes that Congress enacted for those areas where federal jurisdiction was exclusive, such as the District of Columbia and federal territories.

⁴⁴ Beale, *Federalizing Crime*, *supra* note 7. However, one could argue that the mail fraud statute was designed to protect the integrity of the federal Postal Service. Prof. Richman thinks a better candidate for the first federal statute intended to broadly protect individual interests was the Civil Rights Act of 1866, though it was soon judicially and politically nullified.

Clinic Entrances Act (1994), Violence Against Women Act (1994), special provisions against church arson (1996), additional legislation against child pornography (especially combined with use of the internet, 1996), the Sarbanes-Oxley Act (2002), and sex offender registration (2006). While many of the bad acts prohibited in these federal statutes are prohibited on the local level as well, the federal statutes generally contain an additional requirement of movement across state lines, use of the internet, or a Congressional finding that in the aggregate the local conduct substantially affects interstate commerce.⁴⁵

In fact, the rate of enactment for frequently used statutes (as opposed to the many statutes on-the-books but ignored) has not significantly increased since federalism complaints began. The two high profile studies by the American Bar Association and the Federalist Society⁴⁶ attempted to demonstrate, by counting and listing off sections of the federal criminal code, that over-federalization had resulted in the enactment of hundreds, if not thousands, of criminal laws which do not warrant regulation at the federal level.⁴⁷ The studies aimed to count as much of the code as possible, a daunting task indeed, in order to demonstrate not only that there were more criminal statutes than ever before, but also that the rate of enactment was increasing year by year. By listing off a labyrinth of statutes with absurdly technical titles, they hoped to shock readers into thinking an epidemic was underway.⁴⁸

The ABA report is now more than ten years old, the Federalist Society report, five. As part of our preliminary inquiry into the over-federalization debate, we compiled an unofficial list of commonly used federal statutes⁴⁹ in response to the lists and counts created by the authors of

⁴⁵ Though the Court in Perez v. United States, 402 U. S. 146 (1971) approved of the “class of activities” approach to federal jurisdiction (permitting regulation of purely local conduct if in the aggregate the class of activities substantially affected interstate commerce), that approach is rarely used. See Abrams, Beale, and Klein, Federal Criminal Law and Its Enforcement 27 (5th ed.) (West 2010).

⁴⁶ *Infra* notes 3 and 4.

⁴⁷ See, e. g., ABA REPORT, *supra* note 3, at 10 (“[T]he amount of individual citizen behavior now potentially subject to federal criminal control has increased in astonishing proportions in the last few decades. ”); FEDERALIST SOCIETY REPORT, *supra* note 4, at 10 (arguing persuasively that “[i]ncreasing the number and variety” of charging grounds “tends to dissuade defendants from fighting the charges, because (s)he usually can be ‘clipped’ for something).

⁴⁸ ABA Report, *supra* note 3, at 130, 153. For example, Animal Enterprise Terrorism, and misuse of the Smokey the Bear likeness, were both included in the ABA REPORT as examples of over-federalization gone too far; they are codified at 18 U. S. C. § 43 (animal enterprise terrorism) and 18 U. S. C. § 711 (misuse of “Smokey the Bear” name or character).

⁴⁹ Chart on file with authors and law review. This Chart also includes the date of enactment and the percentage of federal criminal defendants sentenced under that code provision in 2010.

the ABA and Federalist Society reports. Rather than compile a complete laundry list of all federal criminal statutes (an impossible task) we created a list of statutes both familiar to and frequently used by federal prosecutors in real (as opposed to hypothetical) prosecutions.⁵⁰ What we immediately noticed was that many of the statutes present on our list were enacted decades ago, and furthermore, the rate of enactment for these frequently used statutes is relatively stable throughout each decade.⁵¹

- Approximately 170 major statutes were initially enacted prior to 1909;
- Approximately 40 major statutes were enacted from 1910-1919;
- Approximately 20 major statutes were enacted from 1920-29;
- Approximately 70 major statutes were enacted from 1930-39;
- Approximately 50 major statutes were enacted in the 1940s;
- Approximately 60 major statutes were enacted in the 1950s;
- Approximately 47 major statutes were enacted in the 1960s;
- Approximately 76 major statutes were enacted in the 1970s;
- Approximately 80 major statutes were enacted in the 1980s;
- Approximately 80 major statutes were enacted in the 1990s;
- Fewer than 50 major statutes were enacted in the period 2000-2010.

Starting after the New Deal, there is a more or less regular rate of enactment for widely charged criminal statutes. This suggests that in spite of many new criminal proscriptions being enacted, federal prosecutors generally adopt a select few of these laws into their arsenals, and

⁵⁰ The task of compiling this Chart was more challenging than we first anticipated. Counting and dating statutes is notoriously difficult, due to the near-perpetual amendment of certain statutes and frequent reorganizational efforts. We relied primarily on the federal caseload reports from the Administrative Office of the U. S. Courts, the U. S. Attorneys Manual, and U. S. Sentencing Commission data to draw inferences about the types of cases being brought by federal prosecutors. We believe that the Chart represents a good snapshot of the statutes that are frequently used or referred to by federal prosecutors, but it is by no means a complete list of all relevant statutes.

⁵¹ See Chart of Commonly Used Federal Criminal Statutes, for a detailed list of all statutes included in this analysis.

they do so at a more or less stable rate from year to year. If we look at the statutes that prosecutors are actually utilizing on a day to day basis, there is little evidence of the so-called avalanche of new federal criminal enactments in the past 40 years. Sifting through this list of fewer than 750 statutes, we can find no statutes representing more than, say, one percent of the federal criminal caseload that should arguably be prosecuted solely at the state, as opposed to federal, level, due to either prudential or federalism concerns.

Similar conclusions can be drawn with respect to claims that these new criminal statutes, enacted during a recent period of alleged over-federalization, accounted for the bulk of the federal criminal caseload. As noted in the Introduction (and further explained in Part I. B. below), the vast majority of federal criminal charges today are brought under the Immigration Act (1952), the Controlled Substances Act (1970), Weapons Offenses (1932, 1968), and various fraud statutes (for example, Mail Fraud, 1876).

These findings seem eminently plausible given everything we know about the individual and institutional structures, and incentives that underlie federal prosecutors' work. The criminal code might be potentially infinite, but a prosecutor's time and resources are both finite. The federal prosecutorial budget did not keep pace with the rising crime rates of the 1990s,⁵² not to mention population growth. Current federal criminal law is set forth in 48 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.⁵³ No busy professional wants to take time away from her important work to study complex new laws, especially when the old statutes seem to do the trick quite well. This is particularly true where the Department of Justice fails to require (or offer) continuing education courses or monographs in these areas.⁵⁴ Most federal prosecutors don't want to be the official who "tests" a new law, especially on pain of losing a conviction under a reliable statute.⁵⁵ Just because Congress wants

⁵² *Infra* n. 52.

⁵³ The Federalist Society Report at note 7, *supra* note 4, citing Ronald J. Gainer, *Federal Criminal Code Reform: Past and Future*, 2 *Buff. Crim. L. Rev.* 46, 53 (1998). Mr. Gainer oversaw the comprehensive effort by the Office of Legal Policy in the U. S. Department of Justice to count the number of federal crimes.

⁵⁴ When Prof. Klein served in the Department, new trial attorneys were required to take courses in Trial Advocacy and the Federal Sentencing Guidelines. At our leisure, we could read the monographs published by about half of the sixteen (at that time) criminal sections at the department.

⁵⁵ Of course there are exceptions to this, as when a prosecutor wants to make a name for herself, or wants to use a statute in a novel way to avoid problems she might otherwise encounter. The former is less likely on the federal level, where line-prosecutors are appointed based upon a merit, rather than elected based upon their win-loss record. The latter scenario is exactly what happened to create the "honest services" theory in mail fraud. Though it took thirty years and two Supreme Court slapdowns, that theory was eventually rejected, and many convictions are at peril. This may be enough to make future prosecutors think twice.

to score whatever political points it believes obtainable with the next federal criminal enactment, these political priorities won't necessarily be shared by the President, Main Justice, or any of the United States Attorneys.⁵⁶ Congress may be passing too many federal criminal laws, but since enforcement can only be accomplished by the Executive, the Department can ignore these symbolic laws with impunity.

B. Comparison of Federal and State Court Caseloads

There have been large fluctuations in the past concerning the number of federal criminal filings per year.⁵⁷ For example, there were 92,174 federal criminal cases filed in 1932 at the height of Prohibition, two and a half times the total number of federal criminal cases filed in 1918.⁵⁸ As reflected in Table 1-B, federal criminal filings were down to about 30,000 in 1964, peaked to over 48,000 in 1972, and then returned to under 30,000 in 1980.⁵⁹ The number did not reach 1972 levels again until 1992.⁶⁰ The number of federal criminal prosecutions has grown steadily, with little fluctuation, since 1980, at a rate of about 1,500 additional cases per year.⁶¹

⁵⁶ A nice example of this is explored by Professor Jucien E. Dervon in *New Crimes and Punishments: A Case Study Regarding the Impact of Over-Criminalization on White Collar Criminal Cases*, SEALS 2011. He examines the effect of two new obstruction of justice statutes enacted by Congress as part of the Sarbanes-Oxley Act of 2002, and determined that federal prosecutors did not increase (and in fact decreased) administration of justice prosecutions as a total percentage of the criminal caseload in response.

⁵⁷ Note that year to year comparisons of federal and state data for the pre-1980 era should be considered as estimations, as methods for collecting data from the federal courts have vastly improved over the years, and methods of classifying cases by offense type and severity have similarly changed. Likewise, pre-1980 data contains some federal petty offenses

⁵⁸ Edward Rubin, *A Statistical Study of Federal Criminal Prosecutions*, Law and Contemporary Problems, 1:494, 497 (tab. 1) (1934). In 1932 there were 65,960 Prohibition-related criminal cases in the federal courts. *Id.* at 497. Prohibition was repealed in 1933. U. S. Constitution, Amendment XXI.

⁵⁹ Beale, *The Annals of the American Academy*, at 46, citing Administrative Office of the U. S. Courts, Statistics Division (1994). We found very similar but not identical figures in Appendix, Table 1-B, also compiled from data from the Federal Judicial Caseload Statistics, Administrative Office of the U. S. Courts.

⁶⁰ See Appendix, Table 1-B.

⁶¹ See Appendix, Table 1, based on data from Table D-2, *Defendants commenced in federal court in a 12-month period*, FEDERAL JUDICIAL CASELOAD STATISTICS, ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, STATISTICS DIVISION, Washington, D. C. 1982 – 2010. Portions of this data are available online at <http://www.uscourts.gov/Statistics/FederalJudicialCaseloadStatistics/FederalJudicialCaseloadStatistics2010.aspx>). The Supreme Court noted in its 2000 year-end report that the 5% rise in felony criminal filings in 2000 was the sixth straight year to see an increase. 2000 Year-end Report on the Federal Judiciary, The Supreme Court of the United States, <http://www.supremecourt.gov/publicinfo/year-end/2000>. The 2005 report noted that criminal case filings decline 2% that year.

The most recent official count, from the 2011 data, shows that last year federal prosecutors filed charges in slightly more than 79,000 cases, against slightly more than 100,000 defendants.⁶² A good chunk of the steady increase in the federal criminal caseload is certainly attributable to population growth,⁶³ and a significant part can be traced to the growing number of controlled substance prosecutions and stepped-up enforcement against immigration law violators. Since violent and property crime peaked in the 1990s but has decreased 5% a year over the last two years,⁶⁴ perhaps we will see another fluctuation downward in the number of federal criminal charges. That will depend in large measure not on the number of new federal criminal enactments, but rather on the future of federal immigration policy, as immigration cases now represent the fastest-growing segment of federal criminal law enforcement since 1980.⁶⁵

What appears relatively clear is that there is no causal connection (or even a correlation) between the number of federal statutes in existence and the annual number of federal criminal prosecutions. Federal caseload increases are being driven by factors other than the size of the criminal code. This is best established by comparing federal criminal caseloads and convictions to state and local data. As is evident from Tables 9 and 10, number of federal felony convictions relative to the number of state felony convictions has been static for many decades.⁶⁶ State courts, like federal courts, have experienced significant caseload increases since 1960. The fact that both federal and state court criminal dockets are expanding at a steady rate persuasively suggests that some factor other than too many federal offenses is driving higher caseloads across the board, not just in the federal system.

⁶² *Id.*

⁶³ The U. S. population in 1980 was estimated at 227 million, while the latest U. S. Census estimates the current population to be around 310 million. UNITED STATES CENSUS REPORT 1980, UNITED STATES CENSUS REPORT 2010; 2010 report is available at <http://2010.census.gov/2010census/data/>. This thirty-seven percent population increase does not account for the entirety of the increase in federal criminal caseloads, it does help to explain away part of the growth.

⁶⁴ FBI National Crime Statistics, 5/23/11 (noting violent crime peaked nationally in the 1992, but decreased more than 5% in 2009 and again 2010). *See also* Austin American Statesman, 5/24/11, A4 (noting that property offenses fell nationally by 2.8% in 2010 and 4.6% in 2009); *Why are violent crime rates falling?* WASH. POST, Editorial Section, Jan. 2, 2010, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/01/01/AR2010010101829.html> (noting that crime rates are down nationwide, possibly as a result of increased police force presence in many cities; tougher gun control laws; and tougher sentencing laws that removed some career criminals from the streets).

⁶⁵ See Part I C., especially notes 64 - 65.

⁶⁶ *See* Appendix, Tables 9 and 10.

Consider the following: In 1994, about 872,000 felons were convicted in state courts. By 2006, this number had increased 26 percent, to around 1.1 million.⁶⁷ During the same period, federal court felony convictions increased from around 44,000 to about 72,000.⁶⁸

Perhaps more persuasively, throughout the 1990s and first decade of the new millennium, federal court felony convictions have tracked increases in state court felony convictions proportionately. That is, from 1994 to 2006, federal court felony convictions consistently comprised four to six percent of all felony convictions in the country annually (state and federal combined).⁶⁹ Despite slight fluctuations from year to year, the data clearly indicates that about 95% of felons in the United States were convicted in state court, not federal court, between 1994 and 2006. If rampant over-federalization were actually occurring at such an alarming rate, with federal courts encroaching on state court jurisdiction and resources, one would reasonably expect to observe either an increase in the federal caseload without corresponding increases in state court caseloads, or at least a significant rise in the proportion of federal to state felony convictions each year. No such trends are reflected in the data.

An examination of recent state and federal felony caseloads (as opposed to the annual felony *conviction* figures discussed above) compels a similar conclusion. As our Table 9-B reveals, in 2000, state courts commenced felony charges in approximately 2.2 million cases, while federal courts commenced felony charges in just over 48,000 cases during the same year (representing 2% of all felony cases nationally).⁷⁰ This trend held steady in 2009, when state

⁶⁷ BUREAU OF JUSTICE STATISTICS, U. S. DEPARTMENT OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, FELONY SENTENCES IN STATE COURTS 1994, 2000, 2006 [hereinafter FELONY SENTENCES IN STATE COURTS]; reports available at <http://bjs.ojp.usdoj.gov/index.cfm?ty=pbse&sid=28>. See Appendix, Table 9 for graphical representation of state and federal criminal caseload increases.

⁶⁸ *Id.* These figures represent the number of defendants convicted of felonies in federal court, purposefully excluding some federal court misdemeanors convictions so as to draw a more accurate comparison to the state court numbers, which exclude misdemeanors. Notice that these are different numbers than those represented in Appendix, Table 9-B, which represents annual felony *caseloads* (e.g., as opposed to felony *convictions*). Note, too, that other federal caseload data represented in the Appendix, including the data contained in Tables 1-A through 6-B, includes some Class A federal misdemeanors. This fact accounts for discrepancies between the data sets. (For example, in 1994 there were approximately 64,000 defendants commenced in federal court, but just 48,000 or so were being charged with a *felony* offense. In 2006, there were about 92,000 federal defendants, but just 80,000 of these were federal *felony* defendants.)

⁶⁹ See Appendix, Table 10, data based on FELONY SENTENCES IN STATE COURTS, *supra* note 67. Note also that these numbers do not include juvenile or misdemeanor prosecutions, which if included would skew the data even further towards the states.

⁷⁰ See Appendix, Table 9-B.

court felony caseloads reached approximately 2.5 million, while federal courts commenced around 63,600 felony cases during the same year (2.5% of the total).⁷¹

Finally, a careful examination of the types of cases pursued by state courts, when compared to those pursued by federal prosecutors, makes it clear that the division of labor between the two systems is alive and well. The data in Table 11 strikingly illustrates that state courts continue to dominate federal courts in those offense categories reflecting conduct which is generally considered to be local in nature. Consider the following examples:⁷²

- In 2006, state courts convicted 8,670 individuals of murder; federal courts convicted just 146 murderers (or, stated differently, federal courts convicted 1% of all convicted murderers in 2006).
- In 2006, there were 33,566 felony sexual assault convictions in the United States; just 366, or 1%, were prosecuted at the federal level; therefore, 99% of convictions occurred in state court.
- In 2006, 165,534 individuals were convicted of felony drug possession in the United States; of those, just 174, or 0.1%, were convicted in federal court.

Meanwhile, an examination of Table 11 demonstrates that federal courts continue to protect those interests which strongly implicate interstate conduct (the movement of drugs and guns) and the national monetary system. Federal felony convictions represent a significant percentage of all felony convictions (state and federal combined) in just a few offense categories, all of which represent some compelling federal or interstate interest, for example, in 2006:

- Drug trafficking (11.3% of approximately 240,000 felony convictions took place at the federal level).
- Weapons offenses (19% of 46,841 felony convictions took place at the federal level).
- Fraud, forgery and embezzlement (9% of 106,000 felony convictions took place at the federal level).
- International (non-domestic) Terrorism (100% of the 63 felony convictions took place at the federal level).⁷³

⁷¹ *Id.*

⁷² The first six of the following seven examples are reflected in Table 1.6, FELONY SENTENCES IN STATE COURTS 2006, U. S. DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, OFFICE OF JUSTICE PROGRAMS, available at: <http://bjs.ojp.usdoj.gov/content/pub/pdf/fssc06st.pdf>. A summary of this data is attached as Appendix, Table 11.

⁷³ Table D-2, Federal Judicial Caseload Statistics, Administrative Office of the United States Courts, Statistics Division, Washington, D. C., *See also* Appendix, Tables 5 and 11. The number of terrorism convictions is, surprisingly, exactly the same number reached by the National Security Division, <http://web.archive>.

These numbers demonstrate that, in spite of the growing size of the federal criminal code, state and federal courts have continued to adhere to their traditional roles: state courts largely prosecute conduct that is “strictly local” in nature, while federal courts emphasize prosecutions that implicate federal interests or interstate components (for example, drug trafficking across state or national borders, unlawful possession of weapons that have traveled in interstate commerce, distribution of weapons across state lines, and terrorism offenses.) Contrary to what many commentators predicted, the growth of the federal criminal code has not caused federal prosecutions to encroach significantly on areas of traditional state concern, nor has it significantly altered the workload balance between the two systems.

Analysis of Federal Court Caseload Data, 1980 – 2011

A more detailed review of federal court caseload statistics from 1980 onward reveals several trends which weaken claims that over-federalization has caused both an explosion of criminal prosecutions and an enormous increase in the number of federal criminal statutes being utilized. By examining caseload data from the period 1980 onward, it is clear that annual growth in the federal criminal caseload is being driven not by an across-the-board increase in federal criminal law enforcement, but rather is being propelled almost exclusively by increased enforcement in just two offense categories: drug trafficking and immigration offenses. Most other offense categories have experienced declining or stable rates of prosecution since the 1980s, in spite of the fact that numerous new and novel statutes have been enacted during that time period. In those few offense categories that display increased levels of prosecution (immigration, drugs, weapons that traveled in interstate commerce or were used in federal offenses,⁷⁴ and child pornography transmitted over the Internet) it is at least arguable that some quintessentially federal interest is at stake.

In fiscal year 2011, of nearly 80,000 criminal cases commenced in federal court, 56% were either drug or immigration cases.⁷⁵ Put another way, of the approximately 103,000

org/web/20100528153616/http://www.justice.gov/cjs/docs/terrorism-convictions-statistics.pdf. The NSD data tracks only those charges with some nexus to international terrorism, it does not include purely domestic terrorism with no international nexus. However, it is wider in that the Federal Judicial Caseload Statistics data includes only violations of 18 U. S. C. §§ 2331-2339, whereas it includes those terrorism offenses as well as any cases “involving” domestic terrorism, including conspiracy, firearms, obstruction, immigration, passport fraud, etc. We could, of course, find no state cases where international terrorism was charged.

⁷⁴ These weapons offenses may be challenged as being generally inappropriate for federal intervention, though we ultimately conclude that they are. See Part II. A. , *infra*.

⁷⁵ Drug cases represented 21% of the caseload, while immigration cases represented 36% of the caseload. Table D-2, *Cases Commenced in Federal Court in a 12-month period*, FEDERAL JUDICIAL CASELOAD STATISTICS, ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, STATISTICS DIVISION, Washington, D. C. 2010, available

defendants charged in federal court in 2011, more than 60,000 of them (59%) were charged with immigration or drug offenses.⁷⁶ If we look more closely within those offense categories, we find that 48% of cases commenced against federal criminal defendants in 2011 were charged under just two federal criminal statutes!⁷⁷ These numbers reflect a vast increase in the investment of federal prosecutorial resources in drug and immigration prosecutions, perhaps indicating that resources previously devoted to prosecuting other types of offenses have been reallocated to support the rise in drug and immigration prosecutions.⁷⁸

In 1980, immigration and drug defendants constituted just 7% and 19% respectively of all criminal defendants in federal court (of around 40,000 federal court defendants in 1980, approximately 2,800 were immigration defendants, while 7,600 were drug defendants.)⁷⁹ Since

at <http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/Statistics/FederalJudicialCaseloadStatistics/2010/tables/D02CMar10.pdf>. There were more drug *defendants* in federal court in 2010 than there were immigration defendants, owing to prosecutors' preference for trying multi-defendant cases (note that drug prosecutions averaged 1.8 defendants per case.)

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⁷⁶ There were 30,795 drug and 29,530 immigration defendants commenced in federal court in 2011, of a total 103,274 defendants. *Id.* Thus, as noted in the introduction and in Appendix, Table 7, 59% of cases commenced against defendants were either drug (30%) or immigration (29%) cases. In fact, prosecutions under just two statutes, 21 U. S. C. section 841 (distribution of a controlled substance) and 8 U. S. C. section 1326 (reentry of previously removed alien) respectively, now jointly comprise approximately 48% of the federal criminal caseload. See Table D-2, *Defendants commenced in federal court in a 12-month period*, FEDERAL JUDICIAL CASELOAD STATISTICS, ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, STATISTICS DIVISION, Washington, D. C. 1980 and 2011; supra note 58.

⁷⁷ Table D-2, supra note 58, indicates that of approximately 103,000 defendants commenced in federal court in 2011, more than 25,000 of them were prosecuted for selling, distributing, or dispensing drugs, covered by 21 U. S. C. section 841, while around 24,000 defendants were prosecuted for "improper reentry by alien," covered by 8 U. S. C. section 1326. Thus 25% of all federal criminal defendants in 2011 were prosecuted under 21 U. S. C. section 841, and 22.4% of all federal criminal defendants in 2010 were prosecuted under 8 U. S. C. section 1326, for a total of 48.3% for the two statutes combined.

⁷⁸ See Julia Preston, *States Resisting Program Central to Obama's Immigration Strategy*, THE NEW YORK TIMES, May 5, 2011, available at <http://www.nytimes.com/2011/05/06/us/06immigration.html> (detailing the Obama administration's Secure Communities program, which mandates that participating local governments fingerprint all those booked into local jails for immigration violations; the strategy has led to a record number of immigration prosecutions and deportations, nearly 800,000, in the past two years); see also NATIONAL DRUG CONTROL STRATEGY 2010 EXECUTIVE SUMMARY, available at http://www.whitehousedrugpolicy.gov/publications/policy/ndcs10/exec_summary.pdf (stating that the administration will maximize availability of federal resources to combat drug trafficking and flow of weapons across the southern U. S. -Mexico border.)

⁷⁹ Table D-2, *Defendants commenced in federal court in a 12-month period*, FEDERAL JUDICIAL CASELOAD STATISTICS, ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, STATISTICS DIVISION, Washington, D. C. 1980. See also Appendix, Tables 2 through 6, where the enormous rise in drug and immigration offenses is represented graphically.

1980, prosecutions against immigration offenders have increased tenfold, to more than 29,000 defendants in 2011, while prosecutions against drug offenders have increased by a factor of four, to more than 30,000 defendants in 2010.⁸⁰ A few key points on this significant rise:

- If we compare the number of federal criminal prosecutions in 1980 (approximately 40,000) to the number in 2011 (just over 100,000), this yields an average annual increase of around 60,000 prosecutions, or 150% over the 1980 caseload. Increases to immigration and drug prosecutions can account for nearly 50,000 cases, or 83% of the increase.⁸¹
- The drug and immigration offense categories now dwarf all others; the next largest offense category behind drugs, 30%, and immigration, 29% (offense categories number one and two respectively) is fraud, a distant third, at just 12% of the caseload, followed by Firearms and Explosives, fourth at 9% of the caseload.⁸²
- The category of fraud offenses has decreased from 15% of criminal cases commenced against federal defendants in 1980 down to 12.8% in 2011.⁸³ While the raw number of annual fraud prosecutions commenced has risen slightly between 1980 and 2011,⁸⁴ fraud as a percentage of the federal caseload has declined.
- Drug and immigration cases now so overwhelmingly dominate the federal criminal caseload that no major offense category aside from drugs, immigration, fraud and firearms constituted more than five percent of the criminal caseload in 2011.⁸⁵ This

⁸⁰ 29,530 individuals were charged with immigration offenses in 2011; 30,795 individuals were charged with drug offenses during the same period. See Table D-2, 2011.

⁸¹ To arrive at this number, we compared the annual number of drug and immigration prosecutions in 1980 (around 10,400 combined) to the number of combined drug and immigration prosecutions in 2011 (around 60,000). This represents an increase of around 50,000 cases annually over the 1980 drug and immigration caseload. See Table D-2, *Defendants commenced in federal court in a 12-month period*, FEDERAL JUDICIAL CASELOAD STATISTICS, ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, STATISTICS DIVISION, Washington, D. C. 1980 and 2011; 2011 data available at <http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/Statistics/FederalJudicialCaseloadStatistics/2010/tables/D02DMar10.pdf>.

⁸² *Id.*

⁸³ See Appendix, Tables 2 through 6.

⁸⁴ See Appendix, Table 7.

⁸⁵ See Table D-2, *supra* note 63.

includes such high-profile offense categories as regulatory offenses (less than two percent, with around 2,000 defendants prosecuted annually for all regulatory offenses combined); violent offenses, including murder (. 1%), assault (1%), kidnapping (. 1%), robbery (1%), carjacking (. 1%), and terrorism (0%); money laundering (1%); securities fraud (. 1%); mail and wire fraud (1% combined); and RICO (. 1%).⁸⁶

Where approximately 60% of the criminal defendants haled into federal court last year are being charged under just a handful of federal drug and immigration statutes, it is difficult to accept the proposition that it is the sprawling size of the code that's to blame for the growth of the federal criminal docket. One may surely criticize the enactment of overly broad criminal proscriptions, draconian federal sentences, or unbridled discretion of federal prosecutors, but these criticisms have little to do with the number of federal crimes in existence at any given time.

When one considers that for every 100 criminal defendants in federal court today, approximately 50 are being prosecuted pursuant to one of two federal criminal statutes,⁸⁷ it becomes clear that it is the overwhelming number of drug and immigration offenders, and not the size of the code, which is the strongest driver of caseload increases in the federal courts.

One might certainly question whether this emphasis on immigration and drug enforcement is warranted. However, absent an amendment regarding the constitutional allocation of authority to the national government to enforce our country's borders, and a sea change in the public perception regarding the dangers inherent in the drug trade, increased federal prosecution in these offense categories constitutes a necessary (in the immigration area) or appropriate (in the controlled substance area) response to distinctly national problems.

The spike in the illegal immigrant population from the period 1980 onward is an issue that can only be fully addressed at the federal level.⁸⁸ Much has been written of late regarding

⁸⁶ *Id.* See also Appendix, Tables 6-A and 6-B for recent caseload distributions for other offense categories.

⁸⁷ See *supra* note 61.

⁸⁸ Most statisticians agree that approximately 3 million illegal immigrants were present in the United States in the late 1970s, whereas there are now thought to be between 10-11 million. See Robert Warren and Jeffrey S. Passel, *A Count of the Uncountable: Estimates of Undocumented Aliens Counted in the 1980 United States Census*, 1987; U. S. Department of Homeland Security, ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES: JANUARY 2009. This 300% increase in the population of illegal immigrants during the 30-year period between 1980 and 2010 explains some, but not all, of the 1000% increase in immigration prosecutions during that same period. In 2010, 47. 5% of those sentenced in federal court were non-citizens, up from 27. 3% in 1996. Nearly 27,000 of the 38,619 non-citizens sentenced in federal court in 2010 were convicted of immigration offenses. United States Sentencing Commission, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 2010 and 1996, TABLE 9, CITIZENSHIP OF OFFENDERS IN EACH PRIMARY OFFENSE CATEGORY, available at

state and local level involvement in immigration policy and enforcement.⁸⁹ There is little consensus on whether federal immigration prosecutions are handled in an appropriate manner, with particular criticism on the removal of aliens based on what is now an extremely broad array of state and federal crimes, including some that can be characterized as non-violent and fairly minor. Of course these criminal conviction-based removal decisions are the basis for the subsequent federal criminal reentry prosecutions. However, these critiques are primarily directed at whether the federal immigration laws (and more generally our federal immigration policies) are sensible. None suggest that, whatever policy we select, the federal government shouldn't be the primary player. Federal authority to regulate immigration to and expulsion from the United States is not only included in Congress' power to regulate foreign commerce, provide for naturalization, and to make treaties with foreign states, but is inherent in sovereignty itself.⁹⁰ Since immigration authority is one of the enumerated powers of the federal government, federal immigration proscriptions preempt state criminal regulation in this area.⁹¹ The sphere of federal immigration enforcement is distinct from the case of federal criminal proscriptions over controlled substances and white collar frauds, where the state has general police power and related federal criminal statutes do not preempt state law in the field.⁹² State actors, such as

http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2010/Table09.pdf for 2010 statistics and <http://ftp.ussc.gov/annrpt/1996/tab-9.pdf> for 1996 statistics.

⁸⁹ See, e.g., Symposium on Federalism at Word: State Criminal Law, Noncitizens and Immigration Related Activity, 12 Loy. J. Public Int. Law 331 (Spring 2011).

⁹⁰ U. S. Constitution, Art. I § 8, clause 4 (“Congress shall have the power to establish an uniform Rule of Naturalization”); *Chae Chan Ping v. United States*, 130 U. S. 581, 604-05 (1889). The Supreme Court has confirmed on numerous occasions since *Chae Chan* that immigration is a matter for federal enforcement, both as a matter of Constitutional text and preemption law. *DeCanas v. Bica*, 424 U. S. 351 (1976) (holding that the power to regulate immigration is unquestionably exclusively a federal power). Federal civil enforcement is also an appropriate response, of course, but it is not realistic to ignore a federal criminal law response when pursuing illegal aliens who have already been deported once because they violated the criminal laws of the United States during their visit.

⁹¹ *Chamber of Commerce of the United States v. Whiting*, 563 U. S. ____, 131 S. Ct. 1968 (2011) (holding that the Immigration Reform and Control Act preempts state criminal and civil sanctions for employing unauthorized aliens but expressly preserves state authority to impose sanctions through licensing). The analysis of this issue could change in the future, with the Supreme Court's recent grant of certiorari of the Arizona immigration bill. *Arizona v. United States*, 132 S. Ct. 845 (Mem), 181 L. Ed. 2d 547 (2011) (No. 11-182, 10A1277). Several other southern states recently passed immigration enforcement legislation, including Alabama and Georgia, whose laws continue to move through the lower courts. See *Laurence v. Davidson*, “Alabama, Georgia Fight to Salvage Immigration Laws in U. S. Appeals Court,” Bloomberg News (March 1, 2012), available at: <http://www.bloomberg.com/news/2012-03-01/two-states-fight-to-save-immigration-laws-in-u-s-appeals-court.html>.

⁹² “In the criminal law context there is a clear understanding that Congress ordinarily intends to supplement state law, rather than to regulate comprehensively and occupy the field.” Norman Abrams & Sara S. Beale, *Federal Criminal Law and Its Enforcement* 681 (3d ed. 2000).

Arizona state lawmakers, believe that the federal government is failing to adequately enforce federal immigration law and wish to enact state laws that might assist federal regulators, not supplant their role. Similarly, those on the other side of the immigration issue pushing for amnesty for current illegal aliens, a wider door for future immigrants, and a shorter list of what criminal convictions make a person ineligible to enter the United States, must seek federal legislation to accomplish their goals.

Unlike immigration laws and the few other crimes explicitly assigned to the federal government, we could theoretically leave all drug trafficking enforcement to the states.⁹³ On the other hand, having a federal presence does not interfere with state drug control enforcement, as the federal Controlled Substances Act does not displace the state law enforcement regime, but rather supplements it with concurrent jurisdiction over similar misconduct. The valid constitutional basis for the Controlled Substances Act has been confirmed by the Supreme Court on several occasions as a legitimate exercise of Congress' Commerce Clause power to regulate local activities that are part of an economic "class of activities" having a substantial effect on interstate commerce.⁹⁴ The practical problem with removing federal jurisdiction over all controlled substance violations is that large-scale drug trafficking into and within the United States is more than a local problem. It frequently involves interstate and international elements which cannot successfully be prosecuted by states on the same scale as at the federal level. Federal criminal enforcement of drug laws focuses almost exclusively on trafficking, importation and manufacture — drug possession represents less than a percent of the current federal caseload.⁹⁵ Interdiction efforts often require federal Executive Branch involvement, through use of the U. S. military in policing both land borders and the high seas, and the pursuit of diplomatic relationships with source countries.⁹⁶

⁹³ David W. Rasmussen & Bruce L. Benson, Rationalizing Drug Policy Under Federalism, Fla. St. U. L. Rev. 679 (2003) (advocating the decentralization of the drug policy to the state and local governments).

⁹⁴ See e. g., *Gonzales v. Raich*, 545 U. S. 1, 21 (2005) ("[W]e have no difficulty concluding that Congress had a rational basis for believing that failure to regulate the intrastate manufacture and possession of marijuana would leave a gaping hole in the CSA ... [therefore] Congress was acting well within its authority to 'make all Laws which shall be necessary and proper' to 'regulate Commerce . . . among the several States. '").

⁹⁵ Table D-2, Federal Judicial Caseload Statistics, Administrative office of the United States Courts, supra note 63.

⁹⁶ It would be difficult to imagine trying General Manuel Antonio Noriega in a state court, especially as he was charged under one of the many drug offenses that explicitly provide for extraterritorial jurisdiction. See *United States v. Noriega*, 746 F. Supp. 1506 (S. D. Fla. 1990) (upholding conviction under 21 U. S. C section 959, an international conspiracy to import cocaine into and out of the United States). The USA Patriot Improvement and Reauthorization Act of 2005 expanded extraterritorial jurisdiction to reach acts of "narco-terrorism." Pub. L. No. 109-177, section 122, 120 Stat. 192, 225 (2006). Moreover, only the federal government can make arrest requests

While drug enforcement laws have often been the focus of harsh criticism, most of this criticism has been directed at the severity of sentencing schemes, the disproportionate cost borne by racial minorities and the poor, the privacy invasions attendant on fighting the war on drugs, and a general lack of rehabilitative options.⁹⁷ These criticisms are not directly relevant to the over-federalization debate; rather, they are criticisms that apply to state and federal drug enforcement schemes alike.

The relevant drug and immigration statutes under discussion here are neither new, novel, nor truly controversial from a federalism standpoint—both have been on the books for more than 40 years and have sustained multiple constitutional challenges.⁹⁸ The ubiquity of drug and immigration prosecutions in the federal system weakens the familiar argument that federal prosecutors are utilizing a slew of new and controversial statutes with weak jurisdictional bases to encroach on subjects traditionally reserved to state control. Drug trafficking and immigration offenses are precisely the types of prosecutions that the federal system should emphasize and prosecute aggressively. Indeed, even those who complain of over-federalization do not frequently criticize federal exercise of jurisdiction over drug trafficking and immigration prosecutions (though they may have valid complaints regarding the way in which this jurisdiction is exercised). This suggests then that the bulk of the current federal criminal caseload, nearly 60%, consists of drug trafficking and immigration prosecutions for which there is little debate as to the legitimacy or desirability of federal enforcement as opposed to state enforcement.

C. Beyond Drugs and Immigration: What cases are prosecutors bringing?

Immigration and drug prosecutions have increased both in terms of raw numbers and as a percentage of federal criminal caseloads to such a degree that they obscure what is happening in other offense categories. If we turn to the Appendix, Tables 2 through 6, it becomes visually

pursuant to extradition treaties with foreign nations, though violation of such treaties does not deprive the Court of jurisdiction to hear the criminal case. *United States v. Alvarez-Machain*, 504 U. S. 655 (1992).

⁹⁷ See, e. g., cites listed *supra* note 22; Professors Clymer and Smith, *supra* note 9; Professor Frank O. Bowman III and Michael Heise, *Quiet Rebellion? Explaining Nearly A Decade of Declining Federal Drug Sentences*, 86 Iowa Law Rev. 1044 (2001) (establishing that federal prosecutors are gaming system to decrease drug sentences); William J. Stuntz, *Unequal Justice*, 121 Harvard Law Rev. 1969 (2008) (arguing that the drug war unfairly incarcerates Latino and black males); Douglas N. Husak, *Legalize This! The Case for Decriminalizing Drugs* (Colin McGinn ed., 2002) (suggesting that the current drug policy is not only ineffective but unjust).

⁹⁸ See *supra* note 20.

apparent that because of the dominance of drug and immigration prosecutions most other offense categories have now been reduced to less than three percent of the federal criminal caseload.⁹⁹

It is instructive to examine increases and decreases in the raw number of prosecutions for various offense types on an annual basis, as we do in Tables 7 and 8. Overall, caseload indicators demonstrate that, despite an increase in the number of available statutory grounds for charging defendants, the number of prosecutions has remained stable, declined, or increased very slightly in most major offense categories. Aside from drug trafficking and immigration, the only categories to increase as a percentage of the federal criminal caseload were firearms and sex offenses, and the only categories to increase in absolute numbers were fraud (slightly), firearms, sex offenses, and international terrorism offenses.¹⁰⁰ This indicates that prosecutors are by and large uninterested in the latest and greatest anti-crime legislation as a means of reaching new forms of conduct.

For example, for the following offense types, the raw number of prosecutions has remained more or less stable since 1980, in spite of the enactment of additional statutes:

- Homicide: In 1980, federal prosecutors commenced homicide cases against 185 defendants; compared to 2011, when federal prosecutors commenced homicide charges against 130 defendants.¹⁰¹ Note that there was a decrease in the number of prosecutions in spite of the fact that Congress enacted at least five new homicide statutes since 1980.¹⁰²

⁹⁹ For example, violent offenses represent 3% of the caseload; robbery 1%; larceny and theft 3%; regulatory offenses 2%. Appendix, Table 6.

¹⁰⁰ See Appendix, Tables 7-8 for graphical representation of those offenses for which prosecutions have increased, in Table 7, and decreased, in Table 8. Note that these raw numbers do not reflect whether prosecutions for a particular offense type increased or decreased as a percentage of the federal caseload. For that information, see Appendix, Tables 2 – 6B.

¹⁰¹ Table D-2, *Defendants commenced in federal court in a 12-month period*, FEDERAL JUDICIAL CASELOAD STATISTICS, ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, STATISTICS DIVISION, Washington, D. C. 1980, 2010; 2010 data available at: <http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/Statistics/FederalJudicialCaseloadStatistics/2010/tables/D02DMar10.pdf>.

¹⁰² See Appendix, Chart of Commonly Used Federal Criminal Statutes; Congress enacted at least five new homicide statutes in 1994: 18 U. S. C. § 1118, Murder by federal prisoner; 18 U. S. C. § 1119, Foreign murder of U. S. nationals; 18 U. S. C. § 1120, Murder by escaped prisoners; 18 U. S. C. § 1121, Killing of persons aiding federal investigations or correctional officers; and 18 U. S. C. § 1122, protection against the HIV virus.

- Bribery: In 1980, 230 defendants were charged in federal court with bribery; in 2011, 165 defendants were charged with bribery.¹⁰³ This decline occurred in spite of the fact that Congress enacted at least six new bribery statutes during that time period.¹⁰⁴

These are just two examples of a trend that can be traced throughout most offense categories within the caseload data. In reality, most major offense categories have actually decreased both in terms of raw numbers and as a percentage of the caseload since 1980, in spite of a vast increase in the number of available statutory grounds for bringing prosecutions. When considered in conjunction with population growth, this translates into an actual declining rate of prosecution for these offense categories. The following additional examples illustrate this point:¹⁰⁵

- Larceny and theft offenses now comprise less than three percent of the federal criminal caseload. In 2011, around 2,800 prosecutions were commenced, down from approximately 4,000 in 1980. This major offense category represented nearly ten percent of the caseload in 1980. At first glance, larceny and theft appear to be the types of conduct typically regulated by states, but note that in 2011, nearly 2,000 of these prosecutions in federal court were for theft of U. S. property, an undeniably federal interest, while another 300 or so prosecutions were for postal theft, another offense implicating federal interests.
- Forgery and counterfeiting: in 1980, there were 2,493 prosecutions; in 2011, there were only 1,091. Forgery and counterfeiting now comprise around 1% of the caseload, whereas in 1980 these offenses comprised 6% of the federal criminal caseload.
- Regulatory offense prosecutions now comprise a mere 2% of the federal criminal caseload, down from 7% in 1980. During this period, there has been a significant decline in the annual number of regulatory crime prosecutions—down to 2,171 in 2011, from

¹⁰³ Table D-2, *Defendants commenced in federal court in a 12-month period*, FEDERAL JUDICIAL CASELOAD STATISTICS, ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, STATISTICS DIVISION, Washington, D. C. 2010 and 1980, *supra* note 84.

¹⁰⁴ See Appendix, Chart of Commonly Used Federal Criminal Statutes. Post-1980, Congress enacted the following additional bribery statutes: 18 U. S. C. §§ 666, federal programs bribery, enacted in 1984, as well as 18 U. S. C. §§ 225-227, 212-213.

¹⁰⁵ Table D-2, *Defendants commenced in federal court in a 12-month period*, FEDERAL JUDICIAL CASELOAD STATISTICS, ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, STATISTICS DIVISION, Washington, D. C. 1980, 2010, *supra* note 84. The statistics for the larceny, forgery, and regulatory offense examples discussed below come from this source.

2,855 in 1980. An enormous number of new regulatory crimes were enacted in the period 1980 to 2011, so many that we were unable to count even a fraction of them; yet this increase appears to have had virtually no impact on the annual number of regulatory prosecutions. If we look at specific laws within the regulatory offense category, there is a more or less even distribution of prosecutions throughout different sub-categories in the 2011 caseload, with the most frequent types of prosecutions being brought for game and conservation violations (227 prosecutions, down from 459 in 1990); reporting of monetary transactions (368 prosecutions, level since 2001); violations of postal service regulations (125 prosecutions, down from 242 in 1990); customs (196 prosecutions, level since 1990); and national parks regulations (160 prosecutions, down from 194 in 2001). On the low end, just 49 were prosecuted for food, drug and cosmetic act violations in 2011, while 61 were prosecuted for copyright infringement, and 54 were prosecuted for antitrust violations (level since 1990).¹⁰⁶ Thus, most types of regulatory laws are being criminally enforced at an equal or less frequent rate than in decades past—this is in spite of enactment of many new regulations.

A few other offenses of particular notoriety which have experienced flat or declining rates of prosecution in recent years include:¹⁰⁷

- RICO (Racketeer Influenced and Corrupt Organizations Act): 114 prosecutions in 2001, as compared to 189 in 2011 (representing . 1% of the caseload).
- Carjacking: 161 prosecutions in 2001, 131 in 2011 (representing . 1% of the caseload).

¹⁰⁶ The Regulatory Offense category includes a wide array of regulations including those pertaining to aircraft, copyright, the postal service, hazardous waste, migratory bird, reporting of monetary transactions, antitrust, labor, and national defense, to name a few. Table D-2, *supra* note ____ . See Appendix, Chart of Commonly Used Federal Criminal Statutes, for particular laws included in various regulatory subcategories. One colleague suggested to me that the numbers on regulatory charges are artificially low due to the new practice of non-prosecution (“NPA”) and deferred prosecution agreements (“DPA”) in the corporate crime situation. What evidence we could find does not support that thesis. There were only 140 such agreements between 1993 and 2009. United States Government Accountability Office Report, issued 6/26/09 (reviewing 57 of the 140 NPA and DPA negotiated between 1993 and 2009), available at <http://www.gao.gov/cgi-bin/getrpt?GAO-09-636T>.

¹⁰⁷ Table D-2, *Defendants commenced in federal court in a 12-month period*, FEDERAL JUDICIAL CASELOAD STATISTICS, ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, STATISTICS DIVISION, Washington, D. C. 2010 and 2005; 2005 data available at <http://www.uscourts.gov/uscourts/Statistics/FederalJudicialCaseloadStatistics/2005/tables/D02Dmar05.pdf>; 2010 data available at <http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/Statistics/FederalJudicialCaseloadStatistics/2010/tables/D02DMar10.pdf>. The data in this table provides the statistics for the below RICO, carjacking, mail/wire fraud, and financial institution offense examples. There are many additional examples of this trend in the caseload statistics.

- Mail and Wire fraud: 1,457 prosecutions in 2001, 1,408 in 2011 (representing 1% of the caseload). We can expect that number to decrease significantly after last term's *Skilling v. United States*,¹⁰⁸ where the Supreme Court limited honest services mail and wire fraud to instances involving kickbacks and bribery.
- Financial institutions fraud: 1,633 prosecutions in 2001, 751 in 2011 (representing less than 1% of the caseload).

The offense categories identified below represent those few areas (other than drugs and immigration) that have experienced increased levels of prosecution in the past 30 years. While we do not wish to overlook the significance of these areas of growth, we would note three things: 1) the increases are relatively modest, especially when considered in light of population growth; 2) their significance to the over-federalization debate is outweighed by declining prosecutions in all other major offense categories in spite of many new laws being enacted; and 3) the increases in these few categories arguably reflect a valid investment of resources to protect federal interests and to prosecute developing forms of interstate criminal conduct. For example:¹⁰⁹

- The sex offense category has experienced a significant increase in number of prosecutions since 1980, when there were just 172 prosecutions, to 3,237 prosecutions in 2011. At first glance, this increase may be attacked by critics of federalization as an encroachment upon states' traditional regulation of sexual crimes. But a closer examination reveals that almost the entirety of the increase in sex offense prosecutions at the federal level consists of interstate child pornography offenses, sexual abuse of minors in geographic regions of exclusive federal jurisdiction, and failure to complete national sex offender registry requirements.¹¹⁰ The strong interstate and international component involved in interstate trafficking of child pornography, particularly via the Internet, indicates that it is a legitimate subject for federal enforcement. Likewise, the federal

¹⁰⁸ 561 U. S. ____ (2010); 130 S. Ct. 2896, 2931 (2010) ("For the purposes of this chapter, the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services. ").

¹⁰⁹ Table D-2, *Defendants commenced in federal court in a 12-month period*, FEDERAL JUDICIAL CASELOAD STATISTICS, ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, STATISTICS DIVISION, Washington, D. C. 2010 and 1980, 2010 data available at <http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/Statistics/FederalJudicialCaseloadStatistics/2010/tables/D02DMar10.pdf>. The statistics for the below sex offense, firearm, and fraud examples come from this source.

¹¹⁰ Prosecutions for sexually explicit material offenses comprised around 1,800 of federal prosecutions in 2011, sexual abuse of minors added another 657 prosecutions, and sex offender registry violations nearly rounded out the category with another 466 prosecutions. See 2011 Table D-2, *supra*.

government's ability to prosecute for sexual abuse of a minor (unconnected to interstate or foreign commerce) is triggered only where the relevant conduct occurs within United States territorial, maritime or federal prison jurisdiction, and thus in such cases there exists no concurrent state jurisdiction in which to bring charges. Finally, a national registry of sex offenders can only be accomplished at the federal level.¹¹¹

- Firearms offenses have experienced a significant increase in the number of prosecutions since 1980, when there were around 1,500 prosecutions (4% of the caseload). By 2011, approximately 8,500 defendants were prosecuted for firearms offenses in federal court (8% of the caseload). Most prosecutions within this category are for weapons possession by prohibited persons (e. g. , convicted felons), and use of a firearm in furtherance of violent or drug trafficking crimes (2,087 prosecutions), and most are brought by Operation Triggerlock, consisting of Task Forces comprised of federal, state, and local officials.¹¹² This is an area where national sentiment, under both Democratic and Republican administrations, has called for the stricter enforcement of federal prosecutions.
- In 2011, there were around 13,000 federal prosecutions for all types of fraud, comprising 12% of all federal prosecutions. Compare this to 1980, when fraud prosecutions numbered approximately 6,000, or 15% of the caseload. The fraud offense category has experienced a 100% increase in the raw number of prosecutions since 1980, yet it has declined slightly as a percentage of the overall caseload. Within the fraud category, the most frequently used statutes in 2011 were those reflecting undeniably strong federal interests: false use of U. S. identification documents and information, or interstate trafficking in fraudulent identification documents (approximately 2,800 prosecutions) and frauds committed against the United States (approximately 1,000 prosecutions). Also

¹¹¹ See 18 U. S. C. § 2243, Sexual abuse of minor or ward, enacted in 1986 (express jurisdictional element indicates that the act applies only to those who engage in acts of sexual abuse against a minor while in special maritime and territorial jurisdiction, or in a federal prison, or in an institution under contract with federal government.) The provisions in 18 U. S. C. §§ 2551, 2552, and 2252A, the most commonly used subsections of Chapter 110, Sexual Exploitation and other Abuse of Children, require either a connection to interstate or international commerce, or occurrence in the special maritime and territorial jurisdiction of the United States. We express no opinion here as to the value of Sex Offender Registration and Notification Act (SORNA), we merely note that no state or even combination of states could be able to create or maintain a national registry.

¹¹² Operation Triggerlock was established in 1991 by then Republican Attorney General Richard Thornburg. See Text of Triggerlock Implementation Memo, DOJ Alert, vol. 1, No. 1, p. 17 (July 1991). See also Abrams, Beale, and Klein, FEDERAL CRIMINAL LAW AND ITS ENFORCEMENT, at 487 - 489.

strongly represented are tax fraud, health care fraud, and Social Security fraud, all of which are protective of federal interests or target interstate criminal activity.

- Within the violent offense category, only Violent Racketeering and Terrorism prosecutions have experienced any growth in the past decade—but note that the violent offense category overall is shrinking as a percentage of the caseload, down from 7.2% in 1980 to 2% in 2011.¹¹³ Moreover, the increase in violent racketeering and terrorism prosecutions is small—violent racketeering rose from 144 prosecutions in 2001 to 467 prosecutions in 2010; terrorism prosecutions rose from 25 in 2001 to 65 in 2011.¹¹⁴ Both offenses combined represent less than 1% of the 2011 federal caseload.¹¹⁵ Obviously terrorism offenses are of critical national concern, and violent racketeering offenses generally involve multi-state or international organizations of a sophisticated nature, making federal involvement imperative.

We pause here to note that the absolute number of terrorism prosecutions annually, which continues to be quite low, certainly does not reflect their importance in the federal criminal justice system. In fact, the federal focus on anti-terrorism enforcement is much greater than the small number of cases reflects. Post 9/11, anti-terrorism enforcement was elevated to top priority at the FBI. After a 2005 report of the Special Presidential Intelligence Commission highly critical of the FBI, organizational changes have shifted nearly half of the FBI's 1200 agents to terrorism and intelligence work.¹¹⁶ The goal, of course, is to identify risks and prevent terrorist attacks, and there is no way to quantify how many attacks were thwarted and cases not filed due to the diligence of our federal agents.

The foregoing data illustrates that, beyond immigration and drug trafficking, few offenses are experiencing increased rates of prosecution at the federal level. Those that are (such as fraud,

¹¹³ Table D-2, *Defendants commenced in federal court in a 12-month period*, FEDERAL JUDICIAL CASELOAD STATISTICS, ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, STATISTICS DIVISION, Washington, D. C. 2010 and 2005, 2010 data available at: <http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/Statistics/FederalJudicialCaseloadStatistics/2010/tables/D02DMar10.pdf>.

¹¹⁴ Table D-2, Federal Judicial Caseload Statistics, Administrative Office of the United States Courts, Statistics Division, Washington, D. C., 1004, 2005, 2010. See also National Security Division, <http://web.archive.org/web/20100528153616/http://www.justice.gov/cjs/docs/terrorism-convictions-statistics.pdf>. According to the National Security Division, the federal government has prosecuted 403 terrorism cases since 2001. Unlike the statistics from the Administrative Office of the U. S. Courts, these statistics also include non-terrorist offenses (such as passport fraud and perjury) so long as the case is *related to* international terrorism.

¹¹⁵ See Appendix, Table 6.

¹¹⁶ Abrams, Beale, and Klein, *Federal Criminal Law*, *supra*, at 709 - 712.

firearms, sex offenses, and terrorism) represent and protect federal interests. Critics of over-federalization who claim that the ever-expanding scope and size of the criminal code are responsible for caseload increases will be hard-pressed to respond to the fact that 80% of growth to the federal criminal caseload since 1980 is attributable to increased enforcement of our nation's drug and immigration laws.¹¹⁷ To a much lesser degree, caseload increases are being driven by increased prosecutions of fraud involving the federal government, unlawful weapons, trafficking in child pornography, and other offenses devoted to defending national interests and resources. In spite of the expanding number of federal criminal statutes in many major offense categories (most notably, regulatory offenses), all other major offense categories have actually experienced notable declines in both the rate and raw number of annual prosecutions.

D. Analysis of Federal Sentencing Data and Prison Populations as Evidence of Legitimate Federal Law Enforcement

Federalization of criminal law is often cited as an unnecessary drain on federal court, prosecutorial, and prison resources. It is true that federal courts are busier than ever before with criminal matters, and federal prison populations are at peak capacity, with more than 210,000 inmates.¹¹⁸ Critics of federalization may evoke sympathetic images of unwitting offenders rotting in federal prisons, having been unlucky enough to violate some obscure federal regulation. Are we really spilling our coffers to jail nonviolent regulatory and white collar offenders? The answer, again, is a resounding “no.” Sentencing data and prison population data reveal that our limited federal resources are being expended primarily to prosecute and imprison those who have offended federal interests, and not to punish those who have committed trivial offenses, or who have engaged in conduct traditionally regulated by states.

In fiscal year 2010, the United States Sentencing Commission reported that 83,946 individuals were sentenced in federal court.¹¹⁹ In the following offense categories, offenders received a median prison sentence of less than 12 months¹²⁰:

¹¹⁷ In 1980, there were around 10,000 drug and immigration defendants commenced in federal court; in 2011, there were more than 60,000. See Table D-2, 1980 and 2011.

¹¹⁸ See Appendix, Table 12.

¹¹⁹ UNITED STATES SENTENCING COMMISSION, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 2010, Table 13, *Sentence Length in Each Primary Offense Category*, available at http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2010/Table13.pdf. That Table represents not only average sentences, but also the number of total offenders and number of offenders in each major offense category. For a summary of that data, see Appendix, Table 13, providing average sentences in federal court by offense type.

¹²⁰ *Id.*

- Simple possession of drugs (3 months)
- Larceny (0 months)
- Embezzlement (3 months)
- Gambling/Lottery (5 months)
- Environmental / Wildlife offenses (0 months)
- Antitrust (8 months)
- Food & Drug offenses (0 months)
- Other miscellaneous offenses (0 months)
- Fraud (10 months)

The above-referenced offense categories, and specifically the number of statutes criminalizing regulatory infractions, are often cited by critics of over-federalization as proof that Congress and federal prosecutors have gone too far. However, it is apparent from the statistics above that these prosecutions are not actually a significant drain on federal resources. Regulatory prosecutions, specifically, are relatively few in number, 121 prison sentences are short (or nonexistent in many cases), and trial costs are frequently avoided through plea bargains.¹²²

Commentators who attempt to connect the dots between over-federalization and prison overcrowding would perhaps be surprised to learn that many federal offenders convicted of regulatory offenses, and even some white collar offenses, frequently receive probation and criminal fines instead of prison time. For example, offenders in the following offense categories were given “probation-only” sentences more than 40% of the time:¹²³

- Miscellaneous regulatory offenses (49%)

¹²¹ For example, in 2011, around 2,000 defendants were charged with regulatory offenses in federal court. *See* Table D-2, 2011, *supra*.

¹²² An average of 96.8% of those convicted in federal court entered guilty pleas in 2010. For example, of 16 Antitrust defendants sentenced in 2010, 15 entered guilty pleas; of 84 Food & Drug offenders sentenced, 80 pled guilty. UNITED STATES SENTENCING COMMISSION, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 2010, Table 11, *Guilty Pleas and Trials in Each Primary Offense Category, Fiscal Year 2010*, available at http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2010/Table11.pdf.

¹²³ UNITED STATES SENTENCING COMMISSION, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 2010, Table 12, *Offenders Receiving Sentencing Options in Each Primary Offense Category, Fiscal Year 2010*, available at [http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2010/2 Table12.pdf](http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2010/2%20Table12.pdf).

- Food and Drug offenses (57. 5%)
- Environmental/Wildlife offenses (60%)
- Gambling/Lottery offenses (43. 4%)
- Embezzlement (42. 8%)
- Larceny (44. 4%)

Likewise, many costs of prosecution may be offset by imposition at the sentencing stage of fines (payable to the government) and restitution (payable to victims.) In 2010 federal judges ordered all offenders, for example, to pay a total sum of \$8,206,913,773 in fines and restitution.¹²⁴ Fraud offenders alone were ordered to pay more than \$6 billion in fines and restitution, but served median sentences of just 10 months in federal prison.¹²⁵

Federal prison resources are being consumed primarily by drug, immigration and firearm offenders. Consider the following data from Tables 12 and 13: In 2010, nearly 29,000 immigration offenders were sentenced to an average of 16. 8 months in jail,¹²⁶ and immigration law violators now constitute 12% of the federal prison population.¹²⁷ Whereas immigration sentences are relatively low, a few other major offenses carry very heavy average sentences, including drug trafficking (75 months); child pornography (118 months); and firearms (85 months).¹²⁸ This emphasis on harshly protecting federal interests at the sentencing stage is also reflected in the makeup of the federal prison population, where nearly 50% of the current inmates are drug offenders, and 16% are weapons, explosives, and firearms offenders.¹²⁹ Regulatory offenders, in contrast, make up less than 1% of the federal prison population, while

¹²⁴ UNITED STATES SENTENCING COMMISSION, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 2010, Table 15, *Offenders Receiving Fines and Restitution in Each Primary Offense Category, Fiscal Year 2010*, available at: http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2010/Table15.pdf. We were unable to find statistics on the percentage of these court-ordered fines and restitution that were actually paid.

¹²⁵ *Id.* See also UNITED STATES SENTENCING COMMISSION, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 2010, Table 13, *Sentence Length in Each Primary Offense Category*, available at http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2010/Table13.pdf.

¹²⁶ See Appendix, Table 13. See also *Id.*

¹²⁷ See Appendix, Table 12.

¹²⁸ See Appendix, Table 13.

¹²⁹ See Appendix, Table 12.

certain white collar offenders (banking and insurance, counterfeiting, and embezzlement) make up just .4%.¹³⁰

Increases in the federal prison population are undoubtedly striking and alarming. The federal system currently imprisons around 216,000 individuals, up 250% from 1992, when just 59,516 were incarcerated.¹³¹ In light of the caseload increases described previously, it is not hard to see why federal prisons are now crowded with drug, firearms and immigration offenders. Additionally, the imposition in 1987 of the now-advisory Sentencing Guidelines, and the trend during that same time period towards statutory mandatory minimum sentences, has resulted in harsher sentences for many classes of offenders.¹³²

In light of the fact that most federal prison resources are consumed by just a few types of offenders, the criticism of over-federalization and the growth of the federal criminal code as a driver of booming prison populations loses much of its steam. Just as any debate about caseload increases must begin with a discussion of drug and immigration prosecutions, so too must discussions of prison overcrowding focus on mandatory sentencing provisions for the largest and most harshly punished groups of offenders—specifically drug, immigration and firearms offenders, who now jointly constitute almost 80% of the federal prison population.¹³³

II. Concurrent Federal and State Criminal Jurisdiction

In Part I, we established that the growth of the federal criminal justice system is being driven primarily by increased prosecutions of immigration and controlled substances offenders (and, to a much lesser extent, weapons and fraud offenders). A substantial percentage of federal law enforcement resources are now devoted to counterintelligence and otherwise preventing terrorism offenses, though this allocation is not reflected in the number of terrorism cases or

¹³⁰ *Id.*

¹³¹ *Id.* See also FEDERAL BUREAU OF PRISONS DRUG INTERDICTION ACTIVITIES, U. S. Department of Justice, January 2003, available at <http://www.justice.gov/oig/reports/BOP/e0302/intro.htm#back> (noting that, from fiscal year 1992 through 2001, the number of sentenced inmates in BOP institutions increased by 103 percent from 59,516 to 120,827).

¹³² See Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (1984) (codified as amended in Title 18); *Booker v. United States*, 542 U. S. 220 (2005) (striking down mandatory provisions of the Federal Sentencing Guidelines); Erik Luna & Paul G. Cassell, *Mandatory Minimalism*, 32 CARDOZO L. REV. 1, 27 (2010) (noting that harsh mandatory minimum sentences have the effect of encouraging defendants “to cooperate with the prosecution by providing information, entering into plea agreements, and waiving their constitutional rights.”) See also Anthony M. Kennedy, Speech at the American Bar Association Annual Meeting (Aug. 9, 2003) (expressing that he can “accept neither the necessity nor the wisdom of mandatory minimum sentences”).

¹³³ See Appendix, Table 12.

defendants. The plethora of federal criminal statutes on the books is largely irrelevant to federal law enforcement activities, prosecutorial charging decisions, and the constituency of the federal prison population. The argument from the ABA, the Federalist Society, and others that the federal criminal law enforcement system is encroaching on state systems and endangering the balance between state and federal law enforcement is clearly mistaken.

Perhaps most tellingly, the national proportion of criminal cases brought federally has remained constant since at least 1980,¹³⁴ and has averaged between 2- 5% of the total national criminal felony caseload for the last century,¹³⁵ leaving the vast bulk of criminal cases filed at the state and local level. In fact, the proportion of federal criminal prosecutions, as a percentage of all criminal prosecutions in this country annually, has been more or less stable since 1918, with a brief spike in the number of federal prosecutions during the Prohibition era.¹³⁶ This pattern holds true even in those areas where jurisdiction is concurrent, such as possession of controlled substances, fraud, and weapons offenses. The federal law enforcement apparatus remains limited both in size and scope relative to its state law enforcement counterpart. States can thus continue to fruitfully experiment with different substantive criminal laws, procedures and penalty schemes.¹³⁷

A. Disparate Sentences and Procedures

A more nuanced version of the over-federalization critique is that concurrent federal and state criminal jurisdiction results in unfairness to those defendants unlucky enough to be chosen for federal criminal prosecution—an unfairness that may rise to constitutional dimensions, some have argued. Though still framed as such by many scholars, this is not truly an “over-federalization” critique at all. As we explained in Part I of this paper, the inequity attacked is not the result of too many federal criminal laws, but rather of the fact that a particular federal law may overlap an almost identical state law barring the same misbehavior. A close reading of the literature reveals that the critique is directed not at the vast size of the federal criminal code, but at the harsher procedure and penalties imposed in the federal system in instances of concurrent jurisdiction, and the alleged arbitrariness of the selection between forums.

¹³⁴ See Appendix, Tables 9-A and 9-B.

¹³⁵ We have documented the stability of federal court caseloads since the 1980s. See Appendix Tables 1-A and 1-B. See also Beale, *Federalizing Crime: Assessing the Impact on the Federal Courts*, *supra* n. 59, at 46. For more recent data, see also Appendix, Tables 9-A and 9-B.

¹³⁶ See also Beale, *Federalizing Crime: Assessing the Impact on the Federal Courts*, *supra* n. 59; Rubin, *supra* n. 58.

¹³⁷ See Part II-B, *infra*.

This argument is offered particularly vehemently regarding cases involving drug trafficking, weapons offenses, and fraud. Several well-known and well-respected scholars claim that federal prosecutors, using a plethora of federal criminal statutes that duplicate and overlap similar state criminal statutes, routinely bring criminal charges in federal district court that could and perhaps should have been brought in state court.¹³⁸ Such concurrent jurisdiction, combined with the relatively low rate of federal prosecution and open-ended charging policies that hinge on prosecutorial discretion, form what some scholars have dubbed “a kind of cruel lottery” for criminal defendants.¹³⁹ While federal prosecution affects only a small fraction of criminal defendants,¹⁴⁰ federal prosecutors enjoy a variety of procedural and evidentiary advantages, including the long duration and national subpoena power of the federal grand jury; limited, rather than blanket, immunity for grand jury witnesses; lower standards for obtaining search warrants; the availability of preventative detention; the lower burden of proof required for electronic surveillance; a well-developed witness protection program; the ability to use uncorroborated accomplice testimony; and more favorable discovery rules.¹⁴¹ The losers of this lottery thus face serious disadvantages as compared to their state-charged compatriots.

These significant prosecutorial advantages, combined with sky-high conviction rates in federal court,¹⁴² and the *much* stiffer penalties handed out by the federal system,¹⁴³ mean that a federal prosecutor’s decision to bring charges may indeed have grave, life-altering ramifications

¹³⁸ Clymer, *supra* note 9, at 675; Smith, *supra* n. 9; Beale, *supra* n. 7.

¹³⁹ See Beale, *Too Many Yet Too Few*, *supra* note 7, at 997.

¹⁴⁰ See Appendix Table 9-B. In 2009, less than 3% of all felony cases brought nationally were brought in federal court; the remaining 97% were brought in state court.

¹⁴¹ Norma Abrams, Sara Sun Beale, & Susan Riva Klein, *FEDERAL CRIMINAL LAW AND ITS ENFORCEMENT* 81 (5th ed., 2010) (citing NAT’L INST. OF JUSTICE, U. S. DEP’T OF JUSTICE, *FIGHTING URBAN CRIME: THE EVOLUTION OF FEDERAL & LOCAL COLLABORATION* 3 (2003)).

¹⁴² For example, in 2011, federal courts disposed of around 99,000 defendants; of those defendants who did not receive outright dismissal, 99.5% were convicted either by guilty plea (87,000) or by trial (approximately 2,400). Of those defendants who went to trial, just 428 were acquitted. See Table D-4, Criminal Defendants Disposed of, by Type of Disposition and Offense, *FEDERAL JUDICIAL CASELOAD STATISTICS*, ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, STATISTICS DIVISION, Washington, D. C. 2011, available at: <http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/Statistics/FederalJudicialCaseloadStatistics/2011/tables/D04Mar11.pdf>

¹⁴³ As one example of this, consider that in 2006, felony weapons offenders at the state level received prison sentences 73% of the time, whereas federal weapons offenders received prison sentences 93% of the time. Similarly, in 2006 just 67% of drug traffickers convicted at the state level received prison time; those convicted in federal court during the same period received prison time 93% of the time. See *Felony Sentences in State Courts 2006*, Bureau of Justice Statistics, Office of Justice Programs, U. S. Department of Justice, Table 1. 6, Comparison of felony convictions in state and federal courts, 2006, available at: <http://bjs.ojp.usdoj.gov/content/pub/pdf/fssc06st.pdf>.

for a criminal defendant.¹⁴⁴ Critics suggest that “the decision to bring charges in federal rather than state court is made on an ad hoc basis. The *United States Attorneys’ Manual* (the *Manual*) does contain some general standards for the exercise of prosecutorial discretion, but they are written so broadly that they provide little guidance.”¹⁴⁵

To make matters even worse for the federal criminal defendant, the Supreme Court’s current precedent on selective and arbitrary prosecution makes charging decisions essentially unreviewable.¹⁴⁶ Scholars such as Sara Sun Beale and Stephanos Bibas have roundly criticized this aspect of federal prosecution and have called for a re-evaluation of the USAO’s charging criteria by the legislative or executive branches.¹⁴⁷ Other scholars, including Professors Smith

¹⁴⁴ See Clymer, *supra* note 9, at 677; see also Sara Sun Beale, *The Many Face of Overcriminalization: From Morals and Mattress Tags to Overfederalization*, 54 AM. U. L. REV. 747, 761-764 (2005) (documenting the prosecutions of two defendants for robbery under the Hobbs Act). Professor Beale notes that while these defendants faced serious jail time under state law, both received much harsher penalties and have no possibility of parole, in stark contrast to defendants prosecuted under state law for the exact same conduct. *Id.* at 763-64. Neither Beale, Clymer, or Smith examine any of the anecdotal examples of disparate federal-state sentencing they discuss in their articles to determine why the cases that were brought federally might have been so selected. In our admittedly cursory review of those cases, we noticed plausible distinguishing features between ostensibly similar cases. For example, the federal case examples included defendants with long criminal records and those who refused to cooperate in the investigation. Finally, none of the scholars who make this criticism appear to have considered the fact that this imbalance could shift direction, and federal criminal defendants could end up the winners of this jurisdictional lottery.

¹⁴⁵ Beale, *id.* at 997. Professor Beale is referring to a Manual that guides the discretion of all trial attorneys at the Department of Justice and Assistant U. S. Attorneys at the 95 U. S. Attorneys’ Offices. This manual can be found at http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/, and is discussed *infra* at n. 163.

¹⁴⁶ The Court reviews cases alleging selective prosecution with a very lenient rational-basis test, making it essentially impossible for a defendant to win. See *Armstrong v. United States*, 517 U. S. 456 (1999) (black defendants alleging selective prosecution of crack cocaine cases by federal prosecutors in Los Angeles not entitled to discovery until they show that the government declined to prosecute similarly situated individuals of other races); *Wayte v. United States*, 470 U. S. 598 (1985) (petitioner alleging selective prosecution of vocal opponents for failure to register for the draft must show that the enforcement system the government used had a discriminatory effect and that it was motivated by a discriminatory purpose); *U. S. v. Bass*, 536 U. S. 862 (2002) (black defendant denied discovery regarding federal selection of death cases despite DOJ report and AG comments detailing statistical disparity based upon race).

¹⁴⁷ See Beale, *Too Many and Yet Too Few*, *supra* note ____, at 1018 (calling for the promulgation of charging criteria that narrows the class of cases eligible for federal prosecution); Stephanos Bibas, *Regulating Local Variations in Federal Sentencing*, 58 Stanford Law Rev. 137 (2005) (arguing for procedural oversight and substantive guidelines to limit “unjustified” regional variations in federal sentences based upon fast-track programs and cooperation agreements). See also Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. Penn. Law Rev. 959 (2009) (suggesting the solution to unreviewable prosecutorial discretion is reform of the internal structure and management of prosecutors’ offices).

and Clymer, have demanded a judicial outlet to challenge seemingly arbitrary prosecutorial charging decisions.¹⁴⁸

We are not particularly sympathetic to these complaints, and we offer two primary responses. First, we believe that even if selection for federal prosecution were completely arbitrary (determination by the flip of a coin), such an “arbitrary” selection between federal and state jurisdiction should not unduly concern us.¹⁴⁹ Certainly there is no constitutional problem with such a procedure. Second, we question whether criminal defendants are actually faced with a “lottery,” that is, the kind of arbitrariness that should trouble those interested in fair treatment of all individuals. In fact, evidence suggests that cases are selected for federal prosecution based upon factors most would find rational and fair, such as the nature and extent of loss caused by a defendant’s conduct, a defendant’s criminal history, and whether a defendant’s conduct implicated federal interests or involved interstate elements.

First, let us assume that a particular defendant is randomly selected for prosecution by federal rather than state prosecutors (or vice-versa). Where such an individual engages in misconduct that violates both federal and state law, she has violated the law of two independent sovereigns, and each has a legitimate interest in deterring such behavior in the future, expressing its moral condemnation of the behavior, and exacting punishment. She has no cognizable legal “right” in choosing which jurisdiction will charge or punish her, so long as the decision to prosecute is not motivated by a constitutionally invidious reason such as race or gender, or is not otherwise arbitrary or capricious.¹⁵⁰

Thus in *Bartkus v. Illinois*,¹⁵¹ the Court rejected the defendant’s argument that the Fourteenth Amendment prevented his prosecution for armed robbery as a habitual offender in Cook County Court after an earlier acquittal in federal District Court for robbery of a federally

¹⁴⁸ Clymer, *supra* note ____, at 739 (demanding that the Court revisit precedent that virtually prohibits judicial review of charging decisions, and instead implement a more vibrant rational-basis test).

¹⁴⁹ See also Vincent Chiao, *Ex Ante Fairness in Criminal Law and Procedure*, *New Criminal Law Review* (forthcoming 2011) (suggesting that fairness requires no more than a rough equalization of *ex ante* chances of punishment given conditions of resource scarcity, an inability to reliably rank claims by comparative desert, and a pressing need for punishment to be imposed).

¹⁵⁰ See *United States v. Armstrong*, 517 U.S. 456 (1996).

¹⁵¹ 359 U. S. 122 (1959) (successive state and federal prosecutions for bank robbery are not prohibited by the Fourteenth Amendment). We note that the Court used the Due Process Clause of the Fourteenth amendment rather than the double jeopardy clause in this review of a state conviction because the latter clause had not yet been incorporated and applied to the states. That happened in *Benton v. Maryland*, 395 U. S. 784 (1969). The Court did employ double jeopardy analysis in *Abbate v. United States* in a review of a federal conviction rendered the same day as *Bartkus*, and the switch in constitutional clauses made no difference in its reasoning.

insured savings and loan association. The *Bartkus* Court noted that over 100 hundred years earlier, in *Fox v. State of Ohio*,¹⁵² it upheld an Ohio conviction for uttering counterfeit money despite the fact that Congress had also imposed federal sanctions for counterfeiting, and these duplicative statutes raised the possibility of double punishment. The federal statutes did not preempt the state sanctions under the Supremacy Clause as “both the Federal and State Governments retained the power to impose criminal sanctions, the United States because of its interest in protecting the purity of its currency, the States because of their interest in protecting their citizens against fraud.”¹⁵³ After all, “every citizen of the United States is also a citizen of a State or territory. He may be said to owe allegiance to two sovereigns, and may be liable to punishment for an infraction of the laws of either. The same act may be an offense or transgression of the laws of both.

Bartkus involved a situation where only one sovereign actually punished the defendant. Given this precedent, perhaps then the actual “cruel lottery” is one where a defendant is selected not just for prosecution but is actually punished at both the state and federal levels. Perhaps one’s intuitive sense of unfairness is triggered by allowing both federal and state sovereigns to punish the same defendant serially for engaging in a single bad act. A perpetrator knows he might have to do the time, but perhaps he doesn’t realize he may have to do it twice. Or perhaps our innate sense of fair play counsels against such an outcome regardless of a defendant’s knowledge. This appears to be the prevailing view of those scholars who have opined on the subject.¹⁵⁴ The Supreme Court, of course, has rejected this entirely, instead employing the *Bartkus* reasoning to a situation where both sovereigns punished a defendant for misconduct that violates each sovereigns’ laws.

In *Abbate v. United States*,¹⁵⁵ decided the same day as *Bartkus*, the Court upheld an indictment in federal court after a successful state prosecution and punishment for the same

¹⁵² 5 How. 410, 12 L. Ed. 213 (1847).

¹⁵³ *Bartkus*, 359 U. S. at 130.

¹⁵⁴ See, e. g., George C. Thomas III, *Islands in the Stream of History: An Institutional Archeology of Dual Sovereignty*, 1 Ohio St. J. Crim. L. 345, 346 (2003) (attacking the dual sovereignty doctrine); Guido Calabresi, *Federal and State Courts: Restoring a Workable Balance*, 78 N. Y. U. L. Rev. 1293, 1298 (2003) (suggesting that where there is a federal crime that parallels a state crime, both crimes be tried together in state court); Sandra Guerra, *The Myth of Dual Sovereignty: Multijurisdictional Drug Law Enforcement and Double Jeopardy*, 73 N. C. L. Rev. 1159 (1995); Susan N. Herman, *Double Jeopardy all Over Again, Dual-Sovereignty, Rodney King, and the ACLU*, 41 UCLA L. Rev. 609, 618-19, n. 32 (1994) (discussing a dozen law review articles on the subject).

¹⁵⁵ 359 U. S. 187, 195-96 (1959).

misconduct.¹⁵⁶ As Justice Brennan explained, “if the States are free to prosecute criminal acts violating their laws, and the resultant state prosecutions bar federal prosecutions based on the same acts, federal law enforcement must necessarily be hindered.”¹⁵⁷ This is particularly true in a case like *Abbate*, where the defendant received only three months’ prison sentence in state court for conduct that could result in a five year federal penalty. The defendant’s act in threatening interstate lines of communications “impinge[d] more seriously on a federal interest than on a state interest. . . . Needless to say, it would be highly impractical for the federal authorities to attempt to keep informed of all state prosecutions which might bear on federal offenses.”¹⁵⁸

The Court has shown no inclination to back away from the historically accurate position that the federal government and each state is sovereign in the fields of defining and punishing crimes against their peace and dignity, instead extending the dual sovereignty doctrine wherever possible. In *Heath v. Alabama*¹⁵⁹ the Court found that the State of Alabama had a legitimate interest in convicting the defendant of first degree murder during a kidnapping and sentencing him to death, even after this defendant pled guilty to murder in Georgia and received a life sentence (with the possibility of parole after seven years). The Court reiterated that “two identical offenses are not the ‘same offence’ within the meaning of the Double Jeopardy Clause if they are prosecuted by different sovereigns.”¹⁶⁰ Each State’s power to prosecute and punish derives from its “inherent sovereignty, preserved to it by the Tenth Amendment, and not from the Federal Government.”¹⁶¹ (Likewise, the Court held that the Navajo Tribe is an independent sovereign from the Federal Government for purposes of the dual sovereignty doctrine.)¹⁶²

If the primary criticism of this so-called lottery system is indeed that defendants are twice punished for a single offense, critics should rest assured that such successive prosecutions are quite rare, and where they do occur, there generally exists some unique circumstance warranting both state and federal prosecutions. In the typical case, a defendant is extremely unlikely to be

¹⁵⁶ The state conviction was for conspiracy to injure property of the telephone company, and the federal charge was for conspiracy to injure means of communications, both involving a single conspiracy by union representatives to dynamite a telephone company facility located in Mississippi during a labor dispute.

¹⁵⁷ *Id.* at 195.

¹⁵⁸ *Id.* at 195-96.

¹⁵⁹ 474 U. S. 82, 106 S. Ct. 433 (1985).

¹⁶⁰ *Heath*, 106 S. Ct. at 439.

¹⁶¹ *Id.* at 437.

¹⁶² *United States v. Wheeler*, 435 U. S. 313, 328 (1978).

prosecuted by the federal government once he has been prosecuted by a state, regardless of whether that first prosecution resulted in an acquittal or a conviction. Such defendant receives the benefit of the Department of Justice's strong and well-enforced Petite policy, which since 1959 has barred prosecution of a defendant who has been tried first in state court for similar misconduct, unless it can be demonstrated that a "substantial federal interest" was "demonstrably unvindicated" in the first prosecution, and the Assistant Attorney General expressly approves the proceeding.¹⁶³ Though there are exceptions to the Petite policy, for the most part those defendants tried first in a state or federal court, whether convicted or acquitted, are relatively safe from a second federal prosecution. The few times the Department makes exceptions to the policy are rare enough to make national headlines.¹⁶⁴

Likewise, those defendants prosecuted first by the federal government need not be overly concerned about a second trial at the state or local level, as *The Heath* situation will likewise be extremely rare, as state jurisdictional authority is tied to a territoriality principle.¹⁶⁵ Finally, the converse of the Petite policy situation - where a defendant is tried first in federal court and second in state court, is also improbable. A number of states have enacted statutes which bar a second prosecution if the defendant has been once tried by another government (federal or state) for a similar offense.¹⁶⁶ Thus in practice the vast majority of defendants can expect to be prosecuted one time, or more likely not at all.¹⁶⁷

¹⁶³ See United States Attorney's Manual 9-2. 031, Dual and Successive Prosecution Policy ("Petite Policy"), available at http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/2mcrm.htm#9-2.031 (establishing that prosecution of a crime following a prior state or federal prosecution for substantially the same acts is precluded unless the matter involves "a substantial federal interest;" the prior prosecution "must have left that interest demonstrably unvindicated;" and "the government must believe that the defendant's conduct constitutes a federal offense, and that the admissible evidence probably will be sufficient to obtain and sustain a conviction by an unbiased trier of fact. In addition, there is a procedural prerequisite to be satisfied, that is, the prosecution must be expressly approved by the appropriate Assistant Attorney General.") The Attorney General first created this policy in a memorandum issued to all U. S. Attorneys immediately after the *Abbate* and *Barkus* decisions were rendered. It became known as the Petite policy when the Supreme Court recognized it in *Petite v. United States*, 361 U. S. 529 (1960).

¹⁶⁴ The Rodney King case is the prime example of a case fitting into an exception to the Petite policy for "gross injustice" at the state level. See "2nd King Trial Raises Double Jeopardy Flag," *The Chicago Tribune*, May 15, 1992, available at: http://articles.chicagotribune.com/1992-05-15/news/9202130079_1_double-jeopardy-prosecutions-police-officers.

¹⁶⁵ In *Heath* the kidnapping started in Alabama, where the defendant lived with his wife, but ended in Georgia, where the hit man left the victim in the trunk of a car.

¹⁶⁶ The *Barkus* majority supplied such a chart as an appendix to its opinion. 359 U. S. 122, 138, n. 27. According to a well-known treatise, about half of the states have, since *Barkus*, adopted statutes prohibiting state prosecution for offenses that relate to a previous federal prosecution, though these vary considerably as to the

If we assume that the selection of jurisdiction for criminal defendants is truly random, and therefore once caught, two similarly situated suspects have an equal “chance” of being charged federally, we see no constitutional violation nor any intuitive sense of “unfairness” or “wrongness” about this “lottery.” Let us assume that names were picked out of a hat. So long as the defendant is actually found guilty beyond a reasonable doubt; the substantive offense is one we can agree should be criminalized; the punishment in each jurisdiction is proportional within the meaning of the Eighth Amendment’s Cruel & Unusual Punishment Clause; and the procedures used to investigate and prosecute the offense are fundamentally fair within the meaning of the Due Process Clauses of the Fifth and Fourteenth Amendment, there is no legally cognizable harm or deprivation of rights where one is ultimately prosecuted by the jurisdiction that gives a higher rather than a lower penalty, or vice versa. Every crook is aware of the aphorism, “don’t do the crime if you can’t do the time.”

Several of our colleagues and professors suggested to us that being given a longer or shorter sentence based upon the fortuity of being hauled into federal or state court is [unfair] in the same manner that it is “unfair” for federal criminal defendants to get longer or shorter sentences depending upon which federal district judge they draw at their plea or sentencing hearing. This lack of uniformity at the sentencing stage was the primary rationale behind the once-mandatory Federal Sentencing Guidelines.¹⁶⁸ The argument against what they considered our cavalier attitude toward those unfortunate losers of the federal lottery went something like this: Fairness depends upon a uniform national policy for sentencing determinations, which should not be arbitrarily based upon gender, geography, which level of law enforcement personnel caught you, or judicial temperament. Furthermore, fairness, their argument goes, depends not only on uniform sentencing policy (that is, a uniform approach by judges making sentencing decisions), but also on uniform sentencing outcomes (resulting in more or less the same sentence for similarly situated defendants).

We find unconvincing the comparison between selection for federal prosecution on the one hand, and lack of uniformity in federal sentencing on the other. While we might agree that it is “unfair” to treat similarly situated defendants differently once they are all before a single jurisdictional authority, such is simply not the case here. The very nature of our federalist

extent of the prohibition. LaFave, Israel, King, & Kerr, 6 Criminal Procedure 662 (West 2007 and 2010 supplement).

¹⁶⁷ Clearance rates for most local and state crimes are below 50% in most jurisdictions. The crime problem for most people is that no perpetrator is ever found, not that the perpetrator might be convicted twice by separate jurisdictions. See FBI Annual Crime Report, available at: <http://www.fbi.gov/about-us/cjis/ucr/ucr>. See in particular Crime in the United States, Tables 25-28, 2010 (showing various clearance rates for various offense types.)

¹⁶⁸ *Mistretta v. United States*, 488 U.S. 361 (1989).

system requires independent law enforcement systems to vindicate their own respective interests, limited only by their resources, policies, and the requirements of federal and state Constitutions. Where each sovereign has its own individual set of law enforcement priorities and values, this necessarily means that prosecuting a particular defendant may be a low priority for the state, but a high priority for the federal government.

Obviously, we have no central repository for all criminal suspects that would allow us to separate them out for state or federal charging and punishment and therefore to rationalize sentences. Perhaps if there were such a sorting system in place, then defendants could be separated according to the presence and strength of the national interest (or lack thereof) in prosecuting a particular case, given all of the facts and attendant circumstances.¹⁶⁹ For several reasons, we think this an unworkable idea. First, it is at the very least impracticable. It would require the sharing of mountains of information between federal, state and local actors, thereby creating an enormous bureaucracy and the resultant inefficiencies in a system already strained by lack of resources. Ignoring momentarily the practical difficulties, such a system would fly in the face of “Our Federalism” by denying each sovereign the independence to make the ultimate decision, to charge or not to charge. Finally, sorting or tracking of suspects into federal or state law enforcement systems is already happening on an informal basis. Federal law enforcement agents are not interested in small cases—they generally limit themselves to investigations that bear on federal interests or carry national significance. Even after a federal agent brings a case to the prosecutor’s desk, the investigating agents’ decisions are reviewed by federal prosecutors, who may (and often do) choose to dismiss a case they deem too insignificant or lacking in value in light of limited federal resources.

In reality, selection for federal prosecution is not truly random. Losers of the federal lottery did not have their names picked out of a hat. Rather, the funneling of defendants into state or federal court rests in largest measure on objective, neutral matters such as which law enforcement agency catches the suspect and develops the case file. Generally, where federal law enforcement agents investigate a crime over which there is concurrent jurisdiction and apprehend suspects, those suspects wind up in federal court. Where state law enforcement agents investigate a file and turn it over to the local assistant district attorney, that suspect, should he become a defendant is generally prosecuted in state court. In many instances the identity of the investigative agency is a matter of chance—do the victims or witnesses to a fraud or drug transaction call the FBI or their local police department after they suffer or witness a crime? Is the surveillance team that observes the suspects selling drugs on a street corner made up of local officers or DEA agents? In most of the 95% of criminal cases that are filed at the state level,

¹⁶⁹ We envision something like the Sorting Hat from Harry Potter, which would sit on the defendant’s head and shout “Federal” or “State” to a crowd of cheering federal and state prosecutors assembled in the Great Hall.

investigative and prosecutorial decisions are reactive, not proactive—law enforcement is responding to the dead body found, the van full of illegal immigrants, the suitcase full of drug money. In those situations, there is rarely a conscious decision made regarding whether to investigate, or which jurisdiction should handle a particular matter.

At the federal level, the majority of case files also start in a reactive manner. The SEC receives a complaint, or an FBI agent gets a call from a bank. Other than in planned undercover operations, which are more prevalent at the federal than state level (though they still certainly comprise a minority of federal cases filed), the decision is whether to prosecute or not, not whether to prosecute at the state or federal level (though case files rejected by federal prosecutors may be brought instead at the state level). Some cases that start at the state level are handed off to federal law enforcement authorities for the entirely legitimate reason that the case is related to an ongoing federal investigation. Other times, the state officials are part of a formal or informal state-federal task force, or otherwise request federal assistance. The more difficult question arises where a suspect is apprehended by state law enforcement and is later turned over to federal law enforcement for federal intervention precisely because of the increased punishment that will probably provide. The reasons federal prosecutors might accept such cases (and they often won't) are detailed below.

After traveling through what seems to us the entirely fair and rationale process of being compiled by law enforcement agents, case files land on the desks of federal prosecutors around the country. Again, some come directly from federal law enforcement officials, some were created by the federal prosecutors themselves overseeing federal undercover investigations, some come from formal and informal federal-state-local task forces, and some come by request from state/local law enforcement agents or Assistant District Attorneys. That happens if the case is too big, too complex, or appears to implicate weighty federal interests. Among these case files, some criminal defendants are in fact “selected” for criminal prosecution at the federal level. That is, federal prosecutors must affirmatively decide to indict and prosecute a matter, or they must instead decline to prosecute that file. Such declinations are supposed to be recorded, though this does not always occur.¹⁷⁰

In 2009, federal prosecutors were presented with just over 193,000 suspects for possible prosecution by federal investigators. Federal prosecutors declined to pursue cases against 29,780

¹⁷⁰ Federal prosecutors are required by regulation to write down the case file name of any matter on which they work for at least an hour. Federal Justice Statistics 2006 - Statistical Tables, Glossary p. 5. Some cases are so obviously inappropriate for federal concern that they can be disregarded within an hour.

of those individuals, or approximately 15.4%.¹⁷¹ A good portion of those defendants whose cases are dismissed federally will be brought up on state or local rather than federal charges.

The 85% of defendants initially selected by federal prosecutors are carefully chosen from a pool of case files. Available evidence suggests that federal prosecutors have legitimate criteria in mind when they select defendants for prosecution or dismissal. Where federal interests were strongly represented, the declination rate was markedly lower, for example, nearly all of those matters investigated for immigration offenses (99%) were referred for prosecution.¹⁷² It appears that prosecutors are exercising their discretion to dismiss cases most frequently in areas of concurrent jurisdiction, such as property offenses (declination rate of 37%), and violent offenses (declination rate of 34%).¹⁷³ Federal prosecutors also appear to dismiss where the *mens rea* required for the offense includes a specific intent (usually the intent to injure or deceive), a very difficult element to prove.¹⁷⁴

Why are certain cases selected for federal prosecution? Federal prosecutors first consult the U. S. Attorneys' Manual, which provides both general and specific rules. For example, the general provision regarding when to initiate or decline a federal case requires that a prosecutor first determine there is "a substantial Federal interest" served by the prosecution, "taking into account both national investigative and prosecutorial priorities" established by the Department of Justice and those priorities established by "individual United States Attorneys . . . within the national priorities."¹⁷⁵ A prosecutor should decline a case if there is no substantial federal interest or if the defendant is subject to effective prosecution in another jurisdiction.¹⁷⁶ In

¹⁷¹ See Federal Justice Statistics 2009, Bureau of Justice Statistics, Table 2. 2, available at: <http://bjs.ojp.usdoj.gov/content/pub/pdf/fjs09st.pdf>. This is a decrease from the 21% of the 141,130 matters concluded between Oct. 1, 2005 and Sept. 20, 2006. However, that year the percentage of cases disposed of by U. S. magistrates was 20.1%, so the total prosecution rate of 58.9 percent remained stable. See Federal Justice Statistics 2006, Table 2. 2, at <http://bjs.ojp.usdoj.gov/index.cfm?ty=pbse&sid=62>.

¹⁷² *Id.* This figure is essentially unchanged from the 2005-2006 data, showing a 1.8% prosecutorial declination rate for immigration offenses. See Federal Justice Statistics 2006, Table 2. 2, available at <http://bjs.ojp.usdoj.gov/index.cfm?ty=pbse&sid=62>.

¹⁷³ *Id.* Again, these figures are unchanged from the 2006 data.

¹⁷⁴ See Federal Justice Statistics 2009, Bureau of Justice Statistics, Table 2. 2, available at: <http://bjs.ojp.usdoj.gov/content/pub/pdf/fjs09st.pdf>. Declination rates were very high for bribery (49%), which requires a corrupt *quid pro quo*; perjury, contempt and intimidation (59%), which require intent to deceive or injure; national defense offenses (55%), which require an intent to harm; civil rights (85%), which generally require an intent to deprive the victim of her civil rights; and threats against the president (89%), which requires a credible threat to injure to avoid First Amendment concerns.

¹⁷⁵ See U. S. A. M., cited *infra* n. 19, Section 9-27. 230.

¹⁷⁶ Section 9-27. 220.

addition to these general guidelines, there are many more specific ones, some requiring approval or at least consultation with Main Justice before charging.¹⁷⁷

Very little empirical work exists regarding the crucial question of how prosecutors implement these rules.¹⁷⁸ Professor Richard S. Frase conducted a well-designed study of federal criminal prosecutors in the Northern District of Illinois in 1979.¹⁷⁹ He found that the most frequent reasons that federal prosecutions declined to bring charges, in order of how frequently each reason was selected, were the state-prosecution alternative, insufficiency of the evidence, the small amount of loss by the victim, the prior record of defendant, the small amount of the contraband (drugs and weapons), alternative civil/administrative remedies, the isolated nature of defendant's act or other defendant characteristic, a recommendation by the investigating agency or the Department of Justice, a lack of interstate impact, and statutory overbreadth.¹⁸⁰ One analyst found in a 2004 empirical study of national drug prosecutions that those cases with the lowest drug weights were more likely to be declined by federal prosecutors.¹⁸¹ Likewise, the Bureau of Justice Statistics reports that the most common reasons for

¹⁷⁷ For example, USAM section 9-60. 1010 essentially requires that the U. S. Attorney consult with state officials before initiating a federal prosecution under the carjacking statute, 18 U. S. C. section 2119; USAM section 9-61. 610 encourages deferral of all bank robbery cases in violation of 18 U. S. C. section 2113 to state and local law enforcement; USAM section 9-110. 812 provides that Violent Crimes In Aid of Racketeering (VICAR) prosecutions under 18 U. S. C. section 1959 will not be approved unless the violent crimes are "substantial;" USAM section 9-131 requires consultation with the RICO section of Main Justice before pursuing a Hobbs Act charge under 18 U. S. C. section 1951 involving a labor dispute; USAM section 9-131 establishes that the Department's policy is to restrict a Hobbs Act robbery charge under 18 U. S. C. section 1951 to those cases involving organized crime; USAM section 9. 110. 010 requires prior approval from the Criminal Division of Main Justice before filing a RICO case pursuant to 18 U. S. C. sections 1961 - 1963.

¹⁷⁸ On May 5, 2011 Professor Klein signed a cooperation agreement with the United States Sentencing Commission which will give her team access to plea agreements, Pre-Sentencing Reports, Judicial Statements of Reasons, and other confidential federal data regarding certain charges subject to concurrent federal and state jurisdiction (robbery, arson, and carjacking). Agreement on file with author and law review. This project (with Stefanie Lindquist) seeks to examine all such data in an attempt to document how and why federal law enforcement agents and prosecutors select cases for federal prosecution.

¹⁷⁹ Richard S. Frase, The Decision to File Federal Criminal Charges: A Quantitative Study of Prosecutorial Discretion, 47 U. Chi. L. Rev. 246 (1980).

¹⁸⁰ Id. at 263 - 265.

¹⁸¹ Michael Edmund O'Neill, Understanding Federal Prosecutorial Declinations: An Empirical Analysis of Predictive Factors, 41 Am. Crim. L. Rev. 1439 (2004).

declinations nationwide in 2009 were weak evidence (23%), prosecution by other authorities (12%), and investigative agency request (11%).¹⁸² These are sensible reasons for declinations.

Professor Daniel C. Richman has also noted that while the overlap between federal and state jurisdiction in criminal codes is substantial, there are unwritten boundaries between the two systems, resulting from negotiations between state and federal prosecutors in each jurisdiction as to the kinds of cases that each should handle.¹⁸³ Professor Klein found the existence of similar general agreements during her time as a Trial Attorney with the U. S. Department of Justice and Special Assistant to the U. S. Attorney's Office for the Southern District of California, and in her role (with Chief Assistant Anthony Brown) as supervisor of a University of Texas internship program with the U. S. Attorney's Office for the Western District of Texas. Each U.S. Attorney's Office has formal or informal written or unwritten guidelines as to when a case subject to concurrent jurisdiction can "go federal." This determination frequently involves an objective measure (quantity of drugs, value of property defrauded, defendant's number of prior state convictions and time incarcerated), and consultation with state officials (especially in high profile or borderline cases). Gone is the possibility of "federal day," when low-level drug dealers were randomly shifted from state to federal court, intended as a sort of Russian roulette to deter street level drug dealers.¹⁸⁴

About a third of federal controlled substance offenses are investigated by regional task forces called Organized Crime Drug Enforcement Task Forces ("OCDETF").¹⁸⁵ The first OCDETF was established in 1982, and there are now nine task forces covering most of areas of the nation.¹⁸⁶ These task forces involve law enforcement agents from many federal agencies (such as the FBI, DEA, ATF, ICE) along with state and local agents to target high-level figures

¹⁸² See Federal Justice Statistics 2009, Bureau of Justice Statistics, Table 2. 3, available at: <http://bjs.ojp.usdoj.gov/content/pub/pdf/fjs09st.pdf>.

¹⁸³ Richman, The Changing Boundaries Between Federal and Local Law Enforcement, 2 Criminal Justice Organizations 91, 91 (2000).

¹⁸⁴ *Morganthau Calls U. S. Bid to Fight Cocaine "Minimal,"* New York Times, 7/11/86 (District Attorney describing United States Attorney Rudolph W. Giuliani's "Federal Day" program for prosecuting drug violators in New York city as "a token effort"); City Forms Unit to Fight Crack, Newsday, 5/22/86 (noting that those arrested on Federal Day - a day in which city police work with federal agents and charge those arrested with federal crimes, face double the normal 15-year sentence).

¹⁸⁵ U. S. Attorney's Statistical Report, Fiscal Year 2010, available by request at any USAO and on file with author.

¹⁸⁶ The nine regional offices are located in Atlanta, Boston, El Paso, Houston, New York, San Diego, San Juan, and Tampa. See U. S. DEA Programs, Organized Crime Drug Enforcement Task Force, www.justice.gov/dea/programs/ocdef.htm, Abrams, Beale & Klein, *Federal Criminal Law* at 12.

in organized criminal drug enterprises. According to the DOJ, of the about 25,000 narcotics convictions between during the fiscal year 2010, approximately 8,000 of them, or 30%, were OCDETF cases.¹⁸⁷ These investigations target the very worst national and international traffickers, and each Task Force consists of state and local officials who endorse these federal prosecutions. In many cases, the state and local law enforcement agencies working alone lack the resources to efficiently prosecute interstate or international drug trafficking organizations. Thus, in addition to OCDETF, the DEA has 381 State and Local Task Force programs (targeting middle-level violators) in major cities throughout the country.¹⁸⁸ Such figures suggest that the selection of these federal narcotics defendants for criminal prosecution is appropriate.

B. Independent-Norm Federalism

A second more nuanced critique of the federal criminal law is that concurrent federal/state jurisdiction will impinge upon states' ability to foster minority norms. We offer two responses to this criticism. First, it has little to do with the problem of overfederalization. Very few to none of the laws promulgated by Congress since the 1970s were enacted to quell state experimentation with criminal justice policy. Our second response is more substantive. One of us made the argument a decade ago that "our federalism" remains vibrant despite concurrent federal and state jurisdiction over similar criminal matters.¹⁸⁹ So long as the federal system continues to constitute a mere 5% of the total criminal law system, and so long as federal criminal laws don't preempt state ones on a grand scale, states can continue to experiment with different solutions to a host of social ills. We continue to believe this to be true.

Perhaps the most active area of state law experimentation at the moment is the use of medical marijuana. Many state laws on this subject are in direct conflict with the federal Controlled Substances Act, which provides that marijuana has no recognized medical usage.¹⁹⁰

¹⁸⁷ *Supra* n. 52. In fiscal year 2008, OCDETF was the investigative muscle behind more than 8,200 drug convictions. See 2010 Interagency Crime and Drug Enforcement Congressional Submission, United States Department of Justice, Interagency Law Enforcement Division, available at: <http://www.justice.gov/jmd/2010justification/pdf/fy10-ocdef.pdf>.

¹⁸⁸ U. S. DEA, State & Local Task Forces, www.justice.gov/dea/programs/taskforces.htm.

¹⁸⁹ Klein, Independent-Norm Federalism, 90 Cal. Law Rev. 1541, *supra* note 32.

¹⁹⁰ See 21 U. S. C section 812(b)(1)(C), which provides that there is no accepted use of the drugs, like marijuana, classified under Schedule I under medical supervision; 21 U. S. C. sections 841(a) and (b)(1)(A)(vii), providing for penalty of minimum 10 years imprisonment maximum life for possession with intent to distribute 1000 kilograms of mixture or substance containing a detectable amount of marijuana. See also United States v. Oakland Cannabes Buyers Cooperative; 552 U. S. 483 (2001) (rejecting medical necessity defense to federal criminal controlled substance prohibitions where provisions of Controlled Substances Act makes clear that such a defense is unavailable); *Gonzalez v. Raich*, 545 U. S. 1 (2005) (rejecting request to enjoin federal government from

Since California led the way in 1996 with the Compassionate Use Act, at least 16 other states and the District of Columbia have passed similar bills to allow medical marijuana use with a doctor's prescription.¹⁹¹ At present, it appears to us that there is a stalemate. Federal officials appear for the most part to realize that they are less likely to be successful in prosecuting those who use medical marijuana, or even those who supply it, when trying to convince a jury comprised of citizens who voted to decriminalize medical marijuana use in the first place. While there have been public squabbles, to our knowledge there has been no actual federal prosecution of either a sick patient for use of medical marijuana, or of a state employee for providing the marijuana. It does not appear to be to anyone's political advantage to force a court to answer the difficult question of whether the federal Controlled Substances Act preempts the state law in the medical marijuana arena. For this reason, DOJ has expressly fought to keep courts from resolving the issue.¹⁹²

Recently Arizona Attorney General Tom Horne filed a civil complaint in the U. S. District Court for the District of Arizona on behalf of Governor Jan Brewer and against the U. S. Department of Justice, asking the federal judge to declare that compliance with Arizona's medical marijuana law "provides a safe harbor from federal prosecution."¹⁹³ The suit essentially asks the federal judge to rule that compliance with the Arizona law, which decriminalizes distribution, possession, and use of medical marijuana, provides protection from federal prosecution and is not preempted by federal law. The Department of Justice's stated in an October 2009 memorandum from then Deputy Attorney General David W. Odgen to all United States Attorney that prosecution of those "using" or "providing" marijuana in compliance with state law "is unlikely to be an efficient use of limited federal resources."¹⁹⁴ However, this provides no guarantee that state employees and dispensaries won't be prosecuted under any

enforcing federal drug laws on the grounds that criminalizing the possession of marijuana for personal use is beyond the scope of Congressional authority under the Commerce Clause).

¹⁹¹ Cong. Research Serv., 109th Cong. : Review and Analysis of Federal and State Policies 17-18, n. 59 (2005) (counting 12 states, Alaska, California, Colorado, Hawaii, Maine, Montana, Nevada, New Mexico, Oregon, Rhode Island, Vermont, and Washington, covering 22% of the U. S. population); USDOJ brief, counting 16 states (adding Arizona).

¹⁹² We note that both medical marijuana cases were brought as civil injunctive actions. The Department of Justice did not attempt to criminally prosecute these sick marijuana users, probably realizing that their jury pool would be the same group of persons who voted in favor of California's Compassionate Use Act. We also note that the current preemption case (the Arizona case cited supra at n. ___) was brought by Arizona, and the Department is working to get it dismissed rather than resolved.

¹⁹³ *Arizona v. United States Department of Justice*, Complaint for Declaratory Judgment, Case 2:11-cv-01072-SRB, filed 5/27/11, in the U. S. District Court for the District of Arizona.

¹⁹⁴ *Infra* n. 199.

circumstances. For that reason, the Arizona Department of Health Services, at the direction of the Governor, decided not to license any dispensaries.¹⁹⁵ That, in turn, prompted the State Attorney General to file the lawsuit. The Department of Justice moved to dismiss the complaint on the grounds that the federal court lacked jurisdiction because there was no federal question; that is, there is no actual controversy because there is no allegation that the state statute violated federal law or any state employee was likely to be prosecuted federally; the plaintiff lacked standing because there was no actual injury; and finally the case was not ripe for review since there was no genuine threat of federal prosecution.¹⁹⁶

It seems to us that if the Attorney General of the United States is willing to publicly state on the record that the Department of Justice is not going to prosecute any of the allegedly at-risk individuals in Arizona with violations of the federal Controlled Substances Act, one can take him at his word.¹⁹⁷ The Department has given assurances that the Department will not seek to prosecute those involved in medical marijuana programs in most other cases as well. In the October 2009 memorandum mentioned above, the Department stated that its official position is that there is a strong federal interest in prosecuting “significant marijuana traffickers” and noted that “marijuana distribution in the United States remains the single largest source of revenue for the Mexican Cartel.” However, the memorandum further advised federal prosecutors that they “should not focus federal resources in your States on individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana.” Such a prosecution is “unlikely to be an efficient use of limited federal resources.” Marijuana trafficking may be of potential federal interest, the memorandum continued, if the following characteristics are present: unlawful use of firearms; violence; sales to minors; money laundering activity; amounts of marijuana inconsistent with compliance with state or local law; illegal sale of other controlled substances; or ties to other criminal enterprises.¹⁹⁸ On June 29, 2011, Deputy Attorney General James M. Cole’s new Memorandum to United States Attorneys provided that

¹⁹⁵ See United States opposition in *Arizona v. United States Department of Justice*, *supra* note 194.

¹⁹⁶ *Id.*

¹⁹⁷ On the other hand, violation of the federal drug laws certainly impose severe consequences, and particular U. S. Attorneys could pursue a federal case despite the directive from Main Justice to the contrary. For example, in Washington state Governor Chris Gregoire vetoed part of a new medical marijuana bill because two local United States Attorneys threatened to prosecute state workers that would be passing out the distributor’s licenses if those provisions of the bill were enacted. See www.huffingtonpost.com/2011/04/29/washington-marijuana-bill-veto_n_855765.html; The Seattle Times, 4/28/11 (describing raids on two dispensaries, and letters from Spokane U. S. Attorney Michael Ormsby and Seattle U. S. Attorney Jenny Durkan warning that state employees involved in the licensing scheme could face prosecution).

¹⁹⁸ <http://blogs.usdoj.gov/blog/archives/192>.

the “Department's view of the efficient use of limited federal resources as articulated in the Ogden Memorandum has not changed. ”

Another active area of state experimentation is assisted suicide laws. The Supreme Court has been particularly active¹⁹⁹ in preserving the role of states as laboratories. Three states now make it expressly legal for a doctor to actively help a patient commit suicide: Washington, Oregon, and Montana.²⁰⁰ Depending upon the method used to cause death, such statutes could easily run afoul of the federal Controlled Substances Act (“CSA”), which classifies drugs based on their potential for abuse or dependence, their accepted medical use, and their accepted safety for use under medical supervision.²⁰¹ This potential clash set the stage for a showdown between federal and state power, the culmination of which was a lower court decision favoring the states in *Gonzales v. Oregon*.²⁰² In *Gonzales*, the Supreme Court ruled that Oregon’s Death With Dignity Act did not run afoul of a CSA regulation requiring that every prescription “be issued for a legitimate medical purpose.”²⁰³ After *Gonzales*, an Oregon physician would not violate the CSA by prescribing a fatal drug to a terminally ill patient, in accordance with Oregon’s assisted suicide law.

Writing a fatal prescription to a terminally ill patient, the government had argued in *Gonzales*, did not constitute a “legitimate medical purpose” within the meaning of the CSA, and thus a physician prescribing fatal drugs under Oregon’s law could be penalized under the CSA. In rejecting the government’s argument, the Court approached the issue as one of administrative overreaching. The Attorney General was “not authorized [under the CSA] to make a rule declaring illegitimate a medical standard for care and treatment of patients that is specifically authorized under state law.” The *Gonzales* majority gave other, not so subtle indications that it would support states’ ability to experiment with solutions to the quandary of end-of-life planning. The Court noted, for example, that the “structure and operation of the CSA presume and rely upon a functioning medical profession regulated under the States' police powers.”²⁰⁴ This tacit encouragement of states’ homegrown solutions to the problem of assisted suicide was

¹⁹⁹ See Department of Justice memorandum, on file with authors.

²⁰⁰ William Yardley, “First Death for Washington Assisted Suicide Law,” *The New York Times*, May 23, 2009; “Dr. Death” Spent Decades Fighting for Assisted Suicide,” *Austin American Statesman*, A-4, June 2, 2011. Note that the majority of states now expressly ban assisted suicide, for example, Michigan explicitly banned physician assisted suicide in 1993 in direct response to Dr. Kevorkian's efforts.

²⁰¹ See *Oregon v. Gonzales*, at 911; see also Controlled Substances Act.

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *Id.*

consistent with the Court's prior rulings on right-to-die questions. In *Washington v. Glucksberg*,²⁰⁵ the Court held that a Washington State law criminalizing assisting in a suicide *did not* violate the Fourteenth Amendment, and in *Vacco v. Quill*,²⁰⁶ the Court upheld a New York law which permitted patients to refuse life-saving medical treatment, but simultaneously prohibited assisted suicide, against a Fourteenth Amendment challenge. While the Court in *Glucksberg* and *Vacco* declined to recognize the right to die as a fundamental federal constitutional right, several justices suggested that end-of-life planning, including assisted suicide, was properly understood as a medical issue, and that regulation of such medical issues was properly within the legislative province of the states.²⁰⁷ Furthermore, several justices in *Glucksberg* and *Vacco* opined that the individual states, as the primary regulators of matters relating to health and safety, should be free to craft medical policies and to "experiment" with laws and procedures surrounding end-of-life care.²⁰⁸ In closing in *Glucksberg*, Chief Justice Rehnquist acknowledged that "Americans are engaged in an earnest and profound debate about the morality, legality, and practicality of physician-assisted suicide." The Court's holding, he said, "permits this debate to continue, as it should in a democratic society."²⁰⁹

Through its interpretation of the CSA and the Constitution, the Court has effectively created a safety zone where states can experiment relatively freely with medical marijuana and assisted suicide laws as they see fit. In reference to assisted suicide laws, Owen Lipsett noted that the "Court has explicitly recognized the right of states to disagree on the subject of euthanasia . . . [and implies] willingness to countenance diversity in states' euthanasia regimes."²¹⁰ He further argued that, by fostering a "multiplicity of perspectives enabled by

²⁰⁵ *Washington v. Glucksberg*, 521 U.S. 702, 733-36 (1997).

²⁰⁶ *Vacco v. Quill*, 521 U.S. 793 (1997).

²⁰⁷ See Bryan Hilliard, *The Politics of Palliative Care and the Ethical Boundaries of Medicine: Gonzales v. Oregon as a Cautionary Tale*, 35 J.L. Med. & Ethics 158 (2007).

²⁰⁸ *Glucksberg*, 521 U.S. at 788 (Souter, J., concurring) ("Legislatures, on the other hand, have superior opportunities to obtain the facts necessary for a judgment about the present controversy. Not only do they have more flexible mechanisms for factfinding than the Judiciary, but their mechanisms include the power to experiment, moving forward and pulling back as facts emerge within their own jurisdictions. There is, indeed, good reason to suppose that in the absence of a judgment for respondents here, just such experimentation will be attempted in some of the States.")

²⁰⁹ *Glucksberg*, 521 U.S. at 735.

²¹⁰ Owen Lipsett, *The Failure of Federalism: Does Competitive Federalism Actually Protect Individual Rights?*, 10 U. Pa. J. Const. L. 643, 654 (2008).

competitive federalism” citizens can “act as consumers of government by choosing the regime that best suits their needs and views.”²¹¹

Even if a future administration were to take aim at state assisted suicide statutes, it seems likely that the Court would again step in to defend states’ ability to experiment in this area. Thus, returning to the concept of fostering minority norms, it appears that the Court is willing and able, in appropriate circumstances, to shelter states from aggressive federal enforcement that might otherwise threaten the vitality and diversity of state solutions to local problems. The Court’s apparently active interest in fostering and preserving minority norms should comfort those who are broadly concerned about the potentially stifling effects of far-reaching federal legislation.

Governor Rick Perry of our great state of Texas announced on July 22, 2011, that he would revive a bill to criminalize intrusive pat-downs by airport security screeners.²¹² Here again there is a genuine moral conflict about the behavior at issue—should it be legal to “touch the anus, sexual organ, buttocks or breast of another person” during a screening?²¹³ In this context, not only do the jurisdictions disagree about how much punishment should be doled out, but whether it should be punishable conduct at all. In fact, the federal government may consider invasive touching at airports, if warranted by the circumstances, beneficial and necessary in order to deter terrorist attacks, whereas the state may consider the exact same conduct criminally intrusive and unjustified, where screening could arguably be accomplished by profiling or other means. Here is an area where an abundance of federal statutes might negatively impact independent state norms. However, such instances are quite rare. Furthermore, in these limited areas, federal interests tend to be strong (as in the airport security regulation context, where the safety of citizens of many states is at issue) and we may therefore prefer to slight independent state norms in favor of uniform federal regulation.

It seems to us that where there are sufficient numbers of states in favor of an experiment such as decriminalization, the states will likely win any arguments with the federal government regarding federal enforcement of contrary laws.²¹⁴ Where a growing number of states are experimenting with a new norm, as with assisted suicide, the federal government is likely to leave them alone. After all, as Jesse Choper and others argued years ago, these states have

²¹¹ *Id.*

²¹² USA Today, 3A, "TSA to Avoid Pat-Down Searches of Kids," 6/23/11.

²¹³ *Id.*

²¹⁴ See Ekow N. Yankah, *A Paradox in Overcriminalization*, 14 *New Criminal Law Review* 1, 4 (2011) (suggesting that marijuana decriminalization has been successful because of agreement across a broad span of philosophical frameworks).

representation in the House and Senate to protect their interests.²¹⁵ Where the state norm is a true outlier, and its position seems outrageous as a matter of substantive law and/or penalties or procedures, it may get trampled by contrary federal law, and rightly so. However, at bottom this is essentially a problem of federalism itself, and not a result of the explosion of the federal criminal code. For the most part, state experimentation on the best way to handle recognized social ills, including criminal misconduct, continues unabated.

III. Federalism, Culpability, and Vagueness

A second line of argument for those attacking the phenomenon of “over-federalization” is the claim that too many federal laws provide undue discretion to federal prosecutors. Many who complain that the myriad of federal crimes disrupt federal-state relations are bothered most by two types of statutes: federal strict liability offenses that dispense with *mens rea*; and broad and ill-defined federal criminal proscriptions. Both types of laws, they claim, give federal prosecutors undue power to sanction a wide range of conduct that would not be sanctioned in the counterpart state law system. In fact, as we will demonstrate below, there are very few federal statutes that fit into either of these categories, and the few that there are either rarely used, or their definitions have been narrowed by the Court. Moreover, these kinds of laws might just as easily be enacted at the federal or state level. The criticism of poorly drafted laws, or strict liability offenses, is not particular to the over-federalization debate, but rather is a broad critique of over-*criminalization*, a distinct issue from the one under consideration here.

A more nuanced view of the potential issue here is not that too many federal crimes exist, but rather that a few well-known federal crimes are poorly conceived and/or poorly drafted, and that these account for the majority of the unwarranted federal prosecutorial discretion. Strict liability statutes that criminalize morally blameless conduct are unjust; every first-year law student learns that an evil mind must accompany the evil act. The existence of such strict liability offenses will allow federal prosecutors to pick and choose from any hapless non-blameworthy person, as it is difficult for most of us to avoid conduct that we don't consider morally wrong. An example of this kind of strict liability public welfare offense is a criminal prosecution under the federal Food, Drug and Cosmetics Act.²¹⁶ Likewise with overbroad statutes, the complaint is that no one knows exactly what conduct is criminal until a federal prosecutor exercises her discretion to charge under such a law, and a court opinion later upholds

²¹⁵ Choper, et al. Article on file with authors.

²¹⁶ 21 U.S.C. § 301 *et seq.* See also 21 U.S.C. § 331, Prohibited Acts, which bans activities such as introduction into interstate commerce of an adulterated or misbranded food or cosmetic product; refusal to permit inspection; or receipt or delivery of misbranded or adulterated products.

(or rejects) her theory. A paradigmatic example of this type of prohibition exists in the mail and wire fraud statutes.²¹⁷

We do not find the existence of such federal statutes to be nearly so serious a problem as some suggest, even under the more nuanced view. Any troubling issues stem not from over-federalization or over-expansion of federal jurisdiction, but rather are attributable to drafting problems present in a very small percentage of federal laws, particularly public welfare offenses, fraud offenses, and obstructions statutes. These drafting deficiencies have effectively been corrected at the federal level in a variety of ways so as to alleviate the concerns of those who cry foul in response to these types of prosecutions.

A. Mens Rea

It is difficult to briefly counter the critiques against federal strict liability crimes because the concept is extremely complicated, both theoretically and historically, and ill-defined. Sometimes political and special interest groups who complain of over-federalization appear to attack federal crimes with common law roots (such as fraud or obstruction) as having "relaxed" *mens rea* components.²¹⁸ At other times these groups use the same strict liability language to attack federal regulation of business activity.²¹⁹

The attack on federal "strict liability" offenses is both mostly incorrect and wholly imprecise. We will start with definitions and categorizations. One might label as "strict liability" those offenses under which a person might be convicted despite his claimed lack of

²¹⁷ 18 U.S.C. §§ 1341, 1343. Because the mail and wire fraud statutes prohibit, generally, any scheme or artifice to defraud or obtain property by means of fraudulent pretenses, courts have sometimes struggled to interpret what types of conduct are barred. *See, e.g., Pasquantino v. United States*, 544 U.S. 349 (2005) (upholding § 1343 conviction of individuals who imported American liquor into Canada in order to avoid paying that country's higher alcohol taxes; by depriving Canada of its right to receive tax revenue, the defendants had deprived that country of "property" within the meaning of § 1343); *Cleveland v. United States*, 531 U.S. 12 (2000) (a license to operate video poker machines from the state of Louisiana was not "property" within the meaning of § 1341, and therefore defendants did not violate the federal mail fraud statute by falsifying applications for such licenses).

Because of this vagueness in the statutory language, scholars have frequently taken aim at the federal fraud statutes. *See* Gregory H. Williams, *Good Government by Prosecutorial Decree: The Use and Abuse of Mail Fraud*, 32 ARIZ. L. REV. 137 (1990) (arguing generally that the mail fraud statute is vague and therefore gives rise to unfettered prosecutorial discretion); *but see also* Geraldine S. Moohr, *Mail Fraud Meets Criminal Theory*, 67 U. Cin. L. Rev. 1 (1998) (arguing that, while the scope of mail fraud is somewhat undefined, courts are generally on "sound theoretical ground" in interpreting the statute.)

²¹⁸ *See* Heritage Foundation Report, *supra* note 4.

²¹⁹ *See, e.g.,* Gary Shields & John Emshwiller, "A Sewage Blunder Earns Engineer a Criminal Record," *The Wall Street Journal*, Dec. 12, 2011 (detailing prosecution of individual for violating the Clean Water Act after he unwittingly dumped sewage into a stream; the defendant was fined and received 1 year of probation.)

awareness that he was engaging in wrongful conduct. A defendant may claim he did not know his conduct was wrongful either because he lacked awareness about a particular fact that made his conduct unlawful, or because he lacked awareness of the law itself.²²⁰ An example of the former situation, which we will label "true strict liability," is captured in *United States v. Staples*. Mr. Staples was convicted of violating the National Firearm Act by knowingly possessing a prohibited firearm, in his case an automatic assault rifle, despite his argument that he did not realize that his AR-15 had been modified from a semi-automatic to an automatic one.²²¹ An example of the latter situation, which we will call "semi-strict liability," is captured in *United States v. Freed*. Mr. Freed was also convicted of violating the same provision of the National Firearm Act by knowingly possessing a prohibited firearm, in his case a hand grenade, despite his argument that he not realize that the law forbids possession of grenades.²²²

Generally, where a defendant argues that he lacked awareness regarding the nature of his conduct, that is a true strict liability federal offense and the Court frequently reads in an extra-textual *mens rea* regarding that fact. There is a very limited exception here for certain public welfare offenses, which will we get to in a moment.²²³ Where the defendant claims he lacked awareness that his conduct was illegal, that is a semi-strict liability offense that is generally not prohibited, since ignorance of the law is no excuse, and the Court will usually not require that the prosecutor prove knowledge of the law. There is a limited exception here for certain offenses where a defendant may not be on notice of the law that makes his conduct is wrongful. We will revisit that issue later as well.²²⁴ Thus Mr. Staples conviction was reversed, because he shouldn't suffer a federal felony when he lacked awareness of wrongdoing because he did not know all of the facts (he thought he possessed an ordinary non-automatic weapon), but Mr. Freed's conviction was affirmed, as he should suffer a federal felony where he intentionally engaged in all the conduct the crime prohibited, and he should have known or learned the law.

We are making these definitions and classifications appear much simpler than is true in practice. The Court has been notoriously bad at distinguishing between knowledge of law and

²²⁰ We note here that despite the maxim that ignorance of the law is no excuse, it frequently is, especially for *malum prohibitum* offenses.

²²¹ *Staples v. United States*, 511 U.S. 600, n. 10 (1994) (reversing conviction, and reading in *mens rea* of knowledge of attendant circumstance that brings defendant's conduct within law).

²²² *United States v. Freed*, 401 U.S. 601 (1971) (upholding conviction for possession of unregistered grenade, and rejecting reading in *mens rea* requirement as to law).

²²³ See discussion of *United States v. Dotterweich* and *Park v. United States*, *infra* n. 233.

²²⁴ We will also revisit this issue later, see discussion of *Cheek v. United States*, and *Lambert v. California*, *infra* n. 261.

knowledge of facts. Accepting our terminology, this outcome - that true strict liability is generally prohibited but semi-strict liability is generally acceptable, can be attacked on two bases. First, why should we ever allow criminal convictions where there is true strict liability; that is, the government fails to prove knowledge of all of the facts that make the conduct unlawful? Critics charge that the *Staples* rule should be a hard and fast one. If a person is truly unaware that she is engaging in wrongful conduct, there is no point in punishing her (she cannot be deterred, and she is not a proper target of retribution). Second, why should semi-strict liability be tolerated where the federal statute prohibits conduct that is not plainly immoral on its face? The maxim that ignorance of the law is no excuse is perfectly sensible as applied to *malum in se* offenses, no one seriously contends that it should be a defense that a defendant did not know that bank robbery or murder of a federal official was an offense. However, semi-strict liability may be problematic for *malum prohibitum* crimes, where the law governs behavior outside the moral sphere and an individual may not be aware of the law.

Our answer to both of these attacks is historical and logical. In the early to mid-1900s, culminating in the New Deal, the federal government began enacting a number of regulatory statutes to protect our air, water, stock exchange, and general physical and economic health, which we (and the Court) call “public welfare offenses.”²²⁵ For example Congress enacted the Harrison Act of 1914 to regulate narcotics,²²⁶ the National Firearms Act of 1934 to regulate dangerous weapons,²²⁷ the Securities Act of 1933 and the Securities and Exchange Act of 1934

²²⁵ As Justice Jackson explained in *Morissette v. United States*, 342 U.S. 246 (1952), “the industrial revolution multiplied the number of workmen exposed to injury from increasingly powerful and complex mechanism, driven by freshly discovered sources of energy, requiring higher precautions by employers ... Congestion of cities and crowding of quarters called for health and welfare regulations undreamed of in simpler times. Wide distribution of goods became an instrument of wide distribution of harm when those who dispersed food, drink, drugs, and even securities, did not comply with reasonable standard of quality, integrity, disclosure and care. Such dangers have engendered increasingly numerous and detailed regulations which heighten the duties of those in control of particular industries, trades, properties or activities that affect public health, safety or welfare.

While many of these duties are sanctioned by a more strict civil liability, lawmakers, whether wisely or not, have sought to make such regulations more effective by involving criminal sanctions ... for what have been aptly called ‘public welfare offenses.’ ... legislation applicable to such offenses, as a matter of policy, does not specify intent as a necessary element. The accused, if he does not will the violation,, usually is in a position to prevent it with no more care than society might reasonably expect ... Also, penalties commonly are relatively small, ...”.

²²⁶ Harrison Act of 1914, Pub. L. No. 63-223, 38 Stat. 785 (1914) (superseded by *Controlled Substances Act* of 1970)

²²⁷ The National Firearms Act, Pub. L. No. 90-618, 48 Stat. 1236 (1934) (codified as amended in scattered sections of 28 U.S.C.) was the first federal regulation of private firearms, enacted June 26, 1934.

to regulate the market,²²⁸ the Food Drug, and Cosmetic Act of 1938 to regulate the transportation of food and drugs,²²⁹ and the Hazardous Materials Transportation Act to regulate the movement of dangerous chemicals.²³⁰ Most of these criminal provisions apply to businesses and high-level corporate officials, though a few apply directly to ordinary persons. There have since been a series of additional regulatory efforts, such as the Clean Air Act of 1970, the Clean Water Act of 1972,²³¹ and the Sarbanes-Oxley Act of 2002,²³² all with accompanying criminal prohibitions.

Most or perhaps even all of these "public welfare" crimes are semi-strict liability offenses that lack a *mens rea* component regarding whether the conduct violated the law. A very few of them further are true strict liability offenses that allowed conviction where a defendant lacked *mens rea* regarding all facts that made the conduct criminal. The Court recently summarized the contours of public welfare offenses as follows:

"Public Welfare offenses share certain characteristics (1) they regulate 'dangerous or deleterious devices or products or obnoxious waste materials,' (citation omitted) (2) they 'heighten the duties of those in control of particular industries, trades, properties, or activities that affect public health, safety or welfare' (citation omitted); and (3) they 'depend on no mental element but consist only of forbidden acts or missions.'" (citation omitted). Examples of such offenses include Congress' exertion of its power to keep dangerous narcotics, hazardous substances, and impure and adulterated foods and drugs out of the channels of commerce..."²³³

²²⁸ Securities Act of 1933, Pub L. No. 73-22, 48 Stat. 74, enacted May 27, 1933, (codified as amended at 15 U.S.C. §§ 77a–77aa); Securities and Exchange Act of 1934, Pub. L. No. 73-291, 48 Stat. 881, enacted June 6, 1934, (codified as amended at 15 U.S.C. § 78a *et seq.*)

²²⁹ Food, Drug and Cosmetics Act, Pub. L. No. 75-717, 52 Stat. 1040, enacted June 25, 1938 (codified as amended at 21 U.S.C. § 301 *et seq.*)

²³⁰ Hazardous Materials Transportation Act, Pub. L. No. 93-633, 88 Stat. 2156 (1975)(codified as amended in Title 49 of the United States Code.)

²³¹ Clean Air Act, Pub. L. No. 91-604, 84 Stat. 1676 (1970), enacted Dec. 31, 1970 (codified as amended at 42 U.S.C. § 7401 *et seq.*); Clean Water Act, Pub. L. No. 92-500, 86 Stat. 816 (1972), enacted Oct. 18, 1972 (codified as amended at 33 U.S.C. § 1251 *et seq.*)

²³² Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745, enacted July 29, 2002 (codified at 15 U.S.C. § 7201 *et seq.*; 29 U.S.C. § 1021; 29 U.S.C. § 1132; 15 U.S.C. § 7245 *et seq.*; 15 U.S.C. § 78a *et seq.*; 18 U.S.C. § 1501 *et seq.*)

²³³ *See Staples v. United States*, 511 U.S. 600 (1994) (Stevens, J., dissenting). This quote was made in the context of a fight between the majority and dissent regarding whether the National Firearms Act was a public welfare statute. Stevens' dissent claimed that it was, and that therefore the government need not prove that the defendant knew all of the facts surrounding his conduct (in this case, that his weapon was a semi-automatic one.)

To that list of characteristics, we would add number four, that these public welfare offenses carry penalties which are relatively small, and conviction does “no grave damage to an offender’s reputation.”²³⁴

While we find these descriptions in the two quotes to be useful, we note again that in both cases quoted the Court fails to distinguish between knowledge of facts and knowledge of law. In a series of case between 1922 and 1971, the Court permitted criminal prosecutions in semi-strict liability cases, and even in one case of true strict liability offenses against people in a responsible relation to the public welfare. In these cases, we think the Court arrived at the right results for the right reasons. True to their later description in *Staples*, the Court limited liability to corporate officials in a regulated industry, and the penalties were small. In *United States v. Dotterweich*,²³⁵ the Court affirmed a misdemeanor conviction under the Federal Food, Drug, and Cosmetic Act against the President and general manager of a company for shipping misbranded drugs in interstate commerce and for shipping adulterated drugs. The defendant's company purchased drugs from outside manufacturers and shipped them, repackaged under the company’s own label. The defendant was not proven to have known that the drugs he shipped and sold were adulterated or misbranded. “Hardship there doubtless may be under a statute which thus penalizes the transaction though consciousness of wrongdoing be totally wanting. Balancing relative hardships, Congress has preferred to place it upon those who have at least the opportunity of informing themselves of the existence of conditions imposed for the protection of consumers before sharing in illicit commerce, rather than throw the hazard on the innocent public, who are totally helpless.”²³⁶

The *Dotterweich* Court relied on *United States v. Balint*,²³⁷ a 1922 case where the Court affirmed a felony conviction (though a probationary sentence) for selling narcotics in unstamped packages in violation of the 1914 Harris Act, despite the defendant’s undisputed claim that he did not know the substances were so classified by that law. The *Balint* case involved a claim of ignorance of the law, whereas the defendant in *Dotterweich* claimed ignorance of the facts. The

The majority believed that the act as not a public welfare offense, and that therefore Congress intended that the government prove that the defendant had the requisite knowledge as to the type of weapon in his possession.

The citations omitted from this quote are to *Balint*, *Dotterwich*, and *International Chemicals*, all discussed *infra*.

²³⁴ *Morissette v. United States*, 342 U.S. 246, 256 (1952).

²³⁵ 320 U.S. 277 (1943).

²³⁶ *Id.* at 285.

²³⁷ 258 U.S. 250, 253, 42 S.Ct. 301, 302 (1922).

Court did not acknowledge in *Dotterweich* that it was relaxing the usual *mens rea* requirement for a public welfare offense.

In *United States v. International Minerals & Chemical Corp.*,²³⁸ the Court upheld a conviction of a company under the FDA for shipping sulfuric acid and hydrofluosilicic acid in interstate commerce, where the company knowingly failed to show on the shipping papers the required classification. The defendant argued *not* that it did not realize it was shipping hazardous chemicals, but rather that it didn't know about the regulations. The Court found this to be a public welfare offense, and rejected the argument that the word "knowingly" should apply to knowledge of the regulation as well as knowledge of the facts. The Court noted that the government bears the burden of proving that the defendant knew he was shipping dangerous chemicals of some kind. "A person thinking in good faith that he was supping distilled water when in fact he was shipping some dangerous acid would not be covered."²³⁹ This case, like *Balint* but unlike *Dotterweich*, represents an example of what we call a semi-strict liability (as opposed to a true strict liability) offense. Ignorance of the law is no defense, but the prosecution must still prove awareness of conduct. A defendant's awareness of his conduct suggests that a defendant knew, or should have known, that he was engaging in a highly regulated activity.

Before moving on to the attacks on what we call true strict liability offenses, we want to point out here that we are aware of only a single statute that fits into this category—the Federal Food and Drug Act (that statute accounts for *Dotterweich*, discussed above, and *Park*, discussed *infra*).²⁴⁰ Given the outcry against such laws, you would think there were hundreds in existence. In practice, the Court accepts a true strict liability construction only in the case of statutes that target prosecution of high-level corporate officials, and even then, only where the penalty is limited to a misdemeanor conviction. The Court has been rightly unwilling to expand the category of true strict liability offenses beyond public welfare offenses since *Dotterweich*. The purpose behind a true strict liability offense is to allow the responsible corporate official to be held responsible, even where the actual conduct (in that case, shipping the adulterated food) was done by an underling. The responsible corporate official should have kept himself apprised of the facts on the ground, as well as the law on the books. Thus, In *United States v. Park*,²⁴¹ the

²³⁸ 402 U.S. 558, 563-564, 91 S.Ct. 1697, 1700-1701 (1971).

²³⁹ *Id.* at 563.

²⁴⁰ Federal Food, Drug, and Cosmetics Act, 21 U.S.C. section 301. Prohibitions at § 331, penalties at § 333. Of several prohibitions contained in the FDCA, only §331(a) is a true strict liability crime that lacks any proof of mental state. Other provisions require a minimal requirement of knowledge as to the facts constituting the offense, see § 333(b). *See also* discussion of *United States v. Dotterweich*, 320 U.S. 277 (1943) and *United States v. Park*, 421 U.S. 658 (1975), *supra* notes 233-36.

²⁴¹ 421 U.S. 658 (1975).

Court affirmed the misdemeanor conviction of a CEO as the responsible corporate official for a violation of the Federal Food, Drug, and Cosmetic Act where food that had been shipped in interstate commerce was held in warehouses infested with rats. In *Park*, it was not a defense that the defendant was unaware that the food he was storing for sale contained rat droppings—given the interests at stake, he *should have* been aware.

The remaining federal regulatory public welfare offenses enacted by Congress and upheld by the Court are what we call semi-strict liability offenses (where ignorance of the law is no excuse), such as the Securities and Exchange Act,²⁴² the Clean Air Act,²⁴³ and the Clean Water Act.²⁴⁴ Into this category fall *Balint*, *International Chemical*, and the *Freed* cases

²⁴² Securities and Exchange Act of 1934, Pub. L. No. 73-291, 48 Stat. 881, enacted June 6, 1934, (codified as amended at 15 U.S.C. § 78a *et seq.*) SEA criminal offenses all require proof of willful or knowing fraud; the insider trading statute requires proof of intent to deceive the market, *and* provides an affirmative defense that allows the defendant to escape from criminal liability and any possible prison time if he can prove he was unaware of the regulations regarding insider trading.

²⁴³ The Clean Air Act, 42 U.S.C. section 7402 *et seq.*, imposes both criminal and civil liability. The criminal provisions found at 42 USC § 7413(c) impose liability on one who (1) “knowingly violates any requirement or prohibition of an applicable implementation plan” (5 year maximum penalty); (2) “knowingly” makes a false or material statement, knowingly conceals or fails to file a required report (2 year maximum penalty); and (5)(A) one who “**knowingly** releases into the ambient air any hazardous air pollutant ... and who **knows** at the time that he thereby places another person in imminent danger of death or serious bodily injury” (punishable up to 15 years imprisonment.) (emphasis added.)

Based on the foregoing, the CAA criminal proscriptions are clearly not true strict liability offenses. While § 7413(c)(1) and (c)(2) are arguably of the quasi-strict liability variety, since the statutes merely require knowledge of facts and no proof of willfulness or guilty mind, §(5)(A) on the other hand clearly requires proof of a guilty mind with respect to the creation of danger of serious bodily injury, and is thus similar to the majority of criminal statutes which require knowledge of wrongdoing without requiring knowledge of the law.

²⁴⁴ The Clean Water Act, 33 U.S.C. section 1251 *et seq.* See enforcement provisions at 33 U.S.C. § 1319. Negligent CWA violations are misdemeanors. See 33 U.S.C. § 1319(c)(1)(A). § 1319(c)(2)(A) criminalizes “knowing” CWA violations, while § 1319 (c)(2)(B) criminalize knowing release of hazardous substances into a sewer or other protected outlet; under this section, a prosecutor must prove that the defendant *knew* the hazardous substance would cause injury/property damage. Under § 1319 (c)(3)(A), the harshest of the CWA’s criminal provisions, a prosecutor must prove up both a knowing violation of CWA regulations, plus knowledge of a risk of danger or serious bodily injury. (Maximum 15 year penalty.) In all of these statutes, with the exception of the misdemeanor violation, a defendant will not be convicted unless he knew, or had reason to know, facts that would alert him to the dangerous, and highly regulated nature, of his activities. Therefore, we would not classify CWA’s criminal provisions as true strict liability.

Similarly, the Hazardous Materials Transportation Act establishes certain criminal provisions, *see* 49 U.S.C. § 5124, prohibiting knowing violations of shipping regulations. An earlier version of this statute was considered by the Court in *United States v. Int’l Minerals & Chemical Corp.*, 402 U.S. 558 (1971) (holding that the word “knowingly” pertains to knowledge of facts, not knowledge of the law.) The Court in *Int’l Minerals* also noted that, when dealing with a dangerous product, regulation is so likely as to put the defendant on notice, because “the

discussed above. Like the true strict liability offense, these apply primarily to corporate officials who have easy access to the law, though they may infrequently apply directly to individuals, as with the Firearm Safety Act.²⁴⁵ The combination of limiting liability to business executives or individuals handling highly dangerous materials generally ensures that truly innocent persons are not ensnared. The attack on these laws is less convincing than the attack on true strict liability; after all ignorance of the law is no excuse. The critics' best argument here is that there are so many modern federal public welfare offenses that it may be possible for someone perfectly willing to follow the law to violate a proscription because he is unaware of its existence. In that instance, where the government fails to prove knowledge of the law, it is arguable that this can result in the conviction of someone not "morally blameworthy" in the conventional sense.

This is the argument that we hear frequently from the conservative press and special interest groups,²⁴⁶ joined less frequently by a small number of scholars.²⁴⁷ In response, many scholars and jurists have plausibly argued that strict liability offenses encourage knowledge of and adherence to the law,²⁴⁸ and force those in responsible positions and those who deal in potentially harmful items to act very carefully. We agree with this position, and find the attack on semi-strict liability offenses ultimately unpersuasive. When the Court finds a law to be an acceptable "public welfare" semi-strict liability offense, it is making a normative judgment that those subject to such laws *should* know about them. Just as we expect ordinary citizens to know about laws against assault and theft, so too do we expect corporate executives with in-house

probability of regulation is so great that anyone who is aware that he is in possession of them or dealing with them must be presumed to be aware of the regulation." *Id.* at 565.

²⁴⁵ *United States v. Freed*, 401 U.S. 601 (1971), *supra* note 220, is the only example of this we could find.

²⁴⁶ *See, e.g., supra* note 4; Over-Criminalization of Conduct/Over-Federalization of Criminal Law, Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security, House Comm. on the Judiciary, 111th Cong. (2009); Reigning In Overcriminalization: Assessing the Problem, Proposing Solutions, Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security, House Comm. on the Judiciary, 111th Cong. (2010).

²⁴⁷ Stuart P. Green, *Why It's A Crime to Tear the Tag Off a Mattress; Overcriminalization and the Moral Content of Regulatory Offenses*, 46 Emory L.J. 1533 (1997) (arguing that criminal sanctions are improper when used for regulatory offenses involving morally neutral conduct); Laurie L. Levinson, *Good Faith Defenses: Reshaping Strict Liability Crimes*, 78 Cornell L. Rev. 401 (1993) (arguing that strict liability offenses do not serve the purposes of criminal punishment, and suggesting a good-faith defense to such crimes where a defendant made an honest and reasonable mistake).

²⁴⁸ Interestingly, Dan Kahan argues that strict liability offenses may be useful because it discourages knowledge of the law's content, with its concomitant exploitation of the gaps in coverage, so we should allow judges to make moral judgments regarding when ignorance of the law should be an excuse. Dan M. Kahan, *Ignorance of the Law is an Excuse - But Only for the Virtuous*, 96 Mich. L. Rev. 197 (1997).

counsel to know and understand business regulations aimed at protecting public health and safety. Most of us believe that those in a position to dump chemicals into the river should know that doing so is illegal and immoral. So far, in our minds, the Court has got the normative judgment just about right. In those rare instances where there is no notice of the law, or the defendant is not likely to have financial access to a lawyer, or the law is simply too difficult to comprehend, the Court has been willing to read knowledge of the law into the statute.²⁴⁹

Behind the claims of statutory proliferation in the area of business regulation is the critique by the business community that the criminal law ought not to be so readily deployed to shore up regulatory regimes. However, these same critics, hailing from the Chamber of Commerce, refuse to fund the civil enforcement arms of those regulatory regimes. Thus, the government must continue to rely on law enforcement and its deterrent effects.²⁵⁰ The bottom line, we believe, is that it might be better to enforce what we call true strict liability regulatory measures with civil liability, and retain the criminal law for clearly morally blameworthy conduct. On the other hand, only the criminal law can send the clear message to the community that violation of regulations controlling our environment, our food and health, and our economy will not be tolerated. So long as the penalties are small and the prosecutions are limited to those corporate executives who have all the legal assistance they need to comply with these regulations, we will not lose any sleep over these provisions.

Our final response is that few federal prosecutorial resources are actually devoted to enforcing what the Administrative Office of the United States Courts labels “regulatory offenses.” Before presenting the data, we note that only one of the offenses in this category is a true strict liability public welfare offense (the FDCA, as we mentioned early), and a number are semi-strict liability public welfare offenses. Many more are public welfare offenses that actually do require the prosecutor to prove knowledge of the law, or they are not public welfare offenses at all but are instead ordinary crimes with traditional *mens rea* elements.

²⁴⁹ *Cheek v. United States*, 498 U.S. 192 (1991) (holding that the government must prove knowledge of and intent to violate the law in proving criminal violations of the tax code, as normal humans like us who can't understand the tax code shouldn't be branded as criminals.) In one instance the Court went further, striking down a state public welfare offense that it could not re-interpret to include knowledge of the regulation. See *Lambert*, *infra* note 261 (reversing as violation of Due Process a conviction under statute making it unlawful for "any convicted person to be or remain in Los Angeles for a period of more than five days without registering" as a felon, where statute did not require proof of defendant's "actual knowledge of the duty to register or proof of the probability of such knowledge").

²⁵⁰ Daniel C. Richman, *Overcriminalization for Lack of Better Options: A Celebration of Bill Stuntz*, Columbia Public Law Research Paper No. 10-234, 5/8/11.

Now for the statistics: the proportion of regulatory defendants as a total of all federal criminal defendants annually fell from 7% of the federal criminal caseload in 1980 to 2% in 2011, with approximately 2,000 defendants being prosecuted for regulatory offenses last year.²⁵¹ There were a grand total of 32 defendants prosecuted for Hazardous Waste violations in 2011, 118 civil rights defendants, 61 copyright defendants, and 348 total prosecutions in the “other regulatory offenses” category (which includes the Clean Air Act).²⁵² Even these quite modest figures are overblown, as civil rights statutes and copyright statutes are *not* strict liability crimes, nor are they semi-strict liability public welfare offenses. In fact, civil rights and copyright criminal provisions expressly require proof of *mens rea*.²⁵³ The “other regulatory offenses” subcategory consists largely of prosecutions under the Clean Air Act, the Resource Conservation and Recovery Act, and other regulations prosecuted by the Environmental Protection Agency's criminal enforcement arm. A review of their 2010 and 2011 cases reveals that few environmental offenders are serving any jail time at all, and those who did receive jail time tended to be willful violators or repeat offenders.²⁵⁴

Even where public welfare offenses are prosecuted, the sentences tend to be quite lenient. While there are a significant number of federal fraud prosecutions stemming from business

²⁵¹ See Appendix, Tables 2 and 6-B. A more finely tuned breakdown can be found in Table D-2, page 4, at <http://www.uscourts.gov/Viewer.aspx?docs=uscourts/Statistics/Federal/JudicialCaseloadStatistics/2011/tables/DO2DMar11.pdf>.

²⁵² *Id.*

²⁵³ The primary criminal civil rights statute, 18 U.S.C. sections 241 - 249, are not strict liability offenses. They require the intent to violate civil rights. See *Screws v. United States*, 325 U.S. 91 (1945) (in the contest of prosecution for willful violation of a citizen's civil rights, the Court held that proof of a “willful” deprivation would require proof of a specific intent to deprive another of his constitutionally guaranteed rights.)

Furthermore, criminal copyright violations under 17 U.S.C. section 506 provide that any person who willfully infringes a copyright shall be punished where the infringement was committed “(A) for purposes of commercial advantage or private financial gain; (B) by the reproduction or distribution of 1 or more copies or phonorecords of 1 or more copyrighted works, which have a total retail value of more than \$1,000; or (C) by the distribution of a work being prepared for commercial distribution, by making it available on a computer network accessible to members of the public, if such person knew or should have known that the work was intended for commercial distribution.” (emphasis added.) Thus, criminal copyright provisions are clearly not strict liability crimes, where the prosecution must prove willfulness. Additional safeguards are found in §506(A), requiring proof that the willful violation was made for the purposes of commercial gain, and in §506(C), requiring proof that a person knew or should have known that the work was intended for commercial distribution.

²⁵⁴ U.S. Environmental Protection Agency, Criminal Enforcement division, Summary of Criminal Prosecutions 2010-2011, case details available at http://cfpub.epa.gov/compliance/criminal_prosecution/index.cfm.

schemes, and some fraud defendants receive moderately serious prison time (though relative to drug and immigrations sentences, they are still quite low), the same is not true of public welfare offenses. For example, the average sentence length for the years 1996, 2000, 2005, and 2009 shows an average of 0.0 months for Environmental/Wildlife offenses, 0.0 for Food and Drug Act offenses, and 0 for other miscellaneous regulatory offenses.²⁵⁵

The number of regulatory prosecutions is so low, and so rarely result in prison time, that the same few and dated examples are recycled through the press year after year. For example, the Wall Street Journal recently published two articles (they do so about every three months) complaining about “picayune” laws such as those prohibiting the unauthorized use of the Smokey the Bear image or the government-owned slogan “Give a Hoot, Don't Pollute.”²⁵⁶ The Journal quoted warnings that people are “one misstep away from the nightmare of a federal indictment.” However, the article provides no examples of actual prosecutions under those provisions. In fact, to be convicted under the “Smokey the Bear” provision, a defendant must knowingly misappropriate the image for profit.²⁵⁷ The first article offers as an example Wade Martin, who in 2003 received probation for violating the Marine Mammal Protection Act, and Mr. Robert Eskridge, Jr., who pled guilty to the same crime and received a fine.²⁵⁸ The second discusses Mr. Anderson, who pled guilty under the Archeological Resources Protection Act of 1979 to taking arrowheads off federal land without a permit, a misdemeanor offense leading to a sentence of

²⁵⁵ See U.S. Sentencing Commission Sourcebook, 1996 Datafile, 2000 Datafile, and 2009 Datafile, Table 13.

²⁵⁶ Wall Street Journal, <http://online.wsj.com/article>, July 23, 2011. See also Wall Street Journal, “As Federal Crime List Grows, Threshold of Guilt Declines,” 9/27/11 (discussing cases against Wade Martin, who in 2003 received probation for violating the Marine Mammal Protection Act, and Mr. Robert Eskridge, Jr., who pled guilty to the same crime and received a fine); the Wall Street Journal, “As Criminal Laws Proliferate, More Are Ensnared,” 7/30/11 (describing cases against Mr. Eddie Leroy Anderson, who in 2009 plead guilty to violating the Archeological Resources Protection Act and received one year's probation, and Mr. Krister Evertson, who in 2006 was convicted of violating the Resource Conservation and Recovery Act and received probation).

²⁵⁷ See 18 U.S.C. § 711. This is a misdemeanor offense, with a maximum prison sentence of six months. We would classify that as a semi-strict liability offense, as ignorance of the law is no excuse. See also 18 U.S.C. § 711a (prohibiting knowing, unauthorized use for profit of the Woodsy Owl character or the slogan, “give a hoot, don't pollute,” punishable by up to six months imprisonment or a fine.) Consider the relatively strong *mens rea* requirement (proof of knowledge and profit motive), and considering the light penalties, this statute gives us little cause for concern.

²⁵⁸ 16 U.S.C. section 1375 prohibits a knowing violation of the MMPA. This means the defendant must know he is engaging in the conduct, but the government need not prove that he knew such conduct was illegal. Thus, the statute is in our terminology a semi-strict liability public welfare offense, with it concomitant misdemeanor penalty and high likelihood of no prison time.

probation.²⁵⁹ And finally there is Mr. Krister Evertson, who in 2006 was convicted of violating the Resource Conservation and Recovery Act and received probation.²⁶⁰ What we find the most interesting about these cases is that no one received any jail time, all defendants knowingly engaged in conduct that should have alerted them to the possibility of regulation, and perhaps most importantly the journalists can only find a handful of such prosecutions nationally despite their best efforts.

Outside of the public welfare arena, ordinary citizens have little cause for concern because of protection from the United States Supreme Court. The Court has gotten into the habit of interpreting federal criminal proscriptions narrowly, or importing extra-textual *mens rea* requirements, in order to avoid difficult constitutional questions bearing on vagueness and due process. As we mentioned above the few true strict liability cases have been confined not only to public welfare offenses, but primarily to prosecutions involving corporate officials who act in a responsible relation to the general public while trading it harmful items. The Supreme Court has been surprisingly active in this area, especially over the last few decades, and has successfully moved beyond the reach of federal criminal law those classes of individual defendants who may not be morally blameworthy. This is accomplished almost exclusively through statutory interpretation, by reading in a *mens rea* where the statute is otherwise devoid of one.²⁶¹

²⁵⁹ 16 U.S.C. section 470ee prohibits a knowingly violation of ARPA regulations, and the penalty is a misdemeanor, unless that value of the archeological find at issue is \$500 or more or the defendant is a repeat offender. Under ARPA, a prosecutor must demonstrate that a defendant knew all of the pertinent facts surrounding his criminal conduct, but need not prove that he knowingly violated the law. Again, this is in our parlance a semi-strict liability public welfare offense. An ordinary person should be on notice that digging up and taking arrowheads and the like, especially when they are valuable, is a regulated activity. It is reasonable to require that they check such regulations before taking these finds, especially after their first conviction.

²⁶⁰ 42 U.S.C. section 6928. The RCRA criminalizes knowing transportation, treatment, storage or disposal of hazardous waste in violation of RCRA regulations. Penalties are significantly enhanced where the prosecution can show that, at the time of the violation, the defendant knew that his conduct “thereby places another person in imminent danger of death or serious bodily injury.” See 42 U.S.C. § 6928(e). We would therefore classify RCRA as a semi-strict liability regime, where knowledge of the facts and circumstances surrounding a course of criminal conduct is required for prosecution, but knowledge as to a probable result/risk is not required, except in the case of prosecutions under §6928(e), where a prosecutor can demonstrate knowledge of imminent danger of death or serious bodily injury.

²⁶¹ Most scholars have noticed that the Court does not uphold strict liability offenses, using our definition of such offenses - that do not require knowledge of any wrongdoing. See, e.g., John Shepard Wiley, Jr., Not Guilty by Reason of Blameworthiness: Culpability in Federal Criminal Interpretation, 85 Val.L. Rev. 1021 (1999); Dan Kahan, supra. n. ___; Sharon L. Davies, The Jurisprudence of Willfulness: An Evolving Theory of Excusable Ignorance, 48 Duke L.J. 341 (1998); Alan Michaels, Constitutional Innocence, 112 Harv. Law Rev. 828 (1999) (arguing that the series of USSC decision discussed in our paper above represent an emerging law of “constitutional innocence”).

There are quite a number of examples of cases where the Court has read a *mens rea* into a federal statute, thereby preventing federal prosecutors from charging non-blameworthy conduct (or at least preventing them from having more such authority than that possessed by state prosecutors). In some of these cases the Court imposes a requirement of knowledge as to facts (where it is the facts that make the conduct wrongful), and in some instances the Court imposes a requirement of knowledge as to the law (where it is not otherwise obvious to most citizens that their conduct would be blameworthy). See, e.g., *United States v. Morissette*, 342 U.S. 246 (1952) (government must prove that defendant knew the beams he took off government land were not abandoned); *Bronston v. United States*, 409 U.S. 352 (1973) (literal truth an absolute defense to perjury charge, lest witnesses who did not intend to mislead prosecutors get inadvertently convicted); *United States v. United States Gypsum Co.*, 438 U.S. 422 (1978) (reading knowledge of anticompetitive effect of conduct into Sherman Act violation to avoid exposure to criminal punishment for a good-faith error of judgment); *Williams v. United States*, 485 U.S. 279 (1982) (writing a bad check does not constitute a false statement to a bank, as defendant may intend to deposit sufficient funds before the check clears); *Liparota v. United States*, 471 U.S. 419, 426 (1985) (government must prove defendant knew that selling food stamps below face value was illegal, to avoid "criminalizing a broad range of apparently innocent conduct"); *Cheek v. United States*, 498 U.S. 192 (1991) (defendant must be permitted to claim good faith mistake of law in a tax prosecution, or the complicated tax code could become a trap for the average citizen); *Ratzlaf v. United States*, 510 U.S. 135, 144 (1994) (government must prove that the defendant knew that structuring was illegal, as such conduct is not "inevitably nefarious")²⁶²; *Sun-Diamond v. United States*, (failure to distinguish gratuity from legal gifts. *McCormick v. United States*, 500 U.S. 257 (1991) (conviction under the Hobbs Act under color of official right requires proof of *quid pro quo* where an official receives a campaign donation, otherwise statute may criminalize ordinary political behavior); *Evans v. United States*, 504 U.S. 255 (1992) (government must prove the same *quid pro quo* required in federal bribery cases to cases where bribery of local officials is charged as a violation of the Hobbs Act, otherwise the innocent acceptance of a campaign contribution might become a criminal offense); *United States v. X-Citement Video*, 513 U.S. 64 (1994) (required prosecutors to prove that defendant had knowledge of age of minor starring in pornography video); *Posters "N" Things v. United States*, 511 U.S. 513 (1994) (reading scienter requirement into former 21 U.S.C. section 857, now codified at 21 U.S.C. section 863, as to the nature of drug paraphernalia, thereby

Lambert v. California, 355 U.S. 225 (1957) is the only case we could where the Court declared strict liability conviction to be unconstitutional, because the state court's interpretation excluded any other method of narrowing the statute. We predict that if the Court is someday forced to declare another strict liability offense unconstitutional, it will be a state and not a federal offense.

²⁶² Overruled by Congress, which amended statute to delete the word "wilfully".

requiring prosecution to prove the defendant's knowledge that the items at issue were likely to be used with illegal drugs); *Staples v. United States*, 511 U.S. 600 (1994) (interpreting Firearms Act to require proof that defendant knew that his weapon was a semi-automatic, as gun ownership is an otherwise innocent activity)

Though every one of these cases was resolved by narrow statutory interpretation rather than constitutional interpretation, only in one case did Congress respond by reinstating the previous interpretation through statutory amendment.²⁶³ The cases cited above illustrate that, particularly in the area of business regulation, the Court has been active in construing statutes so as to protect unwitting offenders from what would otherwise be strict liability offenses.

B. Vague Federal Laws

The claim that vague federal criminal proscriptions provide undue discretion to prosecutors is a debatable one. One can posit numerous legitimate reasons why Congress would construct some federal criminal laws in an open-ended fashion: it prevents clever defendants from loop-holing, and allows law enforcement to keep pace with creative new methods of committing crimes without having to perpetually rewrite statutes.²⁶⁴ Professor Sam Buell recently argued quite convincingly that overbreadth in federal criminal liability rules is sometimes necessary to catch individuals who strategically alter their conduct to avoid punishment; this overbreadth, he said, can be resolved not by reducing the scope of conduct rules, but by greater reliance on *mens rea* doctrines, control over prosecutorial decision-making, and modified sentencing practices.²⁶⁵

On the other hand, we acknowledge that there is some (small) good-faith aspect to what Prof. Dan Richman has called “the Chamber of Commerce whining.”²⁶⁶ When a high-level executive tells corporate counsel that she wishes to maximize revenue by undertaking a certain course of conduct, but definitely does not want to violate federal law and risk jail time along the

²⁶³ See 31 U.S.C. § 5324.

²⁶⁴ See, e. g., Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 519 (2001), at 545-57 (arguing that the alignment of respective costs and benefits for legislators and prosecutors encourages Congress to craft broad statutes that give prosecutors a great deal of discretion); Samuel W. Buell, *The Upside of Overbreadth*, 83 N. Y. U. L. REV. 1491, 1501 (2008) (citing the ex ante limits of a lawmaker's foresight and linguistic tools as reasons for drafting broad criminal provisions); Dan M. Kahan, *Is Chevron Relevant to Federal Criminal Law*, 110 HARV. L. REV. 469, 481-82 (1996) (positing that open-ended criminal statutes and the discretion inherent in them lower the costs of updating laws to keep pace with new forms of criminality).

²⁶⁵ Samuel W. Buell, *The Upside of Overbreadth*, 83 N. Y. U. L. REV. 1491, 1501 (2008) (citing the ex ante limits of a lawmakers' foresight and linguistic tools as reasons for drafting broad criminal provisions).

²⁶⁶ E-mail exchange between Professor Klein and Richman, 8/27/11 (on file with authors and law review).

way, she understandably expects a definitive answer. Instead, she might get the following response: “your conduct is not health care fraud or a false statement to a federal official or obstruction of justice under 18 U. S. C. section 1512. However there is this brand new statute, destruction of documents in violation of 18 U. S. C. section 1519, which arguably covers what you would like to do, but there is no caselaw interpreting that statute.” What is an entrepreneurial business executive to do under such circumstances? One might respond: (1) an appropriate *mens rea* requirement will protect the corporate executive acting in good-faith if she is charged;²⁶⁷ (2) there is social utility in this uncertainty; and (3) this is a problem for the uber-rich only, so we don’t much care.

None of these answers fully address the executive’s *ex ante* perspective. Those with a high-degree of confidence in the judgment of federal prosecutors not to overreach might be satisfied, but this will not stop the complaints from those who lack such confidence in our federal law enforcement officials. An alternative answer is to point out how infrequently corporate executives are prosecuted absent overwhelming evidence of intentional, willful fraud. One obvious illustration of this is that our present financial crisis so far has resulted in zero major prosecutions against bank officials, mortgage lenders, or any other Wall Street Players.²⁶⁸ Neither have they been divested of the huge profits they received, so apparently the burden of vague federal statutes isn’t too severe.

Similar to our evaluation of the critiques of strict liability offenses, we believe that the Court has gotten things just about right in responding to vagueness challenges to federal criminal statutes. Where Congress has refused to limit broadly worded federal criminal prohibitions, either by clearer definitions or by enhancing culpability requirements, the Supreme Court has once again stepped in to remedy the problem. Opinions in the last few decades have curbed prosecutorial interpretations of Congressional statutes in such diverse areas as fraud,²⁶⁹ firearm

²⁶⁷ See DOJ Chapter 27, Common Defenses, p. 717 and 718; Eighth Circuit Pattern Jury Instruction 9.08 (good faith instruction) (West 2000); 11th Circuit Pattern Jury Instruction, Special Instruction 18 (West 2003).

²⁶⁸ See, e. g., Peter J. Henning, *If There Is Overcriminalization, Why Are There So Many Complaints About the Failure to Prosecute Wall Street Bankers?*, SEALS 2011 (arguing that the absence of any high-profile prosecutions of Wall Street executives in the wake of our current economic crisis is due to lack of evidence establishing the *mens rea* for any federal fraud statutes). See also “Why Prosecutors Don’t Go After Wall Street” (National Public Radio broadcast July 13, 2011) (noting that the financial meltdown of 2008 hasn’t generated a single prosecution of high-level Wall Street players) summary available at: <http://www.npr.org/2011/07/13/137789065/why-prosecutors-dont-go-after-wall-street>.

²⁶⁹ The Court restricted mail fraud in *Cleveland v. U. S.*, 531 U. S. 12 (2000) by limiting the definition of Property. The defendant, Carl Cleveland, allegedly concealed his ownership interest in a family-operated limited partnership that applied for a license to operate video poker machines under Louisiana law. The government argued that the defendant defrauded Louisiana of its “right to control the issuance, renewal, and revocation of video poker licenses,” from which it derived substantial sums of money. The Court rejected this formulation of property, stating that “the thing obtained must be property in the hands of the victim” and that “[the] intangible rights of allocation,

offenses,²⁷⁰ obstruction of justice,²⁷¹ witness tampering,²⁷² money laundering,²⁷³ drug facilitation,²⁷⁴ identity theft,²⁷⁵ and unlawful gratuities.²⁷⁶

exclusion, and control amount to no more and no less than Louisiana's sovereign power to regulate. In denying the respondent's definition, the Court stressed that "the Government's reading of § 1341 . . . invites us to approve a sweeping expansion of federal criminal jurisdiction." In a parting shot, the Court implied that it would continue to read broadly-drafted provisions of the mail fraud statute against the government without a clearer and more definite statement from Congress. The Court kept its word. See discussion of *Skilling*, *infra* n. 279.

²⁷⁰ The Court placed limits on firearms offenses under 18 U. S. C. § 924 in two recent cases. *In Begay v. United States* 553 U. S. 137 (2008), the Court addressed the definition of a "violent felony" within the meaning of the Armed Career Criminal Act. At the time, the defendant had three felony DUI convictions on his record, and the trial judge enhanced his sentence under ' 924(e), finding that the felony DUIs involved "conduct that present[ed] a serious potential risk of physical injury to another" according to ' 924(e)(2)(B)(ii). Rejecting this logic, the majority opinion read the catch-all language at the end of ' 924(e)(2)(B)(ii) to be limited to crimes similar to those enumerated at the beginning of the provision. In *Watson v. United States*, 552 U. S. 74 (2007), the Court rejected the government's interpretation of the word "use" in 18 U.S.C. § 924(c)(1)(A) as including a defendant who bartered his handgun for drugs.

²⁷¹ See *infra* n. ____

²⁷² See *infra* n. ____.

²⁷³ *Cuellar v. United States*, 553 U. S. 550 (2008) (government must show in 18 U. S. C. section 1956(a)(2)(B)(i) prosecution not only that the defendant knowingly hid the money in his car floorboards during the transportation to Mexico, but further that he knew that the transportation itself was designed to conceal the source or ownership of the funds, rather than simply to get the funds across the border to repay the drug lord); *United States v. Santos*, 553 U. S. 507 (2008) (Court restricted the scope of "proceeds" within the meaning of § 1956(a)(1) to "profits" in gambling cases). *Santos* was essentially overturned in 2009 when Congress amended the statute to define "proceeds" as "net" income rather than profits. Senate Bill 386, Fraud Enforcement and Recovery Act (2009).

²⁷⁴ The Court in *Abuelhawa v. United States*, 556 U. S. 816, 129 S. Ct. 2102 (2009) marked the boundaries of drug facilitation under 21 U. S. C. § 843(b) by limiting the definition of the word Facilitate. Defendant Salman Abuelhawa made six contacts with a drug dealer who was under federal investigation at the time in order to set up two misdemeanor drug transactions (two felony drug sales for the dealer.) Upon arrest, the government charged him with six counts of felony drug facilitation under the theory that each of the six contacts helped in causing or facilitating the dealer's felony drug sales. The government argued that Abuelhawa's cell phone calls facilitated the transaction by allow[ing] the transaction to take place more efficiently and with less risk of detection. Rejecting this logic, the Court held that the two primary parties to an exchange do not "facilitate" their own transaction within common usage of the word. In doing so, the Court restricted drug facilitation to actors other than those "primary or necessary" to the underlying transaction.

²⁷⁵ The Court in *Flores-Figueroa v. United States*, 556 U. S. 646, 129 S. Ct 1996 (2009) strictly enforced the mental state element of the aggravated identity theft statute, 18 U. S. C. § 1028A(a)(1), so as to narrow the scope of the crime. Defendant Ignacio Flores-Figueroa, an undocumented alien, gave his employer a false name, birth date, Social Security number, and alien registration card. Flores was arrested after Immigration and Customs Enforcement noticed that Flores's documents belonged to other people. The government defended its charge of aggravated identity theft, arguing that the statute's mental state only attached to the verbs ("transfers, possesses, or uses.") The Court disagreed and found that the mental state attached to the objects of those verbs. In doing so, the

As with strict liability cases, the evolution of Court doctrine concerning potentially vague and broad-reaching federal statutes over the last 20 years is stark. The modern Court has not been shy about limiting the reach of such statutes. For example, in *McNally v. United States* the Court rejected decades of circuit precedent holding that undisclosed corruption, self-dealing, and conflicts of interests could be prosecuted under the theory that the public or private defendant (generally a public official or an employee) defrauded the citizens or his employer of their right to the defendant's "honest services."²⁷⁷ Congress reinstated this legal theory in 1988 by enacting 18 U. S. C. section 1346, defining "scheme to defraud" as including any scheme to deprive another of "the intangible right of honest services."²⁷⁸ Given such a license from Congress, unfortunately a few federal prosecutors got ham-handed in charging conduct that only bordered on what most of us would recognize as criminal conduct.²⁷⁹ The Court's response was to narrow the new statute, cabining it in exactly the same way it had over twenty years earlier.

The latest shot from the Court, *Skilling v. United States*, places severe limitations on honest services fraud.²⁸⁰ *Skilling* concerned the prosecution of the former Enron CEO for honest services wire fraud based on his role in the demise of the now-defunct energy giant.²⁸¹ The jury instructions allowed for conviction based solely on the defendant's breach of his duty of honest

Court effectively made aggravated identity theft much harder to prosecute by requiring the government to show that the defendant knew that the identification that he unlawfully used in fact belonged to another person. Indeed, the Court made relatively clear that this was its objective.

²⁷⁶ *United States v. Sun-Diamond Growers of California*, 526 U. S. 398 (1999) (reversing conviction, and holding that in order to establish a violation of 18 U.S.C. §201(c)(1)(A), the Government must prove a link between a thing of value conferred upon a federal official and a specific "official act" for or because of which it was given.)

²⁷⁷ 483 U. S. 350, 358-60 (1987).

²⁷⁸ One year after *McNally*, Congress responded by passing 18 U. S. C. § 1346, reviving the doctrine of honest services fraud. See NORMA ABRAMS, SARA SUN BEALE & SUSAN RIVA KLEIN, *FEDERAL CRIMINAL LAW AND ITS ENFORCEMENT* 143-45 (5th ed. , 2010) (chronicling the death and rebirth of honest services fraud).

²⁷⁹ Gregory H. Williams, *Good Government by Prosecutorial Decree: The Use and Abuse of Mail Fraud*, 32 *Ariz. L. Rev.* 137 (1990) (arguing generally that the mail fraud statute is vague and therefore gives rise to unfettered prosecutorial discretion); John C. Coffee, Jr., *Modern Mail Fraud: The Restoration of the Public/Private Distinction*, 35 *Am. Crim. L. Rev.* 427 (1998) (arguing that mail fraud prosecutions in the private sector should be limited to conduct that violates state law or an independent federal statute); Dale A. Oesterle, *Early Observations on the Prosecutions of the Business Scandals of 2002-2003*, 1 *Ohio St. J. Crim. L.* 443 (2004); Geraldine S. Moohr, *Mail Fraud Meets Criminal Theory*, 67 *U. Cin. L. Rev.* 1 (1998).

²⁸⁰ 561 U. S. ____ (2010); 130 S. Ct. 2896, 2931 (2010). That same term, the Court granted *certiorari* in two outer mail fraud cases, vacating each after rendering *Skilling*. See *Black v. United States*, 2010 WL 2518593 (6/24/10); *Weyhrauch v. United States*, 2010 WL 2518696 (6/24/10).

²⁸¹ *Id.* at 2907.

services to Enron, and Enron's loss of its intangible right to his honest services; the instructions did not require that Skilling have obtained kickbacks from third parties in exchange for his deceit. Skilling argued for the total invalidation of § 1346 on grounds of unconstitutional vagueness.²⁸² Instead, the Court narrowly interpreted the ill-defined provision, holding that section 1346 is limited to schemes involving the receipt of bribes or kickbacks in exchange for official action. In doing so, the majority noted that “[r]eading the statute to proscribe a wider range of offensive conduct . . . would raise the due process concerns underlying the vagueness doctrine.”²⁸³

The Senate Judiciary Committee has advanced new legislation to overturn *Skilling* in the Public Corruption Protection Improvements Act (PCPIA).²⁸⁴ This bill includes a provision to allow prosecutors to target undisclosed “self-dealing” by state and federal public officials, where officials secretly act in their own financial interest rather than in the public’s interest. As of this publication date, no action has been taken by Congress, and we doubt that such a showdown is imminent.

We saw the same story unfold with federal obstruction statutes. In *United States v. Aguilar*, the Court narrowed the government’s interpretation of the most commonly charged obstruction statute, 18 U. S. C. section 1503(a). The defendant, former judge Robert Aguilar, allegedly lied to federal agents about his conduct relating to the investigation of a union official suspected of racketeering. Upon review, the Court affirmed the Ninth Circuit’s reversal of conviction, finding that the government failed to show that Aguilar’s actions had the “natural and probable effect of interfering with the due administration of justice.”²⁸⁵ The Court imported this extra-statutory requirement, first articulated in a 19th century obstruction case, in order to “place metes and bounds on the very broad language of the catchall provision” of section 1503(a).²⁸⁶

Ten years later, in *Arthur Anderson, LLP v. United States*, the Court narrowed the scope of the federal witness tampering provision. In the months leading up to Enron’s financial meltdown, accounting firm Arthur Anderson began vigorously destroying documents according

²⁸² *Id.* at 2925-26.

²⁸³ *Id.* at 2931. See also *Skilling*, 130 S. Ct. at 2933 n. 44 (warning Congress that Ait would have to employ standards of sufficient definiteness and specificity@ if it were to attempt to criminalize non-disclosure and self-dealing).

²⁸⁴ S. 401, 112th Cong. (2011); see also related House legislation, the Clean Up Government Act of 2011, H.R. 2572, 112th Cong. (2011).

²⁸⁵ 515 U. S. 593, 599 (1995).

²⁸⁶ *Id.*

to its document retention policy. It did so with full knowledge that a Securities and Exchange Commission investigation could commence at any time, and it stressed to its employees that document shredding pursuant to the retention policy was legal. The government charged the firm with obstruction under 18 U. S. C. section 1512(b). The government advocated a broad reading of the provision, decoupling the requirement of a “knowing” mental state from the act of “corruptly persuad[ing]” another, and stressing that the government need not prove that the defendant knowingly violated the law. The Court rejected this theory, opting for a narrower construction that requires “conscious wrongdoing” on the part of the defendant.²⁸⁷ In doing so, the Court stated, “it is striking how little culpability the [government’s jury] instructions required,” suggesting that the Court’s ruling at least in part sought to corral an overbroad statute. As it did in response to *McNally*, Congress again responded with a new witness tampering provision that eliminated part of the *mens rea* requirement.²⁸⁸ We could find no cases charging this new subsection, but our prediction is that if prosecutors push, the Court will push back.

Though the Court has almost always favored the government in its interpretation of civil and criminal RICO,²⁸⁹ the criticism is overblown. First, we note that this statute is neither a strict liability one, nor one that defines the conduct so broadly that an ordinary individual cannot anticipate in advance when she is breaking the law. The RICO statute, which consists of three substantive crimes plus a conspiracy to commit any of these three crimes,²⁹⁰ requires proof of many complicated elements, such as an enterprise,²⁹¹ a pattern of racketeering acts (that further

²⁸⁷ 544 U. S. 696 (2005).

²⁸⁸ Amendment to 18 U. S. C. § 1512 (2002) (but after conduct charged in *Anderson*); new 18 U.S.C. § 1519.

²⁸⁹ The Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. sections 1961 - 1963 (enacted 1970). Every RICO case heard by the United States Supreme Court has affirmed the defendant's conviction and accepted the government's interpretation of the statute. See notes 289 - 293, *infra*; see generally Abrams, Beale, and Klein, *Federal Criminal Law and its Enforcement* 587 - 678 (5th ed. 2010). The only exception is a civil RICO case, *Reves v. Ernst & Young*, 507 U.S. 170 (1993) (plaintiff must prove that the person operated or managed the enterprise to establish a 1962(c) violation), which applies equally to criminal RICO cases. I include in this paragraph those civil RICO cases where the issues addressed are identical for civil and RICO prosecutions: the statutes are identical except for causation and damages, which need be proved only in civil RICO cases.

²⁹⁰ 18 U.S.C. section 1962(a) makes it "unlawful for any person who has received any income ... from a pattern of racketeering ... to use or invest ... such income ... in acquisition of any interest in, or the establishment or operation of, any enterprise." 18 U.S.C. section 1962(b) makes it unlawful to use "a pattern of racketeering activity ... to acquire or maintain ... any interest in or control of any enterprise." 18 U.S.C. section 1962(c) makes it "unlawful for any person employed by or associated with any enterprise .. to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity." 18 U.S.C. section 1962(d) makes it a crime to conspire to violate subsections (a) through (c).

²⁹¹ 18 U.S.C. section 1961(4) defines "enterprise." See also *Boyle v. United States*, 129 S.Ct. 2237 (2009) (affirming verdict against challenge that jury was not properly instructed that an enterprise must have a "structure");

requires continuity and relationship),²⁹² and, for the most commonly used subsection,²⁹³ that the defendant operate or manage the alleged enterprise.²⁹⁴ There is no doubt that a defendant who intends the commission of at least two predicate acts of racketeering, such as robbery, murder, loansharking, drug trafficking, or gambling, through a criminal enterprise that effects interstate commerce has sufficient *mens rea* to be properly identified as an appropriate target of federal prosecution.²⁹⁵ Moreover, the charging and proof involved in a RICO charge is so complicated and specific that there is no chance of unfair prosecutorial selection of targets for criminal liability.²⁹⁶ It is no doubt for this reason (and perhaps because AUSAs need Main Justice approval before indicting on a RICO)²⁹⁷ that very few such prosecutions are brought each year.²⁹⁸

United States v. Turkette, 452 U.S. 576 (1982) (jury properly instructed that government must prove that: "91) There [was] an ongoing organization with some sort of framework, formal or informal, for carrying out its objectives; and (2) the various members and associates of the association function[ed] as a continuing unit to achieve a common purpose").

²⁹² A pattern of racketeering acts requires "at least two acts of racketeering activity." 18 U.S.C. section 1961(5). See also H.J. Inc. v. Northwestern Bell Telephone Company, 492 U.S. 229 (1989) (a pattern can be established by continuity of conduct and relationship among predicate acts).

²⁹³ 18 U.S.C. section 1962(c).

²⁹⁴ Reves v. Ernst & Young, 507 U.S. 170 (1993), *supra* n. 90. The Court also demands that, for 1962(c) prosecutions, the enterprise and the "person" be distinct. Cedric Kushner Promotions Ltd. v. Don King, 533 U.S. 158 (2001) (holding that the "person" Don King, a natural person who is the president and sole shareholder of Don King Productions, a corporation, is distinct from the "enterprise" alleged, the corporation Don King Productions).

²⁹⁵ "Racketeering activity" includes 9 state crimes and a very long list of federal crimes believed to be typical or organized crime. See 18 U.S.C. section 1961(1). To be guilty of a RICO conspiracy, a defendant need not agree to personally commit the two predicate racketeering acts, though she must intend that some member of the conspiracy do so. Salinas v. United States, 522 U.S. 52 (1997).

²⁹⁶ RICO has withstood multiple vagueness challenges in the circuit courts, see United States v. Morelli, 643 F.2d 402, 412 (6th Cir. 1981), *cert. denied*, 453 U.S. 912 (1981); United States v. Aleman, 609 F.2d 298, 305 (7th Cir. 1979), *cert. denied*, 445 U.S. 946 (1980); United States v. Huber, 603 F.2d 387, 393 (2d Cir. 1979), *cert. denied*, 445 U.S. 927 (1980); United States v. Swiderski, 593 F.2d 1246, 1249 (D.C. Cir. 1978), *cert. denied*, 441 U.S. 933 (1979); United States v. Campanale, 518 F.2d 352, 364 (9th Cir. 1975), *cert. denied*, 423 U.S. 1050 (1976); United States v. Cappetto, 502 F.2d 1351, 1357-58 (7th Cir. 1974), *cert. denied*, 420 U.S. 925 (1975).

²⁹⁷ U.S. Attorney's Manual paragraphs 9-110.010 et. seq. (Aug. 1999). Federal prosecutors must obtain prior approval of the Criminal Division before filing a RICO criminal indictment.

²⁹⁸ In 2011, just 189 defendants were prosecuted for RICO violations in federal court; this low number of prosecutions is consistent with prior years, for example 2007 (147 RICO defendants); 2008 (158 RICO defendants); 2009 (114 RICO defendants); 2010 (138 RICO defendants). See Table D-2, *Cases Commenced in Federal Court in*

Conclusion

The widely-reported “problem” of over-federalization of crime is largely a myth. Through the empirical data presented in Part I, including federal caseload data from 1940 to 2010, current federal prison-population data, comparisons of federal and state court felony convictions, and an analysis of frequently used federal statutes, we have provided ample support for our claim that, despite the large number of federal criminal proscriptions now in existence, the sheer number of criminal statutes in effect at a given time has no demonstrable impact on the balance of power between state and federal law enforcement systems. In fact, state and federal law enforcement entities continue to share the workload much as they always have, with states dominant in areas of traditional local concern, such as violent and property crime, and the federal government tackling problems of national and international significance. The reality on the ground, then, is vastly different from the conclusory argument advanced by some, that is, that Congress’ promiscuous habit of enacting too many criminal proscriptions has resulted in a significant disruption of traditional federal-state relations. As the data reveals, no such seismic shift has occurred.

While some critics have expressed dissatisfaction with the prevalence of federal prosecutions in areas of concurrent federal/state jurisdiction, particularly in the controlled substance area, such dissatisfaction is likewise not a function of a recent over-federalization phenomenon. Controlled substance cases on the federal level are prosecuted pursuant to essentially a single statute enacted in 1970.²⁹⁹ Importantly, these areas of concurrent or overlapping jurisdiction have not been particularly problematic for state systems, which continue to prosecute the vast majority (more than 95%) of criminal conduct occurring within their borders. Because federal criminal proscriptions do not preempt state law, and because the federal system is very small relative to the states’ systems, criminal law enforcement in this country remains the province of state and local criminal justice systems. Individuals who engage in misconduct that violates both state and federal laws have no cause to complain upon prosecution, especially because federal prosecutors will not charge them successively if the state chooses to prosecute first, and various checks and balances ensure that federal prosecutors use good judgment in selecting which defendants are appropriate for federal charges.

Finally, overbroad or vague federal criminal proscriptions, while admittedly troubling, are not a product of over-federalization itself. Vague federal statutes, particularly in the area of

a 12-month period, FEDERAL JUDICIAL CASELOAD STATISTICS, ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, STATISTICS DIVISION, Washington, D.C. 2011.

²⁹⁹ Controlled Substances Act of 1970, Pub. L. 91-513, 84 Stat. 1242, enacted Oct. 27, 1970, and establishing a comprehensive closed regulatory scheme for controlled substances.

fraud, derive from the common law and have been in existence for decades (for example, the frequently charged mail fraud statute, the enactment of which dates back to 1876.) While vague statutes have created temporary but serious problems in the federal system, the Supreme Court has managed to interpret such federal proscriptions in a manner that balances the amount of breadth needed to capture new forms of criminal conduct against the level of narrowing necessary for fairness. The Court has taken a similarly active role in curbing what might otherwise constitute strict liability offenses by imposing extra-textual *mens rea* requirements, particularly in the area of regulatory offenses. The Court's active involvement in these areas has and continues to serve as a powerful antidote to the perceived ills of Congressional overreaching, poor statutory drafting, and regulatory criminalization.

