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It's A Myth

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Overfederalization of Criminal Law? IT'S A MYTH

By Susan R. Klein and Ingrid B. Grobey

When Mitt Romney lambasted Barack Obama during a 2012 presidential debate for the overzealous use of the Migratory Bird Treaty Act (MBTA) to prosecute patriotic American oil corporations that were merely trying to provide for the country's energy needs, he joined most criminal law scholars who bemoan what they call the "overfederalization" of criminal law. They are on the same page as the Federal Judicial Conference of the United States, the American Bar Association, and conservative special interest groups. Conventional wisdom, along with what seems to be every third issue of the *Wall Street Journal*, reports that Congress obtains votes from constituents by making a "federal case" out of any conceivable bad behavior. Thus, politics (rather than reasoned judgment) has led to the passage of upwards of approximately 4,500 federal criminal prohibitions, as many as half of these enacted since 1970.

Dire warnings and proposed "fixes" are legion. Some academics predict that the sheer number of federal criminal offenses will overwhelm the federal judicial system, and recommend that we try a large swath of federal crimes in state courts. Others worry that the growth of the federal code gives federal law enforcement agents and prosecutors unhealthy amounts of discretion to charge just about anyone, and to unfairly select certain defendants for harsher federal procedures and sentences. They suggest that the Supreme Court impose substantive limits on the definitions of federal crimes. Conservative lobbying groups, such as the Federalist Society and the Heritage Foundation, charge that good people languish in federal prisons for committing "crimes" without bad intent. Our own American

Bar Association reported in 1998 that the number of federal crimes enacted annually so swells federal criminal caseloads and fuels federal prison overcrowding that it interferes with the traditional local nature of law enforcement. For these groups, the solution is a combination of congressional restraint and Supreme Court enforcement of federalism principles. Most recently, the Republican Party's 2012 platform warned that the "resources of the federal government's law enforcement and judicial systems have been strained by two unfortunate expansions: the over-criminalization of behavior and the over-federalization of offenses. . . . Federal criminal law should focus on acts by federal employees or acts committed on federal property—and leave the rest to the States." Then Congress should "withdraw from federal departments and agencies the power to criminalize behavior." (REPUBLICAN NAT'L COMM., REPUBLICAN PLATFORM 2012, at 38 (2012), available at <http://tinyurl.com/8vv98a8>.)

We say hold the phone and stop the presses. Based upon our examination of the current federal criminal caseload, none of the above is cause for concern, and no radical action need be taken. It turns out that the number of federal proscriptions has little effect, negative or positive, in the real world of criminal justice enforcement. Empirical data (including sentencing data, prison population data, and analysis of frequently used statutes) demonstrates that in spite of the large increase in the *number* of federal criminal statutes during the past several decades, this growth in the federal code has generated little impact on federal resources or on the balance of power between state and federal courts. This is because the percentage of felony criminal justice matters heard in federal court each year—5 percent—has

remained relatively constant over many decades. Moreover, the few categories of cases that currently make up the bulk of the federal caseload—primarily drug and immigration prosecutions—are generally appropriate for federal intervention. Federal prosecutors tend to utilize the same limited set of familiar, tried-and-true statutes. Most of the statutes that generate controversy because of triviality (like the one against using the likeness of Smokey Bear, 18 U.S.C. § 711, with zero prosecutions) or federalism concerns (such as carjacking, 18 U.S.C. § 2119, with 148 prosecutions in 2010) are never or are very rarely used. Strict liability offenses are few and far between and generally lead to zero prison time, while vague criminal proscriptions that allow federal prosecutors to select any “victim” are routinely narrowed by the United States Supreme Court.

We will proceed here in three parts. First, we will compare federal and state court caseloads, to determine whether the feds are encroaching on traditional state crimes, and whether the feds’ share of the national criminal caseload is increasing. Next, we will review whether there are any injustices associated with federal strict liability regulatory offenses. Are the feds targeting innocent citizens and corporations, and are the number of regulatory prosecutions increasing? Did the United States attorney in North Dakota or elsewhere unfairly target oil-drilling corporations? Finally, we will explore the issue of concurrent jurisdiction. Our federalism permits the states, as independent sovereigns, to enact different procedures and sentences to combat crime committed within their jurisdictions. Federal law enforcement “selects” defendants for federal prosecution for good reasons—state requests for help, defendant recidivism, and conduct that transcends state lines. As one example of concurrent jurisdiction, we examine states with different moral norms than the feds, focusing on the recent legalization of marijuana in Colorado and Washington. Are the feds hindering independent state norms in these and other areas, or fostering them? We conclude that none of the above-listed federalism critiques have much merit, and that the federal criminal justice system is handling itself quite well in these areas.

Comparison of Federal and State Caseloads

Let’s start with the actual numbers of federal criminal charges brought in the United States since 1940, and compare these to the numbers of state and local criminal cases brought during the same time period. The vast bulk (over 80 percent) of federal prosecutive resources are currently devoted to just four categories of offenses: controlled substances, immigration, fraud, and weapons offenses. In fact, the majority of federal criminal defendants today (around

59 percent) fall into one of just two offense categories: in 2011, 30 percent of all federal criminal defendants were charged with drug offenses under the Controlled Substances Act (primarily 21 U.S.C. § 841), while an additional 29 percent were charged with immigration offenses (primarily the prohibition against unlawful alien reentry, 8 U.S.C. § 1326). (See fig. 1.)

Similarly, controlled substances, immigration, and weapons offenders comprise more than three-quarters of the current federal prison population. 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.

What has also remained static is the percentage of criminal felony matters pursued federally rather than at the state or local level. Crime remains as much a local matter today as it did in 1913. The percentage of overall felony prosecutions pursued federally has hovered at 5 percent since at least 1992. If overfederalization were actually occurring, one would reasonably expect to observe either an increase in the federal caseload without a corresponding increase 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. Unless we have an extreme resource and cultural refocus, federal criminal law will remain a minor player outside the enclaves of direct federal interests (bribery of federal officials and other administration of justice offenses, immigration, terrorism, tax offenses, and protection of federal programs and property), where it reigns supreme. (See fig. 2.)

Finally, a careful comparison of the *types* of cases pursued by state courts to those pursued by federal prosecutors makes it clear that the division of labor between the two systems is alive and well. The data 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. (See fig. 3.) Consider the following examples from 2006:

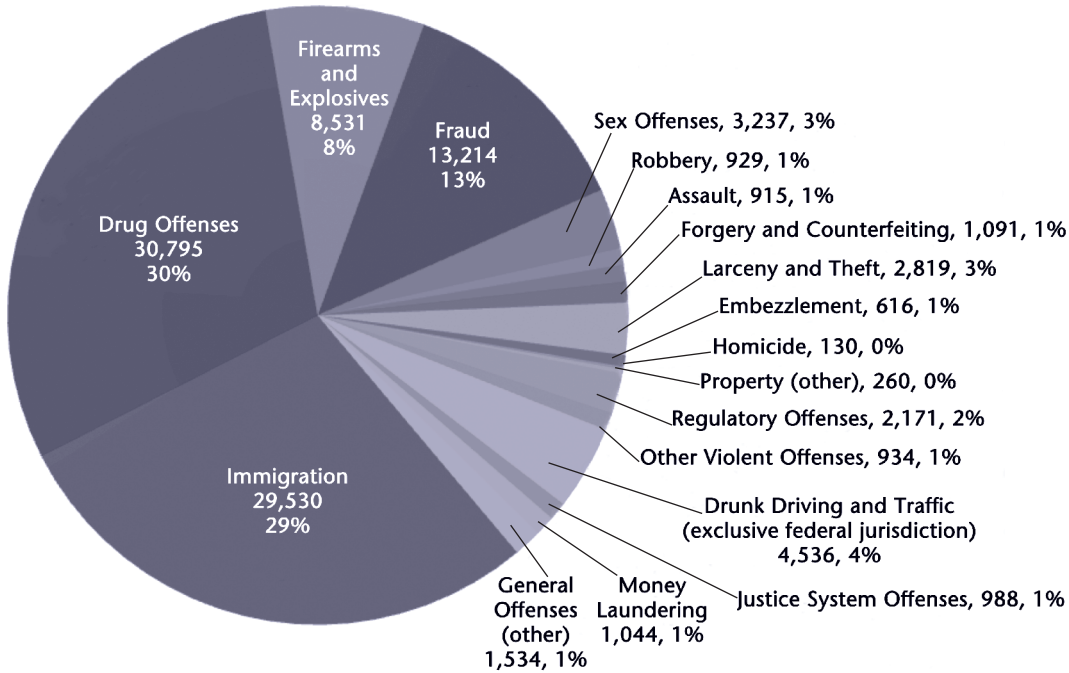
- State courts convicted 8,670 individuals of murder; federal courts convicted just 146 murderers (or, stated differently, federal courts convicted 1 percent of all convicted murderers).
- There were 33,566 felony sexual assault convictions in the United States; just 366, or 1 percent, were prosecuted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

Meanwhile, federal courts continue to protect those interests which strongly implicate interstate conduct (the movement of drugs and guns), the national monetary system, and national security. 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:

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Figure 1

Criminal defendants by offense category, updated for 2011 (103,274 total defendants represented; numbers represent defendants commenced in federal court in a 12-month period, as a percentage of total criminal caseload. Source: Table D-2, FEDERAL JUDICIAL CASELOAD STATISTICS, ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, STATISTICS DIVISION, Washington, D.C. 2011)



Detail on offense categories: Justice system offenses include aiding/abetting; obstruction; escape from custody; failure to appear; perjury; and contempt. Other general offenses includes bribery, RICO, racketeering (nonviolent), extortion, gambling, and failure to pay child support. Other violent offenses includes racketeering (violent); carjacking; terrorism; and other.

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.

The “explosion” in the federal criminal law (at least in terms of the numbers of federal criminal proscriptions) is largely irrelevant to actual practice in the federal

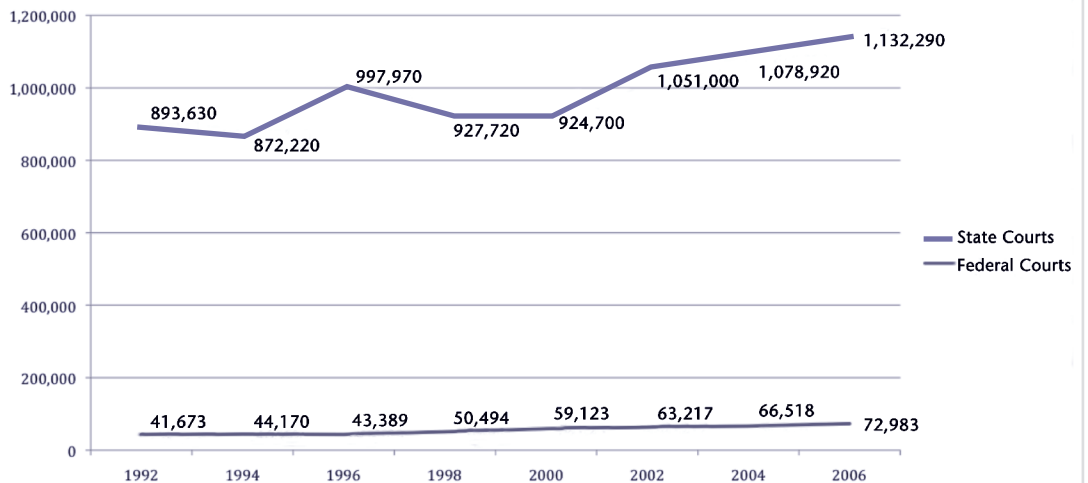
- 100 percent of the 44 felony convictions for international terrorism took place at the federal level;
- 18.9 percent of 46,841 felony convictions for weapons offenses took place at the federal level;
- 11.3 percent of approximately 240,000 felony convictions for drug trafficking took place at the federal level; and
- 9.3 percent of 106,000 felony convictions for fraud, forgery, and embezzlement took place at the federal level.

criminal justice system. Most of these new federal crimes are virtually ignored by federal prosecutors. The criminal code might be potentially infinite, but a prosecutor’s time and resources are both finite. Current federal criminal law

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

Figure 2

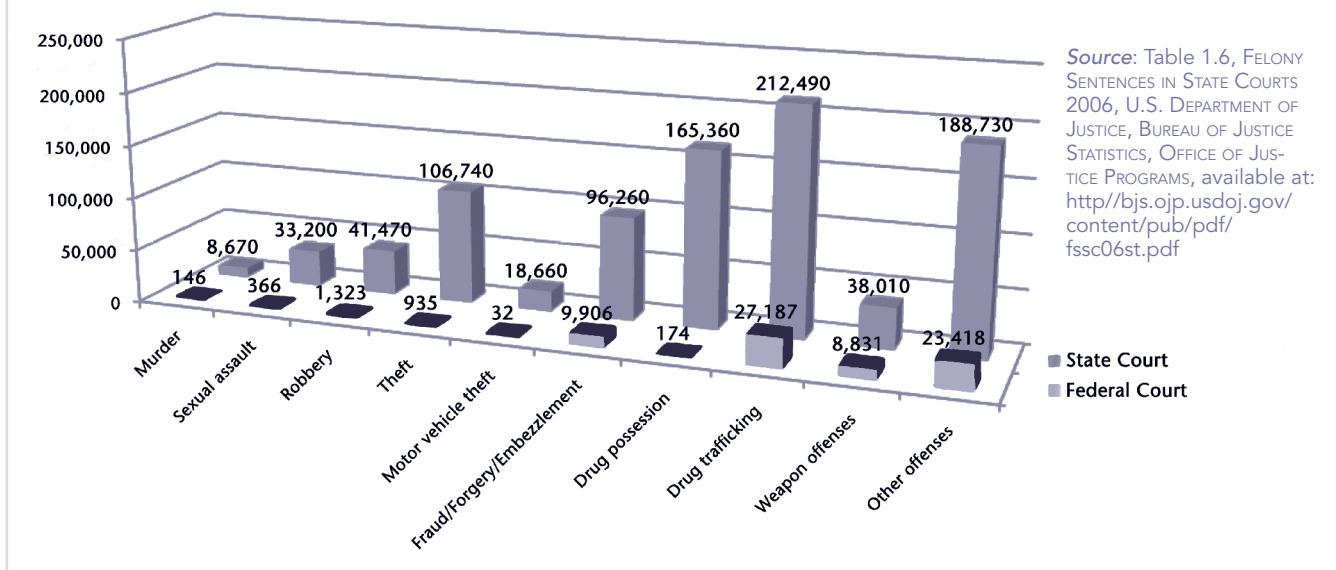
Raw number of felony convictions annually in state court and federal court, 1992-2006



Source: BUREAU OF JUSTICE STATISTICS, U.S. DEPARTMENT OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, FELONY SENTENCES IN STATE COURTS 1994, 2000, 2006; available at <http://bjs.ojp.usdoj.gov/index.cfm?ty=pbse%sid=28>

Figure 3

Number of state and federal felony convictions, by various major offenses types, 2006



is set forth in 48 titles of the United States Code, encompassing roughly 27,000 pages of printed text, as interpreted in judicial opinions containing approximately four million printed pages. No busy prosecutor can afford to take time away from his or her important work to study complex new laws, especially when the old statutes do the trick quite well. Most federal prosecutors do not want to be the official who tests a new law, especially on pain of losing a conviction under a reliable statute. Just because Congress enacts a new law doesn't mean that those political priorities will be shared by the Department of Justice (DOJ).

The largest areas of growth over the last 20 years, immigration and drug offenses, are brought primarily under statutes enacted decades ago (the Immigration and Nationality Act in 1952, the modern-day Controlled Substances Act in 1970). In 1980, immigration and drug defendants constituted just 7 percent and 19 percent of the federal criminal caseload, respectively; by 2011, drug and immigration defendants made up approximately 60 percent of all federal criminal defendants. These two categories now so overwhelmingly dominate the federal criminal caseload that no major offense category aside from fraud and firearms constitutes more than 5 percent of the caseload. While there have been slight increases in prosecutions of sexual abuse offenses and firearms offenses at the federal level, those increases are being driven primarily by criminal conduct implicating federal interests or interstate conduct, for example, interstate child pornography offenses, sex offenses against minors in geographic regions of exclusive federal jurisdiction, and offenses related to failure to complete National Sex Offender Registry requirements. The growth of federal firearm offense prosecutions can be traced to increased enforcement of weapons bans for convicted felons, and targeting use of weapons in furtherance of drug crimes.

Few scholars, judges, practitioners, or citizens would suggest that immigration offenses are inappropriate for federal pursuit. In fact, the Constitution specifically entrusts immigration policy and the protection of our borders to the feds, and the Supreme Court recently affirmed that federal law preempts conflicting state statutes in this field. While a plausible argument can be made that some if not all of the controlled substances banned federally (and at the state level) should be decriminalized, once the policy choice is made to engage in a "war on drugs," it is not a fight that can be won without federal law enforcement, diplomatic, and military involvement, at least in the key areas of importation, manufacturing, and trafficking. The compelling arguments for defederalizing the war on drugs are actually arguments about draconian and mandatory minimum federal sentences, privacy invasion, racial inequality, and the propriety of using any criminal justice system to combat the medical issue of drug abuse.

Strict Liability Offenses: The Migratory Bird Treaty Act

During the recent presidential election, Mitt Romney complained that the federal government unjustly "brought a criminal action against the people drilling up there for oil, this massive new resource we have." (*Transcript and Audio: Second Presidential Debate*, NPR (Oct. 16, 2012), <http://tinyurl.com/9gncq4r>.) It is true that federal prosecutors in the United States Attorney's Office for the District of North Dakota brought misdemeanor charges against seven corporations under the 1918 MBTA for causing the deaths of 28 migratory birds that landed in unprotected oil waste pits from drilling activities on the Bakken Formation in North Dakota. A few months earlier, Newt Gingrich wrote a letter to Lamar Smith, chairman of the House Committee on the Judiciary, likewise complaining that the Obama administration was "selectively" targeting particular oil companies by

bringing criminal charges “and, potentially, prison terms” when no such prosecutions were instituted against commercial airlines or wind turbine generators. (Letter from Newt Gingrich, Former Speaker of the House of Representatives, to Lamar Smith, Chairman of the House Comm. on the Judiciary (Feb. 22, 2012), *available at* <http://tinyurl.com/anosj8r>.) Of course the *Wall Street Journal* quickly chimed in, calling this “a bird-brained prosecution” and giving U.S. Attorney Timothy Purdon the prize for “dodo prosecutor of the year.” (Op-Ed, *Dodo of the Year*, WALL ST. J., Jan. 25, 2012, <http://tinyurl.com/apq6fna>.)

However, a closer review of the statute and the actual facts in these cases tells a different story. Of these seven prosecutions, three were dismissed by federal district judge Daniel Hovland, one was dismissed by the DOJ, and three corporations pleaded guilty. Of course corporations cannot be put in prison, so the worst fate they could suffer from these prosecutions was very minor fines (\$15,000 per bird, levied against a company worth over \$10 billion). Both Romney and Gingrich importantly failed to mention a number of other key points. First, billionaire Harold Hamm, one of Romney’s major contributors who was also part of the team that advised him on energy issues, is CEO of Continental Resources, one of those seven indicted companies. Hamm donated \$985,000 to Restore Our Future, one of the super political action committees backing Romney’s candidacy. (Juliet Eilperin, *Birds and Oil Production in ND*, WASH. POST, Oct. 16, 2012, <http://tinyurl.com/a8n962p>.) Second, neither Romney nor Gingrich mentioned that the bird deaths from planes and wind turbines are unforeseeable and unpreventable, unlike the deaths caused by the oil companies. Third, both men failed to mention that wind turbine generators have agreed to purchase new turbines that are less likely to harm birds. Fourth, all of the companies charged by the US attorney’s office had numerous previous citations for the same misconduct. There was little left to do but institute criminal prosecutions to force these companies to obey the law. Fifth, the harm was easily preventable. The companies had failed to put up netting, screening, or fences around the reserve pits (a chemical-filled lake caused by oil drilling)—fences that could easily have prevented the endangered birds from drowning in these pits.

More importantly from a legal standpoint, it turns out that the federal circuit and district courts are split on what, if any, mens rea is required for a misdemeanor conviction. The Class B misdemeanor provision of the MBTA provides for criminal liability for one who “takes” migratory birds. (16 U.S.C. §§ 703, 707(a).) While no court requires the government to prove that the defendant intended to violate the law in order to convict someone of this public welfare offense (that would be, in our terminology, a “semi-strict liability” offense), they disagree regarding what, if any, level of mens rea regarding conduct or an omission is appropriate (if there is no mens rea as to the conduct itself as well as toward the law, that would be, in our terminology, a “true strict liability” offense). Some courts, such as the Eighth Circuit and Judge Hovland in the District of North Dakota, hold that “migratory bird kills resulting from lawful commercial activity that is unrelated to hunting or poaching”

does not constitute a criminal “taking.” (See *United States v. Brigham Oil & Gas, L.P.*, 840 F. Supp. 2d 1202, 1204 (D.N.D. 2012).) Other districts, like the District of New Mexico and the Western District of Louisiana, similarly hold that merely negligent acts not directed at birds are not a “taking.” That interpretation of the law carries it outside the realm of a strict liability offense, as one would at least need to intend the conduct (killing the bird), and thus oil drillers and pesticide manufacturers who unintentionally kill birds, or whose unintended side effect of their lawful business is to kill birds, are fully protected.

The Second Circuit, on the other hand, found liability where a corporation manufactured pesticides known to be highly toxic and then failed to act to prevent these dangerous chemicals from reaching the pond where it killed birds. The court treated this as a public welfare offense, one we would call a true strict liability offense (no awareness that one is killing a bird is necessary). Under this theory, because the corporation is dealing in a dangerous item in order to make money, it should bear the responsibility for any resulting harm. We will have to wait and see whether the Supreme Court allows the Second Circuit’s interpretation of the MBTA as a semi-strict liability public welfare offense to stand. It does fit nicely into the Court’s definition, as developed over time in response to the Industrial Revolution to protect our air, water, stock exchange, and general physical and economic health: such a regulation is aimed at a high-level responsible corporate official or more likely the corporation itself, it protects the public from dangerous items, it is a misdemeanor or fine-only offense rather than a felony, it has no common law roots, and it is reasonable to expect the corporation to prevent the harm and bear the burden of correcting the problem. We could find only one other regulatory statute, the Federal Food, Drug, and Cosmetic Act of 1938 (FFDCA), where the Court interpreted the proscription as true strict liability. The defendant did not need to know he was shipping misbranded drugs (*United States v. Dotterweich*, 320 U.S. 277 (1943)) or that his warehouses were infected with rat droppings (*United States v. Park*, 421 U.S. 658 (1975)), but the government did need to prove that the defendant was in a responsible relation to the public and that he realized he was dealing in dangerous items.

Critics of overfederalization frequently bemoan regulatory prosecutions as inappropriate for criminal enforcement and wasteful of federal resources. Surprisingly, the proportion of regulatory offenders as a total of all criminal defendants annually fell from 7 percent of the federal criminal caseload in 1980 to 2 percent in 2011, with 2,171 defendants (including corporate entities) being prosecuted for regulatory offenses last year. There were a grand total of 32 defendants prosecuted for hazardous waste violations, 118 civil rights defendants, 81 copyright defendants, and 348 “other regulatory offenses” (which includes Clean Air Act offenses). (See, U.S. COURTS, TABLE D.2 DEFENDANTS (2011), *available at* <http://tinyurl.com/apq63ot>.) Even those 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, at least as we define them. In fact, civil rights and copyright criminal provisions expressly require proof of mens rea. The remaining prosecutions involve almost exclusively semi-strict liability offenses. That is, the government has to prove that the defendant knew or intended the conduct, just not that the conduct was unlawful. Such semi-strict liability offenses encourage knowledge of and adherence to the law, and force corporations to act carefully. Moreover, even where public welfare offenses are prosecuted, the sentences tend to be quite lenient. For example, the median prison sentence length for the year 2009 shows an average of zero months for environmental offenses, FFDCOA offenses, and other miscellaneous offenses.

Outside the public welfare offense category, the Court has implied a mens rea to *all* of those federal offenses that might otherwise appear to be strict liability offenses. A few examples include: *Morissette v. United States*, 342 U.S. 246 (1952) (holding that the government must prove that the defendant knew the beams he took off government land were not abandoned); *Bronston v. United States*, 409 U.S. 352 (1973) (finding literal truth an absolute defense to perjury charge, lest witnesses who did not intend to mislead prosecutors get inadvertently convicted); *Liparota v. United States*, 471 U.S. 419, 426 (1985) (holding that the government must prove the defendant knew that selling food stamps below face value was illegal, to avoid criminalizing “innocent conduct”); *Cheek v. United States*, 498 U.S. 192 (1991) (noting that the defendant must be permitted to claim good faith mistake of law in a tax prosecution or else the complicated tax code could become a trap for the average citizen); and *Staples v. United States*, 511 U.S. 600 (1994) (interpreting Firearms Act to require proof that the defendant knew that his weapon was a semiautomatic, as gun ownership is an otherwise innocent activity).

Vague and sweeping federal offenses, such as obstruction of justice and mail fraud, have likewise been trimmed significantly by the Court’s narrow interpretation of these statutes to clear instances of what we would all recognize as criminal misbehavior. For example, the Court limited the federal mail fraud statute to clear instances of bribery and kickbacks in *Skilling v. United States*, 561 U.S. 40 (2010); it narrowed the money laundering statute by strictly defining “intent to conceal” in *Cuellar v. United States*, 553 U.S. 550 (2008); it required intent to violate the law in witness and document tampering cases in *Arthur Andersen LLP v. United States*, 544 U.S. 696 (2005); and it imposed an extratextual nexus requirement in obstruction cases in *United States v. Aguilar*, 515 U.S. 593 (1995).

Federal criminal defendants plead guilty at an astonishing 97 percent rate not because there are too many federal criminal proscriptions, but instead because the current criminal justice system permits 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), and the federal sentencing system generously rewards guilty pleas and cooperation agreements.

States with Independent Norms: Marijuana Legalization

Concurrent federal and state jurisdiction over the same misconduct is generally benign. Those very few defendants who commit a fraud or drug offenses and receive harsher federal rather than state sentences have little cause for complaint. First, each sovereign has its own independent interest in convicting and punishing misbehavior within its borders or by its citizens. 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 cases), quantity (in drug cases), recidivism, sophistication of means, number of jurisdictions involved, availability and allocation of government resources, and the value of information defendants may possess to substantially assist the prosecution with other important cases. We should be concerned with concurrent jurisdiction only in instances when the federal government criminalizes behavior that some states regard as morally neutral or beneficial. The problem of federal regulation of such activity, such as the use of medicinal marijuana or doctor-assisted suicide by patients in many states, is a real but not intractable one.

While some critics of overfederalization have voiced concerns that federal preemption may prevent states from experimenting with new norms, it turns out, in most cases, that federal regulation has not acted to stifle state-law innovation. Rather, the federal government treats such experimentation with deference and in some situations has even used federal enforcement power to bolster state experimentation. Marijuana deregulation at the state level is the most current and salient example of this evolving federal-state relationship. As the first clouds of legal marijuana smoke rise above the western states, the Obama administration finds itself confronted with some rather perplexing federalism questions: How much latitude should states be afforded to experiment with these new norms in the area of drug regulation? And how far should the states be permitted to stray before the federal government intervenes to defend the federal Controlled Substances Act (CSA)?

Residents of Washington and Colorado are eager to learn the answers to these questions, after voters in both states made history in November 2012 by approving measures to legalize the recreational use of marijuana. In those states, adults over the age of 21 can possess small quantities of pot for recreational use, without a doctor’s prescription or medical need. Meanwhile, the drug remains subject to an outright ban at the federal level under the CSA. As a Schedule I drug with no medically recognized use—marijuana finds itself in the company of hard drugs such as ecstasy, cocaine, methamphetamine, and heroin. Marijuana possession (a one-year misdemeanor under 21 U.S.C. § 844), trafficking (potentially five-years-to-life felony pursuant to 21 U.S.C. § 841), manufacturing, importation, or exportation (10-years-to-life felony pursuant to 21 U.S.C. § 960(b)(1)(G)) are all prohibited without exception under the CSA. Under the new Washington and Colorado laws, adults aged 21 years and

older can legally possess up to one ounce of marijuana. In Colorado, people can grow up to six plants, while in Washington, the state will license dispensaries. Both states plan to establish a system for regulating commercial marijuana sales. In Washington, the Liquor Control Board will oversee regulations, while in Colorado, a task force has been assigned to propose a regulatory system. But smoking will not be permitted in public, and cities are free to decline to license such businesses (much in the same way some counties have remained dry under blue laws).

In recent years, scholars and politicians have been vocal in their criticism of the overfederalization of our nation's antidrug laws, but what exactly they mean by this critique is difficult to pin down at times. It seems clear to us, as mentioned earlier in this article, that we are not talking about the enactment of too many federal laws—after all, the CSA is a singular weapon against drug violations in the federal prosecutor's arsenal. Perhaps these critics are actually referring to federal encroachment upon areas of traditional state concern. That is,

to innovate in this area. The legalization laws in Washington and Colorado will provide the test case for other states that choose to experiment with new solutions to marijuana regulation and other independent norms (physician-assisted suicide and legalized prostitution, for example) in the future.

For now, all eyes are on the federal government to gauge whether it will support or confront this fledgling legalization trend. So far, though it is still quite early, much has been the word from Washington on how it plans to handle the seemingly irreconcilable conflict between state and federal marijuana laws. According to a recent report from the *New York Times*, and our own sources within the DOJ, high-level talks are underway in Washington, D.C., to determine what action the DOJ should take. (Charlie Savage, *Administration Weighs Legal Action against States That Legalized Marijuana Use*, N.Y. TIMES, Dec. 6, 2012, <http://tinyurl.com/bgctjrb>.) Meanwhile, on December 5, 2012, the day before Washington's law went into effect, the Seattle US Attorney's Office released a statement proclaiming that the DOJ's

The legalization laws in Washington and Colorado will provide the test case for other states that choose to experiment with new solutions to marijuana regulation.

that there is too much federal intervention in cracking down on strictly local conduct, such as small-time drug dealing and recreational drug use. But this critique is unsupported by statistical data; after all, federal drug prosecutions make up less than 5 percent of all drug prosecutions in this country annually. Moreover, as we detailed earlier, only 1 percent of the persons convicted of drug possession (rather than distribution) were hauled into federal court because federal prosecutors go after the big fish. And they do so, in most major metropolitan areas, hand-in-hand with their state counterparts. Fully one-third of all federal controlled substance offenses are investigated by regional organized crime drug enforcement task forces (OCDETFs), which are designed to target the very worst national and international traffickers. Each OCDETF is comprised of law enforcement agents from many federal agencies along with state and local agents who endorse the federal prosecutions.

It seems more likely to us that the real source of concern is shifting attitudes on recreational marijuana use in some pockets of the country. As states experiment with new legalization programs, state-law norms are drifting further away from federal norms, thus making enforcement of federal drug bans in those states undesirable and, at least theoretically, setting the stage for a clash between state and federal democratic processes. What remains to be seen is whether any such clash between shifting state norms and arguably stale federal ones will actually come to a head. In practice, the enforcement of the federal ban on marijuana will cause a destabilization of the federal-state relationship only if federal norms stifle, suppress, or interfere with states' ability

responsibility for enforcing the CSA remains unchanged, notwithstanding the strong signal from that state's voters that smoking pot should be treated the same as alcohol. Referring to the supremacy of the CSA, US Attorney Jenny Durkan gave Washingtonians a refresher in Federalism 101, reminding them that "neither States nor the Executive branch can nullify a statute passed by Congress." (Press Release, Jenny A. Durkan, U.S. Attorney, W. Dist. Wash., Statement from U.S. Attorney's Office on Initiative 502 (Dec. 5, 2012), *available at* <http://tinyurl.com/am883yv>.)

Some have speculated that the DOJ could sue civilly to enjoin Colorado and Washington from implementing regulation of commercially sold marijuana, based on the idea that regulation of marijuana is preempted by the federal CSA. Others have suggested that the federal government might cut off grant funding to states that legalize marijuana until anti-marijuana legislation is restored at the state level. We, however, predict a much gentler approach to state-federal relations as these minority states experiment with new forms of marijuana regulation. Rather than squash states' efforts to legalize personal use of marijuana, we anticipate instead that the federal government will turn a blind eye to casual marijuana possession and use, so long as that conduct complies with the new Washington and Colorado laws. We believe that this will be done not only as a matter of practice, but as a matter of policy, with a deputy attorney general memorandum to the field detailing how federal-line prosecutors should respond. The federal government will continue to enforce federal drug laws in those states, but will target conduct that violates both federal- and state-law norms. In Washington and Colorado,

that will mean prosecuting drug dealers and smugglers that seek to thwart the states' regulatory schemes. In this rather surprising sense, the federal government can be viewed not as antagonistic toward the state-as-laboratory model, but rather as supportive of states' innovations and experimentation with new norms. Of course this attitude will remain viable only so long as those experiments do not stray too far from federal-law values.

Our prediction draws support from the historical treatment of medical marijuana, which exemplifies the federal government's permissive (and at times supportive) attitude toward state-law innovations in areas where federal norms have grown unpopular. Eighteen states and the District of Columbia now permit some form of medical marijuana use for seriously ill individuals. Such programs are inconsistent with the CSA, which classifies marijuana as a dangerous, addictive drug having no medically recognized use. (In fact, just last year the Drug Enforcement Agency (DEA) confirmed that marijuana would remain a Schedule I drug over the objection of activists, who had argued that new medical research indicates marijuana has some legitimate uses; those activists recently lost an appeal in federal court in Washington, D.C., challenging that DEA determination).

During President Obama's first term, federal drug agents have made headlines in several crackdowns on medical marijuana dispensaries, particularly in California, where some form of medical marijuana legalization has been in place since 1996. As a result of such federal efforts, about 600 marijuana dispensaries have been shut down since 2011 in California. Recently, federal prosecutors have been using the federal asset forfeiture statute to seize the properties out of which illegal pot dispensaries operate. (In Oakland, the US attorney for the Northern District of California has threatened to use the federal forfeiture statute to seize the building out of which a \$22 million dollar per year medical marijuana business is run.) But almost uniformly, these recent crackdowns have targeted dispensaries that were out of compliance with both federal law and California state law, which requires dispensaries to operate as nonprofits, to be the primary caregiver to the sick individual, and to prescribe marijuana only for medicinal purposes. Other targeted dispensaries were located near schools and parks, which again is proscribed under federal and state law. Where certain communities within the state have been unwilling (or perhaps unable) to enforce the state's existing medical marijuana laws, federal agents have stepped in to enforce federal norms as a way of incentivizing compliance with state medical marijuana laws.

Similarly, in Nevada, federal agents have cracked down on storefronts that claim to sell medical marijuana consistent with Nevada law. While Nevada has legalized medical marijuana use, that state does not permit individuals to purchase marijuana from commercial entities. Rather, patients are expected to grow their own. Federal law enforcement has thus taken on the role of enforcing the state's ban on commercial marijuana sales.

In both of these instances, we see federal law enforcement stepping in to enforce federal norms where communities have been unable (or are unwilling) to enforce their own

state-law medical marijuana regulations. Where individual actors have strayed from or violated state-law norms on medical marijuana, the federal government has intervened to enforce federal law, with the secondary effect of reinforcing the state's regulatory scheme. Conversely, those actors who have fully complied with state-law medical marijuana regulations have been largely permitted to continue to carry out the state's democratic innovations, notwithstanding the fact that their conduct clearly violates the CSA. If the Justice Department's approach to medical marijuana is any indication, the feds will not be coming to a street corner near you to crack down on casual smokers who are in compliance with state marijuana laws. The primary role of federal law enforcement will continue to be to target those entities and individuals whose conduct violates both state- and federal-law norms. In a roundabout way, the federal government can thus be viewed not as antagonistic to legalization efforts, but as a monitor to ensure that states are in fact implementing the voters' democratic solutions to marijuana regulation. Furthermore, this sort of arrangement raises the profile of conflicting norms and can perhaps lead federal statutes to be enforced in a way that is more consistent with each state's norms.

There are several reasons why this cooperative scheme functions as well as it does to, on one hand, allow states to craft and foster their own solutions to the local problem of recreational marijuana use, while simultaneously maintaining federal supremacy in the areas of drug importation and trafficking. One reason is that, in practice, federal norms on marijuana regulation may not be so far off from the recreational-use model adopted in Washington and Colorado. In recent years, the federal government has demonstrated little interest in prosecuting simple possession of marijuana. Last year, marijuana possession convictions made up less than 1 percent of all federal convictions (and even in those cases, some other factor generally triggered federal involvement, such as illegal firearm possession or money laundering). On the question of illegal drug trafficking, federal law enforcement is considerably more focused on stopping the flow of hard drugs into the country than it is on prosecuting marijuana trafficking operations. As a reflection of this prioritization, in 2011, prosecutions targeting hard-drug trafficking operations outnumbered marijuana trafficking cases by a factor of four-to-one.

Given these trends, the Washington and Colorado legalization laws, which permit casual use of small quantities of marijuana by adults in the privacy of their homes, does not represent such a drastic departure from the federal norm, which largely leaves regulation of such conduct to the states anyway. (Of course, if we were dealing with a measure to legalize, say, cocaine, or ecstasy, the federal response would likely be quite different because the federal stance on hard drugs has been unswerving, leaving little room for state innovation in those areas.)

The bigger question for the Obama administration is how the federal government will react to the establishment of state-licensed recreational marijuana dispensaries, which are anticipated to come into existence in 2014. Given the federal government's recent track record of declining to

prosecute those who comply with state-law norms in the area of medical marijuana, we predict that, so long as these commercial marijuana enterprises of the future comply with state-law regulatory and taxation schemes, the federal government will not target local pot shops for federal enforcement action.

Another possible reason for the federal government's willingness to allow state experimentation in the area of marijuana deregulation is a combination of widespread public support for state experimentation in this area, and a corresponding loss of confidence in the effectiveness of some aspects of the federal norm itself. Recent polls show that 64 percent of Americans oppose federal intervention to enforce federal anti-marijuana laws in those states that have legalized personal use. And in another recent CBS poll, 59 percent said that the question of marijuana legalization should be left to the states. (Fred Backus & Stephanie Condon, *Poll: Nearly Half Support Legalization of Marijuana*, CBS NEWS (Nov. 29, 2012), <http://tinyurl.com/d8qdx7q>.) These results may speak as much to our citizenry's attitude toward federalism as they do to the attitude toward legalization itself—after all, we are just about evenly split on the question of marijuana legalization at the national level, with 48 percent in support of legalization and 50 percent opposed.

A recent editorial in the *New York Times* opened, "Our federal marijuana policy is increasingly out of step with both the values of American citizens and with state law. The result is a system of justice that is schizophrenic and at times appalling." (Rebecca Richman Cohen, *The Fight over Medical Marijuana*, N.Y. TIMES, Nov. 7, 2012, <http://tinyurl.com/a6gswgy>.) Given the public's deep ambivalence about marijuana legalization and relatively strong support for states' ability to innovate in this area, federal law enforcement has little to gain from stifling local experimentation in an area widely viewed as outside the preferred sphere of federal enforcement. The public campaigns that propelled legalization efforts in Washington and Colorado focused not on the joys of casual pot-smoking for all, but on the problems inherent in a criminal enforcement model, including prison overcrowding, policies that have unfairly targeted minorities, and violence related to drug trafficking both in this country and abroad. These are problems inherent in both federal- and state-law criminal drug enforcement models. To the extent that voters in Washington and Colorado have now rejected criminal enforcement as an effective model, it is unlikely that the federal government will win back hearts and minds by using that very same criminal model to undermine state legalization measures.

Perhaps the most important explanation for the federal government's hands-off approach to state experimentation in this area is that, given limited federal law enforcement resources, federal prosecutors are unlikely to target conduct that has been decriminalized at the state level, unless that conduct poses a serious threat to federal antidrug-trafficking efforts or to other states' norms that reject marijuana legalization. Because of the vast inequality between federal resources and prevalence of illegal conduct, the ability of the federal government to override state-law norms on recreational marijuana is severely limited, barring some

significant realignment of federal resources. Recognizing this, in 2009, the DOJ released an internal memorandum addressed to all US attorneys regarding the deprioritization of prosecutions of those in compliance with state medical marijuana laws. In that memorandum, Deputy Attorney General David Ogden stated that, while on one hand the department remained "committed to the enforcement of the Controlled Substances Act in all States," the department was also "committed to making efficient and rational use of its limited investigative and prosecutorial resources." This in effect meant prioritizing prosecutions of illegal drug-trafficking and manufacture operations. The department also advised prosecutors to place a low enforcement priority upon "individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana," while continuing to target those whose "claims of compliance with state or local law may mask operations inconsistent with the terms, conditions, or purposes of those laws." (Memorandum from David W. Ogden, Deputy Attorney Gen., U.S. Dep't of Justice, to Selected United States Attorneys (Oct. 19, 2009), available at <http://tinyurl.com/295w3ec>.)

A corollary to this argument is that, practically speaking, the federal government recognizes that it cannot enforce an outright marijuana ban on its own, and it would rather have some cooperation from the states in upholding federal norms than none at all. Even if the feds had the resources to bring possession charges against Colorado pot-smokers, it would be drawing its jury pool from the same group of persons who voted to legalize pot in the first place. It only takes one holdout to acquit, and we could expect to see rampant jury nullification. It is probably for this reason that the DOJ in *United States v. Oakland Cannabis Buyers' Cooperative*, 532 U.S. 483 (2001), brought an injunctive action to challenge the dispensaries under the Compassionate Use Act, knowing that a local jury would not criminally convict the poor sick medical marijuana users described by the dispensaries. To our knowledge, there have been no reported federal criminal cases filed against any patient for the use of medical marijuana or against any state employee for providing it in compliance with state law.

Notably, most scholars agree that, because of the Tenth Amendment, the federal government cannot force the states to enforce the CSA. Thus it seems undisputed that states could simply decriminalize marijuana at the state level and, in the absence of any state regulatory scheme, avoid serious federalism questions on a broad scale. But Washington and Colorado want to tightly regulate marijuana through licensing and taxation schemes. (Proposed regulations under both states' laws include licensing schemes for growers and sellers, and taxation of commercially sold marijuana.) Technically, such state-law regulations are likely preempted by the CSA—but the federal government would have no incentive to strike down or challenge such state regulatory schemes. The alternative might well be unregulated decriminalization of marijuana by the states, thus leaving the federal government to its own devices to try to enforce a federal marijuana ban. Such an arrangement seems hardly desirable (or feasible for that matter) from either the

states' or the federal government's perspective. Reflected in the federal government's approach is thus a certain practical acceptance of the constraints of federalism, which, at least in this case, favors states' ability to engage in experimentation, while leaving the federal government to target fringe conduct offensive to both state and federal law. We can expect to see a similar tone from the DOJ with respect to the legalization experiment in the western states, where federal law enforcement will likely forego prosecution of those who comply with state regulations.

Beyond the challenge of addressing shifting state norms on recreational marijuana use, the new legalization laws in Washington and Colorado may pose a different kind of challenge for federal law enforcement, one much greater than cracking down on the tote-your-own-ounce crowd: keeping legalized states' marijuana supply from flowing into neighboring states that have not adopted (or, as in the case of Oregon and California, that have expressly rejected) recreational marijuana use. Enforcement of federal antidrug-trafficking laws could prove particularly challenging along the Washington-Oregon-California corridor, where all three states have medical marijuana laws in effect, but only Washington permits recreational use of the drug. Neighboring Idaho, on the other hand, bans marijuana for any purpose. We can expect to see enhanced federal involvement in defending these state-law norms where voters have expressly rejected recreational marijuana. The federal government will thus engage in a different form of support for state norms, by protecting and insulating states from unwanted experimental overflow. Because such a defensive role could consume a significant amount of federal resources, it seems unlikely that federal law enforcement would have resources left to target marijuana users or licensed dispensaries in those states that have opted for legalization. Enforcement efforts will likely be focused on those individuals who violate both state- and federal-law norms by trafficking large quantities of drugs, and particularly, by trafficking drugs into states that have rejected recreational usage.

In this sense, the federal government stands poised to take on a more cooperative role in which it will support, rather than stifle, differing state-law norms on marijuana use. The support that form will take will depend on the prevailing norms adopted by the voters in a particular state—in California and Oregon, it may mean blocking the flow of recreational marijuana into those states; in Washington and Colorado, it may mean arresting individuals who attempt to sell marijuana outside the states' regulatory licensing structure. In this sense, the federal government can permit states to engage in culturally and politically acceptable policy innovations while enforcing federal norms in areas that do not directly collide with state interests.

Conclusion

We are not apologists for federal prosecutors, and this article is not meant to imply that there are no problems in the federal criminal justice system. However, the problem is not overfederalization of criminal law (the number of laws), nor differential in sentences and procedures between state and federal systems. Nor is the problem too many strict liability offenses, nor vague proscriptions. The former are very small in number and used against corporations in a responsible position to the public, and the latter are curbed well by US Supreme Court opinions. There is a potential problem with independent-norm federalism, but that is not because of overfederalization, but because of basic disagreement between some states and feds regarding morality. This seems to be resolving itself pretty nicely, considering the nasty showdown that might have resulted. The primary problems are draconian federal sentences (including the overuse of mandatory minimums), disparity caused by substantial assistance and fast-track motions, and potentially coercive guilty pleas. We also don't intend by this article to minimize the serious problems in state criminal justice systems, many of which stem from lack of funding for criminal defense attorneys and investigators. We have not heard a peep out of any conservative organization on any of these issues. ■