

# Overfederalization

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*Since the 1960s, Congress has steadily expanded the crime-fighting reach of the federal government. Unfortunately, the constant drumbeat to “federalize” criminal law by passing more federal statutes, ratcheting up already severe federal punishments, and expanding the federal prison population has accomplished precious little in terms of public safety. The failed drug war proves as much. Worst still, the virtually limitless and unchecked charging authority of federal prosecutors undermines the effectiveness of American criminal justice. Instead of complementing state efforts by focusing on areas of federal comparative advantage, federal prosecutors waste scarce resources “playing district attorney”—that is to say, pursuing the same kinds of crimes that state prosecutors do. The result is a federal prison population that is bursting at the seams, and a national drug problem that has never been worse. The solution is for Congress to undertake a major overhaul of federal criminal law. The number and scope of federal criminal statutes should be drastically reduced, and the definition of federal crimes tightened and modernized, to limit federal enforcement to offenses that are of peculiar concern to the federal government and offenses that defy adequate response within the state system. Sentencing policies that generate unusually severe punishment in federal court, such as harsh statutory mandatory minimums for drug and nonviolent weapons offenses, and overbroad asset forfeiture laws, should be repealed or at least reformed to eliminate incentives for prosecutors to pursue garden-variety criminal matters in federal court. In this context, as in many others, “less is more”: a streamlined federal criminal code limited to the nation’s worst offenses, which reserves major penalties for major crimes, will better protect the public than our costly and ineffective current system of overfederalization.*

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## INTRODUCTION

Since the 1960s, the federal government has played a far more expansive role in criminal law enforcement by virtue both of the large and ever-growing number of federal criminal statutes and less restraint by federal prosecutors. As a result of this “federalization” of criminal law, “the distinction between Federal and State law is effectively dead, at least as a matter of substantive law.”<sup>1</sup> Consequently, for all but the most trivial of crimes, a determined federal prosecutor today could prosecute if he wished—and, increasingly, federal prosecutors are bringing more garden-variety criminal cases in federal court.

In addition to the usual problems associated with overcriminalization,<sup>2</sup> federalization raises serious problems of its own. That is to say, even if *state* criminal codes have been appropriately expanded, the enlarged scope of *federal* criminal jurisdiction remains troubling, particularly given the unusual severity of federal punishments. There is indeed a vital federal role in criminal law, but not to duplicate the efforts of state enforcers. In areas of overlapping authority, federal enforcement must be limited to crimes that cannot adequately be addressed by states. This simply will not happen without federal sentencing reform, a better defined federal criminal code, and more nationally uniform federal enforcement.

### I. THE FEDERALIZATION OF CRIMINAL LAW

#### A. *THE EXPLOSIVE GROWTH OF FEDERAL CRIMINAL LAW*

From the founding of the country until the Civil War, federal criminal law enforcement was constrained by two bedrock constitutional principles. The first principle was that, unlike the states, the federal government lacked the “police power,” understood as the power to protect the health, welfare, and morals of citizens against the predation of criminals. The second constitutional principle, closely related to the first, was that the federal government had no inherent power but only limited, enumerated powers.<sup>3</sup>

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1. Daniel C. Richman, *The Changing Boundaries Between Federal and Local Law Enforcement*, in BOUNDARY CHANGES IN CRIMINAL JUSTICE ORGANIZATIONS 81, 90–91 (2000) (emphasis omitted).

2. See generally Douglas Husak, “Overcriminalization,” in the present Volume.

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

Together, these constitutional principles left the federal government only a limited role in criminal law. Federal enforcers “confined [their] prosecution to less than a score of offenses,”<sup>4</sup> offenses involving criminal activity that either occurred outside of state jurisdiction or uniquely threatened the operations, property, or personnel of the federal government. All other matters were for state-court enforcement.

Those days, of course, are long gone. With Congress having cast off the shackles of federalism and self-restraint in recent generations, it comes as no surprise that the loose collection of statutes known as “federal criminal law” is sprawling and virtually limitless in its reach into the domain of state criminal law. It is, however, surprising just how large, sprawling, and inaccessible the resulting collection of statutes (which, strictly speaking, is not properly referred to as a “code” at all)<sup>5</sup> has become after more than a century of statute-by-statute accumulation.

It is surprising but true that no one—not the Department of Justice, scholars in the field, nor blue-ribbon task forces that spent years studying the subject—has even a rough idea of how many federal criminal laws there are. The American Bar Association’s Task Force on Federalization, for instance, abandoned its own years-long counting effort as futile given how “large ... the present body of federal criminal law [is].”<sup>6</sup> Even defenders of the federalization of criminal law concede that its scope is “potentially infinite”: “Current federal criminal law is set forth in forty-eight titles of the United States Code, encompassing roughly 27,000 pages of printed text, as interpreted in judicial opinions found in over 2,800 volumes, containing approximately 4,000,000 printed pages.”<sup>7</sup>

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4. ABA TASK FORCE ON FEDERALIZATION OF CRIMINAL LAW, *THE FEDERALIZATION OF CRIMINAL LAW* 5 (1998) [hereinafter *FEDERALIZATION TASK FORCE REPORT*].

5. As a leading authority on white-collar crime put it: “Any discussion of federal penal law must begin with an important caveat: There actually is no federal criminal ‘code’ worthy of the name. A criminal code is defined as ‘a systematic collection, compendium, or revision of laws.’ What the federal government has is a haphazard grab-bag of statutes accumulated over 200 years, rather than a comprehensive, thoughtful, and internally consistent system of criminal law.” Julie R. O’Sullivan, *The Federal Criminal “Code” is a Disgrace: Obstruction Statutes as a Case Study*, 96 J. CRIM. L. & CRIMINOLOGY 643, 643 (2006) (footnote omitted).

6. *FEDERALIZATION TASK FORCE REPORT*, *supra* note 4, at 9.

7. Susan R. Klein & Ingrid B. Grobey, *Debunking Claims of Over-Federalization of Criminal Law*, 62 EMORY L.J. 1, 15 (2012). The potential scope of federal criminal liability is broader still given that many crimes are defined in vague terms and contain inadequate mens rea requirements, which allow prosecutors even greater power to charge and convict. *See generally* Stephen F. Smith, *Overcoming Overcriminalization*, 102 J. CRIM. L. & CRIMINOLOGY 537, 565-74 (2012).

Several factors combine with the sheer number of federal criminal laws to make it exceedingly difficult to determine how many actually exist. Federal criminal statutes are not contained in any one volume of the U.S. Code (not even the one volume, Title 18, specifically entitled “Crimes and Criminal Procedure”) but rather scattered throughout almost 50 different volumes, without useful indexing and cross-references. In addition to being difficult to find, federal criminal statutes are often quite complex and multifaceted in structure, with a single provision creating multiple separately enforceable criminal prohibitions.<sup>8</sup>

The difficulty of the Herculean (or, more accurately, Sisyphean) effort to count the number of federal criminal laws is further compounded by the fact that many regulations issued by federal agencies can result in criminal punishment. Given that many administrative regulations are criminally enforceable, a count of the number of federal criminal statutes alone cannot adequately convey the true scope of available punishment; criminally enforceable agency rules and regulations must also be taken into account. Efforts to do so put the number of federal criminal prohibitions at anywhere from 10,000, on the low side, to a staggering 300,000.<sup>9</sup>

The daunting size and utter chaos in federal criminal law resulted principally from the fact that new criminal laws are enacted by Congress at a break-neck pace, year after year. On average, Congress created 56 new crimes every year from 2000 to 2008.<sup>10</sup> Significantly, Congress enacted new criminal laws at

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

9. O’Sullivan, *supra* note 5, at 649.

10. See JOHN S. BAKER, JR., HERITAGE FOUND., REVISITING THE EXPLOSIVE GROWTH OF FEDERAL CRIMES 5 (2008) (estimating the number of federal criminal offenses at “over 4,000”).

roughly the same rate during this period as it did during the two prior decades<sup>11</sup> even though 2000 to 2008 was a period of uncommonly low crime rates.<sup>12</sup> The rate at which Congress has added new criminal prohibitions in recent decades is so high that, according to the ABA's Federalization Task Force, "[m]ore than 40% of the federal criminal provisions enacted since the Civil War have been enacted since 1970."<sup>13</sup>

To be sure, federal prosecutors have not enforced these laws anywhere near the frequency they could under current law. Now, as in the prior era when federal criminal law was much smaller in scope and used mainly to protect direct federal interests, the vast majority of enforcement activity continues to take place in state courts nationwide. Indeed, it is fair to say the federal government's share of the nation's total criminal litigation is vanishingly small.<sup>14</sup> Nevertheless, it would be a mistake to conclude that the steady expansion in the size and scope of federal criminal law has been inconsequential.

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

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11. *Id.*

12. According to one recent account: "In the mid-1990s, crime rates plummeted all across America (in cities, suburbs, exurbs, and rural areas), across all demographic groups (rich and poor, black and white, young and old), and were seen in every crime category. By 2007, the latest year for which systematic data are available, rape, robbery, homicide, burglary, larceny, and motor vehicle theft were all down nearly 40 percent from the peak of the U.S. crime wave in 1991." Vanessa Barker, *Explaining the Great American Crime Decline: A Review of Blumstein and Wallman, Goldberger and Rosenfeld, and Zimring*, 35 LEGAL & SOC. INQUIRY 489, 490 (2010) (citations omitted). The 1990s crime drop "lasted over sixteen years," and was so steep that in 2000 "homicide rates reached levels last reported in the mid-1960s." *Id.*

13. FEDERALIZATION TASK FORCE REPORT, *supra* note 4, at 7 (emphasis omitted). Congress may be the prime culprit, but the federal courts share responsibility for the extreme breadth and severity of federal criminal law. As I have argued in separate work: "Far from being innocent bystanders in the federalization of crime, federal judges have been all too willing to construe federal crimes expansively, without regard to the often dramatic effects expansive interpretations will have on the punishment federal defendants face.... The inevitable result of how courts approach their interpretive tasks is a broader and more punitive federal code." Stephen F. Smith, *Proportionality and Federalization*, 91 VA. L. REV. 879, 884 (2005).

14. See Klein & Grobey, *supra* note 7, at 18 (reporting that "from 1994-2006, federal court felony convictions comprised 5% to 6% of all felony convictions in the country annually"). The federal share would be considerably smaller if state misdemeanor prosecutions were taken into account. See generally NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, MINOR CRIMES, MASSIVE WASTE: THE TERRIBLE TOLL OF AMERICA'S BROKEN MISDEMEANOR COURTS 11 (2009) (finding that there were more than 10 million state misdemeanor prosecutions in 2006 alone).

Of course, the federal government rarely indicts corporations, due no doubt in part to the potentially serious collateral consequences for innocent corporate stakeholders.<sup>15</sup> Even so, the Department of Justice has nonetheless played an aggressive (and, some would say, overzealous) role since the collapse of Enron in the area of corporate crime by using the threat of prosecution to compel corporations to pay billions of dollars in penalties and change their corporate structures to ensure greater future legal compliance.<sup>16</sup> The fact that the Justice Department relies principally on negotiated means, as opposed to actual prosecution, hardly means the government does little to hold corporations accountable for their crimes.

Even looking solely at actual criminal prosecutions, however, it is clear that the federal government does indeed play a significant enforcement role in certain areas. In 2006, almost one in five felony firearms offenses was prosecuted in federal court.<sup>17</sup> Roughly 10% of the nation's prosecutions for drug-trafficking and white-collar offenses also took place in federal court.<sup>18</sup> Two of the areas of most frequent federal enforcement activity (firearms and drug offenses) involve statutes passed in the 1960s and 1970s—the Omnibus Crime Control and Safe Streets Act of 1968,<sup>19</sup> and the Comprehensive Drug Abuse Prevention and Control Act of 1970<sup>20</sup>—not laws of more ancient origin. This fact refutes any suggestion that the dizzying array of new statutes enacted in recent decades are enforced so rarely as to be of little or no consequence in debates over federalization.

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15. See U.S. DEP'T. OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 9-28.1100(B) (recognizing that prosecution of corporations may "seriously harm[] innocent third parties who played no role in the criminal conduct").

16. The results of this enforcement strategy have been dramatic. As a recent Manhattan Institute report notes, such arrangements are so "commonplace" that they "might be characterized as a 'shadow regulatory state' over business." ISAAC GORODETSKI & JAMES R. COPLAND, MANHATTAN INST., *THE SHADOW LENGTHENS: THE CONTINUING THREAT OF REGULATION BY PROSECUTION* at i (2014). Since 2014, federal prosecutors have reached approximately 300 deferred or non-prosecution agreements with major corporations, including ten Fortune 100 companies. *Id.* The almost 70 agreements reached during 2014-16 alone netted the government roughly \$12 billion in fines and penalties. *Id.* See generally Sara Sun Beale, *The Development and Evolution of the U.S. Law of Corporate Criminal Liability and the Yates Memo*, 46 STETSON L. REV. 41 (2016); Brandon L. Garrett, *Structural Reform Prosecution*, 93 VA. L. REV. 853 (2007).

17. Klein & Grobey, *supra* note 7, at 19.

18. *Id.*

19. Pub. L. No. 90-351, 82 Stat. 197 (1968) (codified as amended at 18 U.S.C. §§ 921-28).

20. Pub. L. No. 91-513, 84 Stat. 1236 (1970).

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B. EXTREME SEVERITY IN FEDERAL SENTENCES

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

Although other differences exist, the most important difference between federal and state prosecution, and certainly the most consequential for offenders and taxpayers alike, is sentencing. Federal sentences are typically far more severe than state sentences for parallel offenses—which one might expect, given that, as Congress well knows, its harsh laws will only be applied against a small subset of available offenders, with the overwhelming majority being prosecuted in state court. This means that the severity of sentence the defendant receives for the same crime will vary dramatically if prosecuted in federal court or left to state authorities.

The sentencing difference is at its starkest in first-degree murder cases. In almost half the states and the District of Columbia, the death penalty has either been abolished or is subject to gubernatorial moratorium.<sup>21</sup> In these states, the maximum punishment for murder is effectively life imprisonment, yet, in each, a murder prosecution in federal court can result in the death penalty.<sup>22</sup> In these states, the decision between state or federal prosecution can literally make the difference between life and death—as seen most recently in the successful capital prosecution of the Boston Marathon bomber in U.S. District Court in Massachusetts, a state that abolished the death penalty more than 30 years ago.<sup>23</sup>

Harsher federal sentences are also handed down in noncapital cases. “[S]ome federal laws, most notably those dealing with drug trafficking and weapons offenses, require imposition of harsh statutory mandatory *minimum* sentences which can be as long as or longer than the *maximum* sentences

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21. See *States With and Without the Death Penalty*, DEATH PENALTY INFO.CTR., <http://www.deathpenaltyinfo.org/states-and-without-death-penalty> (last visited Apr. 16, 2017).

22. See 18 U.S.C. § 3591. For a discussion of capital punishment, see Carol S. Steiker & Jordan M. Steiker, “Capital Punishment,” in Volume 4 of the present Report.

23. See Ann O’Neill et al., *Boston Marathon Bomber Dzhokhar Tsarnaev Sentenced to Death*, CNN (May 17, 2015), <http://www.cnn.com/2015/05/15/us/boston-bombing-tsarnaev-sentence/>.

permitted under some state laws.”<sup>24</sup> This is by no means an isolated occurrence or exceptional situation applicable only to persons who are unusually dangerous or blameworthy.

As Professor Sara Sun Beale convincingly explains:

The sentences available in a federal prosecution are generally higher than those available in state court—*often ten or even twenty times higher*. For example, in one drug case the recommended state sentence was eighteen months, while federal law required a mandatory minimum sentence of ten years, and the applicable federal sentencing guidelines range was 151 to 188 months for one defendant and 188 to 235 months for the other. Another defendant ... who received a diversionary state disposition to a thirty-day inpatient drug rehabilitation program, followed by expungement of his conviction upon successful completion of the program and follow-up, was subject to forty-six to fifty-seven months of imprisonment under the applicable federal guidelines.<sup>25</sup>

Two main features of federal sentencing policy combine to produce these comparatively severe results. The first is mandatory minimums, which are much more prevalent (and much harsher) at the federal level than in most states.<sup>26</sup> The second is the rigid sentencing guidelines applicable in federal prosecutions.<sup>27</sup> By virtue of these distinctive facets of the federal approach to

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

25. Sara Sun Beale, *Too Many and Yet Too Few: New Principles to Define the Proper Limits of Federal Criminal Jurisdiction*, 46 HASTINGS L.J. 979, 998-99 (1995) (emphasis added).

26. As I have explained elsewhere: “There are approximately one hundred different provisions in the federal criminal code imposing mandatory minimum sentences, and a number of these provisions concern the frequently prosecuted areas of drug and weapons offenses. The impact of these provisions is far greater than their number would suggest. For example, between 1984 and 1991 alone, ‘nearly 60,000 cases’ were sentenced pursuant to mandatory minimums.” Smith, *supra* note 13, at 895. The U.S. Sentencing Commission has long viewed the danger of excessive punishment as grounds for repealing mandatory minimums. See U.S. SENTENCING COMM’N, SPECIAL REPORT TO CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM (1991). See generally Erik Luna, “Mandatory Minimums,” in Volume 4 of the present Report.

27. Of course, the federal guidelines no longer have the force and effect of law after *United States v. Booker*, 543 U.S. 264 (2005). Still, the influence of the guidelines has remained stable in the most frequent areas of federal prosecution (namely, immigration, drugs, and firearms offenses). See U.S. SENTENCING COMM’N, REPORT ON THE CONTINUING IMPACT OF *UNITED STATES V. BOOKER* ON FEDERAL SENTENCING 62–66 (2012). See generally Douglas A. Berman, “Sentencing Guidelines,” in Volume 4 of the present Report.



sentencing, “[i]t is not unusual for codefendants whose conduct is identical to receive radically different sentences, depending upon whether they are prosecuted in state or federal court.”<sup>28</sup>

## II. THE COSTS AND BENEFITS OF FEDERALIZATION

As the discussion so far indicates, the federalization of criminal law has required enormous and sustained effort on the part of the federal government over the last couple of generations. Congress has repeatedly passed new criminal laws and increased the scope of, and penalties for, existing offenses; similarly, federal prosecutors have substantially increased the number of criminal cases they bring annually. The increased number of federal criminal prosecutions has required dramatic increases in annual expenditures for the investigation and prosecution of federal offenses, not to mention the imprisonment of significantly more people than existing federal facilities were designed to accommodate.

Have these considerable expenditures of effort and resources been worth it? Unfortunately, the answer would seem to be no. Whatever the benefits associated with the federalization of criminal law, they are slight in relation to their detrimental impact on the effectiveness of America’s criminal justice system.

### A. ILLUSORY BENEFITS

The federalization of criminal law was accomplished in the name of public safety—the “crime problem,” the argument ran, was simply too large for states to tackle alone—and so it would be natural to defend federalization on crime-reduction grounds. After all, for a public perpetually obsessed with violent crime and illegal drugs, the best possible argument in favor of a robust federal crime-fighting role would be that federal enforcement meaningfully reduced violent and drug-related crimes. This case, however, simply cannot be made.

Although rates of violent crime have been surprisingly low in recent decades,<sup>29</sup> there is no evidence that law enforcement played a significant role in that welcome development. After all, Canada experienced an “almost perfectly matched” crime drop during the same period, even though the major leading

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28. Beale, *supra* note 25, at 999. It therefore is incorrect to say that critiques of “the severity of sentencing schemes ... are not directly relevant to the over-federalization debate; rather, they are criticisms that apply to state and federal drug enforcement schemes alike.” Klein & Grobey, *supra* note 7, at 25. The severity of federal sentences, particularly for drug offenses, is a—if not *the*—foundational plank in modern criticisms of the federalization of criminal law. See generally Smith, *supra* note 13; Beale, *supra* note 25; Clymer, *supra* note 24.

29. See Barker, *supra* note 12.

potential causes of the crime drop in the United States—“a decade-long economic boom, an explosive expansion of incarceration, added police—didn’t happen in Canada.”<sup>30</sup> Significantly, “no scholar credits mass imprisonment with the bulk of the crime decline.”<sup>31</sup>

Moreover, it strains credulity to think *federal* enforcement efforts were a significant causal factor in the crime drop given how tiny the federal footprint in violent crime is. Violent crime—including crimes as serious as terrorism and murder—accounts for relatively few federal prosecutions annually. In 2011, for example, *less than 5%* of offenders prosecuted in federal court were charged with crimes of violence, broken down as follows: “murder (0.1%), assault (1%), kidnapping (0.1%), robbery (1%), carjacking (0.1%), and terrorism (0%).”<sup>32</sup> Similarly, the percentage of federal inmates incarcerated for crimes of violence has hovered at or near 7% for the last few years; it has not cracked 10% in the last 16 years.<sup>33</sup> In light of such small numbers, it is highly unlikely that federal prosecution played any substantial role in the recent drop in violent crime.

Furthermore, the so-called “war on drugs” undermines any suggestion that the greater federal presence has made much of a difference in reducing crime. Drugs have been the leading area of federal enforcement since President Richard Nixon declared illegal drug use “Public enemy Number 1” in 1971. Today, the federal government alone spends \$15 billion annually on drug control, and has spent a total of \$1 trillion since 1971.<sup>34</sup> Illegal drugs remain the single largest area of federal criminal enforcement, accounting for approximately one-third

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

31. Barker, *supra* note 12, at 598; *see also* Todd R. Clear & James Austin, “Mass Incarceration,” in Volume 4 of the present Report; Daniel S. Nagin, “Deterrence,” in Volume 4 of the present Report; Shawn D. Bushway, “Incapacitation,” in Volume 4 of the present Report. The most that can be said, given the available evidence, is that “get tough” enforcement policies, combined with sustained economic growth and demographic changes, “account[ed] for less than half of the national crime drop.” *See, e.g.,* ZIMRING, *supra* note 30, at 46.

32. Klein & Grobey, *supra* note 7, at 21–22. The vast majority of today’s federal prosecutions involve immigration, drug, and fraud offenses, which together account for almost three-quarters of the annual caseload. *See id.* at 21.

33. E. ANN CARSON, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, *PRISONERS IN 2013*, at 17 tbl.16 (2014). The data here may not tell the full story, insofar as prosecutions for immigration, weapons possession, or other nonviolent offenses can serve to incapacitate persons who might otherwise commit violent crimes. The point is that federal enforcers simply do not target violent crime.

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

(31.8%) of the prosecutions in fiscal 2015.<sup>35</sup> Not surprisingly, drug offenders have occupied 50% to almost 60% of the spaces in federal prisons over the last decade, showing that the “war on drugs” has been a leading driver of mass incarceration at the federal level.<sup>36</sup>

Despite these enormous efforts at the federal level to eradicate illegal drug use, few outside observers would contend that the “war on drugs” has been anything but a monumental failure. According to a RAND Corporation report, “[t]he overall trend in cocaine and heroin retail prices during most of the past two decades has been downward (after adjusting for potency),” which “suggests *greater* availability of drugs on the street in the United States, not less.”<sup>37</sup> As one would expect, ready access to illegal drugs at cheaper prices—not to mention a national drug-control strategy that prioritizes punishment over treatment—has resulted in increased drug use, even among minors.<sup>38</sup> The “war on drugs,” in short, is no nearer “victory” than when it was declared.

The failure of the drug war shows the folly of the federalization of criminal law. For decades, the federal government has devoted enormous resources and enforcement efforts, and filled federal prisons with traffickers and users of illegal drugs, yet illegal drug use is rampant, if not worse. If such sustained federal attention and enormous resources have failed to produce any meaningful progress toward winning the war on drugs, there is every reason to doubt the

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35. GLENN R. SCHMITT & ELIZABETH JONES, U.S. SENTENCING COMM’N, OVERVIEW OF FEDERAL CRIMINAL CASES FISCAL YEAR 2015, at 2 (2016) [hereinafter 2015 OVERVIEW], [http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2016/FY15\\_Overview\\_Federal\\_Criminal\\_Cases.pdf](http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2016/FY15_Overview_Federal_Criminal_Cases.pdf).

36. CARSON, *supra* note 33, at 17 tbl.16. See generally MARC MAUER & RYAN S. KING, THE SENTENCING PROJECT, A 25-YEAR QUAGMIRE: THE WAR ON DRUGS AND ITS IMPACT ON AMERICAN SOCIETY 3-9 (2007) (discussing harsh federal sentencing rules for drug offenders and their impact).

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

38. The 2014 National Survey on Drug Use and Health found that the percentage of Americans, aged 12 or older, who used an illicit drug in 2014 was higher than in every year between 2002 and 2013, driven primarily by increased heroin and marijuana use and widespread opiate abuse. See generally CENTER FOR BEHAVIORAL HEALTH STATISTICS AND QUALITY, KEY SUBSTANCE USE AND MENTAL HEALTH INDICATORS IN THE UNITED STATES: RESULTS FROM THE 2015 NATIONAL SURVEY ON DRUG USE AND HEALTH (2016).

effectiveness of federal enforcement efforts to make a dent in violent crime—which, despite an abundance of available federal laws,<sup>39</sup> federal enforcers do little to prevent.

That said, there is a vital role for federal criminal law to play in protecting the public against the predation of criminals. To be impactful, federal enforcers should *complement*, not *duplicate*, state enforcement efforts. That is to say, in areas of overlapping enforcement authority, federal prosecutors should stop “playing district attorney,” which they do when pursuing the same kinds of offenses and offenders that state prosecutors and police do. Instead, federal enforcers should focus on crimes that are not being, or by their nature cannot be, handled appropriately at the state level, such as terrorism, major international drug trafficking, corruption, and excessive force by police.<sup>40</sup> The “band-aid” solution of new federal criminal laws that will rarely (if ever) be enforced, or increased enforcement of existing laws at levels too small to make a meaningful difference, does nothing except allow publicity-seeking federal officials to take unwarranted credit for being responsive to public-safety needs.

### B. SERIOUS PROBLEMS

In addition to offering little discernible public-safety benefit, the federalization of criminal law has created serious problems that tend to be overlooked in a field characterized by endless moral condemnation of criminals and blind faith in the power of criminal punishment to solve even the most intractable social problems. As a direct result of federalization,

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39. See, e.g., 18 U.S.C. § 36 (drug-related murders); *id.* §§ 245, 249 (hate crimes); *id.* § 875 (threats); *id.* § 924(c) (use of firearm during crimes of violence or drug trafficking); *id.* § 1201 (kidnapping); *id.* § 1844 (arson); *id.* § 1951 (robbery, extortion, and violence in furtherance thereof); *id.* § 1958 (murder for hire); *id.* § 1959 (violence in aid of racketeering); *id.* § 2113 (bank robbery); *id.* § 2119 (carjacking); *id.* § 2251 (murder involving sex offenses against children); *id.* §§ 2261, 2261A (domestic violence and stalking).

40. Organized crime illustrates the positive impact that a wise deployment of federal resources can have for public safety. Due to the international nature of the mafia and other large-scale organized criminals, not to mention their penchant to use bribery, extortion, and other misdeeds to corrupt state and local politicians, judges, and enforcers, the Justice Department made it a priority in the 1960s to eradicate organized crime. These efforts achieved “enormous successes” because federal prosecutors “are peculiarly well equipped to combat organized crime.” John C. Jeffries, Jr. & John Gleeson, *The Federalization of Organized Crime: Advantages of Federal Prosecution*, 46 HASTINGS L.J. 1095, 1126 (1994-95). See generally Smith, *supra* note 13, at 911 n.77 (citing sources). The federal government has no such comparative advantage when it comes to street crime or low-level drug offenses.

badly needed federal enforcement resources have been (and continue to be) squandered in areas state authorities can handle effectively on their own. This serial misallocation of federal enforcement resources has come at the expense of areas where federal resources could be more effectively deployed.

This “ready-fire-aim!” enforcement approach (“strategy” would be too strong of a word) is driven by three factors inherent in a “federalized” system of criminal law. The first is the virtually limitless scope of federal criminal law, which enables federal prosecutors to pursue all but the most localized and trivial of crimes. The second factor is the extreme severity and rigidity of federal penalties. The availability of considerably higher sentences in federal court gives enforcers (state and federal) incentives to “take federal” cases which otherwise would receive more appropriate sentences within the state system. The third factor is uncontrolled prosecutorial discretion allowing individual prosecutors in regional U.S. Attorneys’ offices nationwide the flexibility to pursue and decline the cases they wish.<sup>41</sup>

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

### 1. Arbitrary prosecutorial discretion

A regime such as ours, in which federal prosecutors have virtually limitless (and largely uncontrolled) discretion to charge suspects who committed crimes cognizable under state law, invites arbitrariness. By virtue of the substantial difference in the severity of sanctions available in federal court as compared

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41. For discussions of prosecutorial discretion, see Ronald F. Wright, “Prosecutor Institutions and Incentives,” in Volume 3 of the present Report; and John F. Pfaff, “Prosecutorial Guidelines,” in Volume 3 of the present Report.

to most state courts,<sup>42</sup> the few offenders targeted for federal prosecution will typically be punished far more severely than their many similarly situated counterparts in the state system. The incremental punishment convicted federal offenders receive, over and above the punishment available in state court, is due entirely to a federal prosecutor's charging decision, not the severity of the offender's crime.

It goes without saying that harsher federal sanctions would be warranted if the persons selected for federal prosecution were categorically more dangerous or blameworthy than prisoners sentenced in state court. That, however, is not the case. Many federal prisoners are no worse than those who committed similar offenses yet were lucky enough to escape federal prosecution. In fact, the federal prisoners may well be *less* culpable than their counterparts in the state system.

Three quick comparisons should make the point. First, the public would undoubtedly regard violent crimes as the worst offenses, yet the percentage of offenders in federal prisons for violent offenses is in the single digits and has been for years.<sup>43</sup> By contrast, state prisons are mostly filled with seriously violent offenders, such as murderers and rapists.<sup>44</sup> Second, although the public would regard drug dealing as worse than mere use, 11.5% of 2015 federal drug prosecutions involved mere possession of controlled substances, without any intent to distribute.<sup>45</sup> The percentage of people incarcerated in federal and state prisons for mere possession is roughly the same—3.7% (federal) versus 3.5% (state)<sup>46</sup>—a surprising result for those who would like to believe that only traffickers are prosecuted federally or that federal prosecutors focus more heavily on trafficking than state prosecutors do.

Third, among drug offenses, those involving “hard drugs” (such as heroin, cocaine, and methamphetamines) are commonly viewed as more serious than those involving marijuana, a drug that many Americans believe has valid medicinal or recreational uses.<sup>47</sup> This is because hard drugs, unlike marijuana, carry grave risks of overdose, addiction, and other seriously adverse consequences. Nevertheless, of all federal drug prosecutions in 2015, the

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42. See generally Smith, *supra* note 13, at 893-96.

43. See *supra* notes 29-30 and accompanying text.

44. See E. ANN CARSON & ELIZABETH ANDERSON, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PRISONERS IN 2015, at 14 tbl.9 (2016).

45. See 2015 OVERVIEW, *supra* note 35, at 2.

46. See PRISONERS IN 2015, *supra* note 44, at 15-16 tbls.13-14.

47. See Alex Kreit, “Marijuana Legalization,” in the present Volume.

percentage involving marijuana (24.8%) exceeded the percentage for powder cocaine and heroin (18.4% and 12.1%, respectively), and almost equaled the percentage for methamphetamine (25.8%).<sup>48</sup>

Contrary to popular belief, a surprisingly large number of drug traffickers convicted in federal court are nonviolent, relatively small-time dealers, not “drug kingpins” or career criminals. According to U.S. Sentencing Commission data from fiscal 2015, only 17.2% of federal drug cases involved a weapon of any kind.<sup>49</sup> Almost two-thirds of persons convicted of marijuana offenses (59.5%) had the lowest criminal history possible under the Sentencing Guidelines (Category I).<sup>50</sup> Additionally, 16.7% of defendants convicted of drug trafficking were sentenced below the applicable guidelines range, based on a judicial finding that they played only a “minor or minimal” role in the drug offense.<sup>51</sup> Finally, of the roughly 22% of federal defendants convicted of offenses carrying statutory mandatory minimum sentences, 18.8% were drug offenders with such strong grounds for leniency that they qualified for reduced sentences under the “safety valve” statute,<sup>52</sup> a figure that had been as high as 39.4% as recently as 2010.<sup>53</sup>

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48. See 2015 OVERVIEW, *supra* note 35, at 2 fig.2.

49. See *id.* at 7. There is no empirical support for the notion that drug offenses are inherently correlated with violence. See generally Jeffrey A. Miron, “Drug Prohibition and Violence,” in the present Volume; Shima Baradaran, *Drugs and Violence*, 88 S. CAL. L. REV. 227 (2015) (marshalling empirical and social science data showing that there is no causal link between drug crimes and violence).

50. See 2015 OVERVIEW, *supra* note 35, at 8. The vast majority (two-thirds) of federal marijuana convicts in 2009 “were ‘couriers’ or ‘mules,’ the lowest-level trafficking roles.” PEW CHARITABLE TRUSTS, ISSUE BRIEF: FEDERAL DRUG SENTENCING LAWS BRING HIGH COST, LOW RETURN 4 (2015) (hereinafter HIGH COST, LOW RETURN).

51. See 2015 OVERVIEW, *supra* note 35, at 8. Moreover, *nearly half* (47.8%) of federal drug offenders in 2009 were “street-level dealers” or below, with the highest-level traffickers (“high-level suppliers” and “importers”) comprising only eleven percent. HIGH COST, LOW RETURN, *supra* note 50, at 9.

52. 18 U.S.C. § 3553(f). See U.S. SENTENCING COMM’N, QUICK FACTS ABOUT MANDATORY MINIMUM PENALTIES 1 (2015) [hereinafter QUICK FACTS 2015]. The fact that Congress saw the need to enact the safety valve provision in 1994 shows that *even Congress* recognized that federal prosecutors misuse against low-level offenders harsh drug penalties intended for major players in the drug trade.

53. See U.S. SENTENCING COMM’N, QUICK FACTS ABOUT MANDATORY MINIMUM PENALTIES 1 (2010). The sharp decline was the result of a sensible Obama administration sentencing reform initiative recently reversed by the new administration. Now, as before, federal prosecutors are required to file and seek conviction on the charges that will generate the highest sentence. See Memorandum from Jefferson B. Sessions, Att’y Gen., U.S. Dep’t of Justice, to All Federal Prosecutors, Department Charging and Sentencing Policy (May 10, 2017).

As these examples show, it is not true that federal offenders are categorically worse than offenders in the state system. Many cases are in federal court not because they truly deserve to be based on the seriousness of the defendant's crime or criminal history. Rather, they are in federal court simply because federal prosecution will generate more severe punishment than in state court.

Indeed, many cases are referred to federal prosecutors by state authorities precisely *because* they will generate much stiffer prison sentences in federal court. Most federal cases in areas of overlapping federal-state authority begin with arrests by state and local police. These referrals from local authorities are critical because federal prosecutors “generally will lack the informational resources to pursue offenses in these areas without State assistance.”<sup>54</sup> This results in local authorities “shopping” their cases to federal prosecutors in situations where federal law would provide greater punishment than state law.<sup>55</sup> Seen in this light, it is unsurprising that the two leading areas of federal prosecution originating in local arrests (drug and firearms offenses) account for the lion's share of federal convictions under statutes carrying mandatory minimum sentences.<sup>56</sup>

To be sure, penalties will not always be determinative of the charging decision in cases arising in areas of overlap. There are categories of cases where federal prosecution is more or less certain, irrespective of penalty, based on the nature or gravity of the offense. Obvious examples include terrorist plots, massive corporate frauds on the scale of Enron, or large-scale drug or human-trafficking operations. Similarly, there are categories of cases, such as carjacking, failure to pay child support, drug-induced rape, and theft of

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

55. See, e.g., *id.* at 95: “Explaining how his agency decided whether to take a case federally or stateside, the head of the Richmond[, Virginia] police detective division noted: ‘[I]t’s like buying a car: we’re going to the place we feel we can get the best deal. We shop around.’”

56. As the Sentencing Commission has reported, “[d]rug trafficking offenses accounted for over two-thirds (66.2%) of the offenses carrying a mandatory minimum penalty, followed by firearms (15.4%).” QUICK FACTS 2015, *supra* note 52, at 1.



cellular phone service (and, yes, there are federal criminal laws on each of these subjects), that could be brought federally but almost invariably will be left to state prosecution.<sup>57</sup>

Between these polar extremes, however, are many thousands of cases nationwide that could easily go either way. These include cases involving simple drug possession, small-time frauds,<sup>58</sup> corporate wrongs,<sup>59</sup> and drug sales. It is in *these* cases that comparatively severe federal penalties—such as strict mandatory minimums, the enhanced sentencing rule for “crack” cocaine offenses,<sup>60</sup> and unusually broad forfeiture rules that have been graded as

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57. Unless, of course, a federal prosecutor with too much time on his hands (and not enough common sense) rolls the dice on a creative legal theory elevating a minor crime into a major federal felony. *E.g.*, *Yates v. United States*, 135 S. Ct. 1074 (2015) (reversing conviction under Sarbanes-Oxley’s document-preservation provision of a commercial fisherman who cast overboard undersized fish taken in violation of federal fish size rules); *Bond v. United States*, 134 S. Ct. 2077 (2014) (reversing conviction under federal law prohibiting chemical weapons of a jilted lover who put a mild irritant on the doorknob of her husband’s paramour). The fact that prosecutors ultimately lost on these abusive charges does nothing to redress the substantial costs and burdens imposed on the accused and the court system of prolonged jury trials and appeals concerning baseless charges which should never have been brought.

58. In 2015, almost 7,500 fraud cases were prosecuted federally, making fraud the third-largest area of enforcement activity (second only to drugs and immigration offenses). 2015 OVERVIEW, *supra* note 35, at 9. Although some were large-scale frauds with billions of dollars in losses, 134 cases involved *no loss whatsoever*. With a “median loss amount of \$213,831,” *id.*, it is clear that many involved fairly small losses to victims.

59. Of the 181 organizational defendants (corporations and partnerships) sentenced in federal court in fiscal year 2015, 87 were not sentenced to make restitution (which would have been ordered had the offense caused a loss to victims), and 38 paid *neither* restitution nor even a fine. *Id.* at 10. Given the recent emphasis on using federal prosecution to reform corporate structures allowing illegal conduct to occur, *see* Garrett, *supra* note 16, it is significant that only 51 of the 181 convicted organizations were ordered to make structural changes, an indication that prosecution was unnecessary for structural-reform reasons. 2015 OVERVIEW, *supra* note 35, at 10.

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

“among the nation’s worst”<sup>61</sup>—can and do often tilt the balance in favor of federal prosecution.

Attorney General Eric Holder’s 2013 “Smart on Crime” initiative, recently reversed by the new administration, was a recognition that, as this chapter contends, the public interest demands “a significant change in [the federal government’s] approach to enforcing the nation’s laws.”<sup>62</sup> The proposal called upon federal prosecutors to develop more-restrictive charging guidelines, limit their use of drug mandatory minimums against lower-level offenders, and pursue alternatives to imprisonment in suitable cases.<sup>63</sup> Though a step in the right direction, only drastic, long-overdue statutory reform can guarantee a more effective redeployment of federal crime-fighting resources in the face of opposition from ideologues who prefer to be “tough” (rather than “smart”) on crime.

Although the present state of affairs of disproportionately severe federal penalties results in unequal treatment of similarly situated offenders, far more is at stake than mere fairness to federal offenders. In a system of incredibly broad laws and uncontrolled, decentralized prosecutorial discretion, it is difficult to achieve the optimal “mix” of federal and state enforcement when severe federal penalties incentivize federal prosecutors to duplicate the work of state prosecutors. Federal prosecutors can best promote public safety in areas of overlap with state criminal law by focusing their efforts on offenses that defy adequate response within the state system—offenses such as terrorism, organized crime, large-scaled trafficking in “hard drugs” and firearms, massive frauds, violations of federal civil rights, and corruption by high-ranking state and local officeholders. The “value added” of federal prosecution cannot simply be regarded as higher penalties, especially for low-level and other comparatively minor offenses, in situations where local authorities are perfectly willing and able to act.

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

62. U.S. DEP’T OF JUSTICE, *SMART ON CRIME: REFORMING THE CRIMINAL JUSTICE SYSTEM FOR THE 21ST CENTURY 1* (2013), <https://www.justice.gov/sites/default/files/ag/legacy/2013/08/12/smart-on-crime.pdf>.

63. *Id.*

Counterintuitive though it may seem to defenders of the status quo, the position that federal enforcers should focus on distinctly national threats should be obvious to all after the terrorist attacks of September 11, 2001, claimed the lives of thousands of innocent Americans. During the 1990s, the local offices of the FBI prioritized “traditional crimes such as white-collar offenses and those pertaining to drugs and gangs” over counterterrorism, and “very little of the sprawling U.S. law enforcement community was engaged in countering terrorism.”<sup>64</sup> Congress likewise focused attention and resources on fighting the last war—the so-called “war” on crime—and did not see, until it was much too late, that global terrorists had declared war against the United States and were poised to strike at the homeland.<sup>65</sup>

Then 9/11 happened. After the Twin Towers came tumbling down and the Pentagon stood in flames just outside the nation’s capital, the work of a highly organized and well-financed global terrorist network, Attorney General John Ashcroft had an epiphany: “We cannot do everything we once did because *our lives now depend on us doing a few things very well*. The [D]epartment [of Justice] will not be all things to all people.”<sup>66</sup>

Although the FBI changed considerably after 9/11 to give priority to disrupting terrorist plots against U.S. interests worldwide,<sup>67</sup> old habits die hard elsewhere in the Justice Department. Reminiscent of Nero fiddling as Rome burned, while impoverished black and Latino residents of Chicago endure unimaginable levels of gun violence,<sup>68</sup> and the nation reels from an

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64. NAT’L COMM’N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT 74, 82 (2004). Even when terrorism came into focus as a serious threat, FBI leaders in Washington were “unwilling to shift resources to terrorism from other areas such as violent crime and drug enforcement” and allowed local offices to continue with their emphasis on crimes where progress can be measured (and careers advanced) in terms of “numbers of arrests, indictments, prosecutions, and convictions.” *Id.* at 74.

65. *See id.* at 104-07.

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

67. *See generally* U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-08-751, FBI REORGANIZATION: PROGRESS MADE IN EFFORTS TO TRANSFORM, BUT MAJOR CHALLENGES CONTINUE 2-18 (2003) (statement of David M. Walker, Comptroller General of the United States).

68. *See* Aamer Madhani, *Chicago, After Trump’s “Carnage” Comment: Show Us The Money*, USA TODAY (Jan. 25, 2017), <https://www.usatoday.com/story/news/2017/01/25/chicago-trump-send-money-vioence/97045356/> (reporting that Chicago had 762 murders and 4,300 shootings in 2016, the most in nearly two decades).

unprecedented opioid epidemic,<sup>69</sup> federal prosecutors spend precious time and resources racking up easy convictions in relatively minor drug, gun-possession, and fraud cases. This essential disconnect between the nation's most pressing public-safety needs and federal enforcement activity will likely continue as long as Congress allows federal prosecutors to bring the cases that generate the highest sentences, instead of the cases where federal prosecution is truly essential to safeguard the public.

## 2. Interference with state-level enforcement

In light of the above discussion, it is difficult to contend that the federalization of criminal law has done terribly much to make the nation safer. Nevertheless, it might be possible to defend the federalization of criminal law if it bolsters the effectiveness of state enforcement. Episodic and comparatively rare though it may be in light of the total number of prosecutions nationwide, the argument would go, federal prosecution of cases involving drugs and guns can be a useful means of relieving resource constraints on an overloaded state system.

This potential defense is surprisingly weak. Federal prosecution on the order of roughly 72,000 cases a year (the number brought in federal court in the most recent fiscal year)<sup>70</sup> would be of little use in expanding the resources of state enforcers. Divided over 50 states, the reduced caseload for each state would be an average of 1,440 cases at most, and, realistically, closer to half that amount given that roughly half of the 72,000 cases brought federally in 2015 were immigration cases which, by definition, could only be prosecuted in federal court. No matter how resource-constrained states may be, taking such a small number of cases off their hands will be of little or no consequence—and, of course, the most logical federal response to inadequate state resources would be to grant funding for expanded state enforcement.<sup>71</sup>

The more fundamental response to this line of argument is that the federalization of criminal law can actually undermine the effectiveness of the state system. Once this point is understood, it can no longer be assumed that the two systems operate independently of one another, with seamless cooperation in

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69. See generally Rose A. Rudd et al., CDC, *Increases in Drug and Opioid-Involved Overdose Deaths—United States, 2010–2015*, 65 MORBIDITY & MORTALITY WKLY. REP. 1445 (Dec. 30, 2016) (“During 2015, drug overdoses accounted for 52,404 U.S. deaths, including 33,091 (63.1%) that involved an opioid.”).

70. 2015 OVERVIEW, *supra* note 35, at 1.

71. The Clinton administration's 1994 effort to fund the hiring of 100,000 new state and local officers nationwide is a pertinent example, albeit one that was flawed in execution. See generally GARETH DAVIS ET AL., HERITAGE FOUND., *THE FACTS ABOUT COPS: A PERFORMANCE OVERVIEW OF THE COMMUNITY ORIENTED POLICING SERVICES PROGRAM* (2000).

areas of mutual interest. The expansive reach of federal criminal law, combined with the potential for robust enforcement at the federal level, can operate as an impediment to state-level public-safety efforts—which, of course, would be much less likely if federal law focused on truly national problems that defy adequate response in the state system and left all other problems to states.

The clearest example of federal interference in state enforcement involves marijuana. Without question, there is a strong trend at the state level to decriminalize marijuana. Nearly half of the states have legalized marijuana use in some form, and just last year, four states (California, Maine, Massachusetts, and Nevada) completely legalized marijuana, even for purely recreational use.<sup>72</sup> These laws can be understood as signals that state and local police should switch their drug-control efforts away from marijuana to the kind of drugs which pose serious risks of overdoses and addiction. Potentially, these laws represent the first step toward a comprehensive harm-reduction approach to drug control, substituting a more promising approach based on treatment and regulation for failed prohibition.<sup>73</sup>

Although a principal virtue of federalism is that it allows states to function as social laboratories,<sup>74</sup> the federal government remains determined to keep the entire nation mired in its failed drug war. As Professor Erik Luna has explained:

[D]rug enforcers took an aggressive approach to interpreting the U.S. government’s drug war prerogative, arguing successfully in court that there were no exceptions or limitations to federal prosecutions involving medical marijuana. Federal law enforcement conducted hundreds of raids on medical marijuana dispensaries, and sought criminal prosecution of medical marijuana providers even when they were in full compliance with local and state law. One particularly pathetic raid involved a

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72. Ben Gilbert, *4 States Just Voted to Make Marijuana Completely Legal—Here’s What We Need to Know*, BUSINESS INSIDER (Nov. 9, 2016), <http://www.businessinsider.com/marijuana-states-legalized-weed-2016-11>; see also Kreit, *supra* note 47.

73. See generally GLOB. COMM’N ON DRUG POLICY, *WAR ON DRUGS: REPORT OF THE GLOBAL COMMISSION ON DRUG POLICY* (2011) (calling for a harm-reduction approach to drugs and an end to the war on drugs).

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

collective hospice, located on a farm in Santa Cruz, California, that had “approximately 250 member-patients who suffer from HIV or AIDS, multiple sclerosis, glaucoma, epilepsy, various forms of cancer, and other serious illnesses.”<sup>75</sup>

Without the omnipresent threat of federal enforcement—criminal, civil, and administrative alike—uninhibited state experiments with legalized, government-regulated marijuana could take place, easing the suffering of terminally ill patients and paving the way for more promising drug-control strategies.

Even apart from the widening gulf between federal and state policy on marijuana, federal drug laws create substantial problems for states. The culprit here is statutes authorizing asset forfeiture for violations of federal drug laws. A number of state legislatures fear that economics may lead to “policing for profit”—namely, police diverting scarce enforcement resources to the search for crimes that will generate revenue for the arresting agency through asset forfeiture.<sup>76</sup> Understandably fearing this perverse incentive might jeopardize public safety, not to mention the security of property rights of innocent third parties, some states have imposed limits on the ability of local police agencies to retain the proceeds of asset forfeitures.<sup>77</sup>

Enter the Department of Justice. Eager to secure greater cooperation from local police in the war on drugs, the federal government essentially buys their assistance through aggressive use of federal forfeiture laws. Under the federal “Equitable Sharing Program,”<sup>78</sup> participating police agencies bypass state forfeiture laws, invoking the assistance of federal enforcers. Federal prosecutors

75. Erik Luna, *Drug War and Peace*, 50 U.C. DAVIS L. REV. 813, 880 (2016). The Clinton and George W. Bush administrations sought to obstruct state efforts to legalize marijuana for medical use, and the Obama administration ultimately gravitated toward a similar approach after an initial period of deference to state experiments with medicinal marijuana. See generally Robert A. Mikos, *A Critical Appraisal of the Department of Justice’s New Approach to Medical Marijuana*, 22 STAN. L. & POL’Y REV. 633, 635-40 (2011). After the recent change in presidential administrations, the Justice Department is now headed by an attorney general who believes that marijuana is “only slightly less awful” than heroin. Alexandra Sifferlin, *Jeff Sessions Says Marijuana Is Only “Slightly Less Awful” Than Heroin*. *Science Says He’s Wrong*, TIME (Mar. 16, 2017), <http://time.com/4703888/jeff-sessions-marijuana-heroin-opioid/>.

76. See generally Eric Blumenson & Eva Nilssen, *Policing for Profit: The Drug War’s Hidden Economic Agenda*, 65 U. CHI. L. REV. 35 (1998); Beth A. Colgan, “Fines, Fees, and Forfeitures,” in Volume 4 of the present Report.

77. Consider two examples: the District of Columbia and New Hampshire. Under D.C. law, the proceeds of local forfeiture actions must go into a fund for drug prevention and treatment. New Hampshire caps at 10% the amount of state forfeiture proceeds that law enforcement can keep. See generally LEONARD W. LEVY, *A LICENSE TO STEAL: THE FORFEITURE OF PROPERTY* 149-50 (1996).

78. See *supra* note 61.

obtain forfeiture in federal proceedings and then return the proceeds (minus a 20% cut for the Department of Justice) to the arresting agencies for their own use, free and clear of state-law limits on the use of the proceeds of forfeited assets.

The Equitable Sharing Program seriously complicates efforts within the state system to keep state and local police focused on preventing and solving crimes instead of profiting on them. Apart from the federal intrusion into local policing, the incentive and ability to “police for profit” would be reduced or eliminated in states with restrictive forfeiture laws, with some or all of the proceeds received as a result of drug arrests going into the state treasury, where they might be used for the benefit of all state residents. Through the complicity of federal enforcers, however, money resulting from seizures within the state system is redirected back to the arresting agency for its use alone.<sup>79</sup> This gives police incentives to overinvest in traffic stops (which, in addition to being the easiest way to find drugs and drug proceeds, involve valuable assets for seizure, *i.e.*, automobiles) as well as other drug interdiction efforts, small as well as large.

Although advocates of strict drug prohibition may not fret about over-enforcement problems, the perverse incentives equitable sharing creates for police on the front lines of the drug war are troubling. Quite simply, equitable sharing gives police strong incentives to target major *assets* instead of major *crimes*. As a senior Customs Service official memorably put it, if police had “a guy with a ton of marijuana and no assets versus a guy with two joints and a Lear jet, I guarantee you they’ll bust the guy with the Lear jet.”<sup>80</sup>

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

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79. As one critical review notes, “not only does federal law allow forfeiture proceeds to be spent by law enforcement, but equitable sharing rules actually mandate that funds go to law enforcement.... If state law directs proceeds elsewhere, the Justice Department will cut off the flow of funds.” CARPENTER ET AL., *supra* note 61, at 28.

80. LEVY, *supra* note 77, at 152. As bad as targeting minor drug crimes in the interest of forfeiting major assets is, forfeiture is also used to target cash *not derived from illegal activity*. When fairly large sums of money are discovered during traffic stops, “it is presumed to be drug money, seized, and handed over to the federal government for forfeiture,” putting the burden on the owner to retain counsel and prove the money was legally obtained. CARPENTER ET AL., *supra* note 61, at 29.

With forfeiture in the picture, police may *allow* illegal drug activity they might otherwise prevent. By postponing arrests until dealers have accumulated large amounts of cash, the police can ensure that the resulting arrests will generate significant assets for seizure.<sup>81</sup> Police have the same incentive to concentrate interdiction efforts on the export of drug proceeds rather than on the import of illegal drugs: pursuing proceeds produces cash and other valuable assets for seizure to a much greater degree than stopping the drugs.<sup>82</sup> Similarly, instead of targeting dealers, who may often have only drugs, police frequently conduct “reverse sting operations” targeting *buyers*.<sup>83</sup> This allows police to choose the buyers and locations involving major assets to seize, such as residences and automobiles.

Seen in this light, asset forfeiture does not merely ensure that crime does not pay. Instead, it leads to policing for profit, which causes police to “make business judgments that can only compete with, if not wholly supplant, their broader law enforcement goals.”<sup>84</sup> This is what state laws limiting asset forfeiture seek to prevent—and what the Justice Department’s Equitable Sharing Program allows police to do, potentially in violation of state law.<sup>85</sup> Even the euphemism of “sharing” cannot mask a perverse state of affairs in which the funding wishes of individual law enforcement agencies trump public safety.

There are other examples in which broad federal criminal law interferes with the effective functioning of the state system. One concerns what Professor Robert Mikos terms “federal supplemental sanctions”<sup>86</sup> attaching adverse collateral consequences (such as deportation or disqualification to carry

81. See generally Blumenson & Nilsen, *supra* note 76, at 67-73 (discussing examples of how the pursuit of forfeitable assets has changed police drug enforcement tactics).

82. See, e.g., *id.* at 68 (quoting testimony of former New York City police commissioner concerning the advantages to police of targeting proceeds instead of drugs); see generally Conor Friedersdorf, *Police Ignore Illegal Drugs, Focus on Seizing Cash*, THE ATLANTIC (May 24, 2011), <https://www.theatlantic.com/national/archive/2011/05/police-ignore-illegal-drugs-focus-on-seizing-cash/239349/> (citing investigation finding that police in Tennessee conducted ninety percent of their seizures on westbound traffic routes through which drug proceeds flow back to Mexican importers instead of eastbound traffic routes bringing drugs to U.S. markets).

83. See generally Blumenson & Nilsen, *supra* note 76, at 67-73.

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

85. As one might expect, police agencies in states with laws combatting “policing for profit” receive the biggest payouts from the Equitable Sharing Program. See generally CARPENTER ET AL., *supra* note 61, at 26 (citing studies).

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



firearms) to certain kinds of state-court criminal convictions. States cannot effectively combat domestic violence, for example, if undocumented victims cannot call the police for help or participate in state court proceedings without exposing themselves or their loved ones to deportation or federal prosecution.<sup>87</sup>

An even broader example of the mischief that limitless federal criminal laws can produce for the state system involves empowering state and local police to sidestep state limits on law enforcement. Equitable sharing is but one instance of state and local police using federal criminal enforcement to evade state-system controls on their authority. Others include breaking down the “bilateral monopoly”<sup>88</sup> that otherwise would give higher state authorities (legislatures, prosecutors, and courts) the authority to regulate and control the activities and investigative methods of state and local police. Without the ability to hand off their arrests and seizures to the federal government, state and local police would have to comply with state legislative and judicial limits on their authority and investigative methods, not to mention the priorities of state prosecutors. Federalization, however, allows police to disregard these limits by using federal prosecutions to achieve their local objectives, flouting the very state authority from which their powers derive.<sup>89</sup>

As a consequence, it cannot be maintained that the federalization of criminal law promotes more-effective state enforcement. In most cases, federalization does not appreciably aid state enforcement—and, in some cases (such as legalized marijuana, equitable sharing, and federal supplemental sanctions for state-law offenses), it actually undermines the effective enforcement of state law. In these areas of federal-state conflict, federal prosecutors insist on rigid adherence to federal policy, however outmoded, giving short shrift to important countervailing interests states wish to protect.<sup>90</sup> Without federal prosecutorial

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87. Similar complications arise if convicting an abusive spouse in state court will cause him to lose his job as a police officer because federal law will preclude him from carrying firearms. *See generally id.* at 1444-74 (describing five areas where federal supplemental sanctions complicate the enforcement of state law).

88. Richman, *supra* note 1, at 98.

89. *See id.* at 98-99. Attorney General Holder essentially conceded as much in the forfeiture context by limiting the use of equitable sharing in cases where assets were seized by local police on their own initiative and only later “adopted” by the federal government for seizure. The move was largely symbolic, however, because “adoptions” constitute only a “small piece” of forfeiture actions. Rachel A. Harmon, *Federal Programs and the Real Costs of Policing*, 90 N.Y.U. L. REV. 870, 935-36 (2015).

90. The dismissive attitude of the U.S. Attorney for Los Angeles on the subject of legal medical marijuana says it all: “California law doesn’t matter.” *See* Todd Grabarsky, *Conflicting Federal and State Medical Marijuana Policies: A Threat to Cooperative Federalism*, 116 W. VA. L. REV. 1, 19 (2013).

discretion as a reliable means of resolving conflicts between federal and state enforcement, the only solution is narrower, more-targeted federal law that will restrict federal enforcers to areas of truly national concern, leaving broader space for state law to operate free from federal interference.

### 3. Negative externalities

The best potential defense of the federalization of criminal law is that the virtual overlap between federal and state criminal law merely sets the stage for negotiations between federal and state enforcers about how the two bodies of law should be enforced. As Professor Dan Richman notes, limitless federal criminal laws do not compel limitless enforcement; rather, they leave “the precise boundaries of Federal and State responsibility” to be determined “through explicit or tacit negotiation among enforcement agencies.”<sup>91</sup> Presumably, federal and state enforcers, with their specialized knowledge of the public-safety needs of the areas within their jurisdictions, are well-positioned to determine where state responsibility should end and federal responsibility should begin.

The obvious problem with this line of argument (as Richman himself notes) is that it ignores agency costs. It can safely be assumed the deals federal and state enforcers strike will serve their own interests. There is, however, no reason to assume those deals will advance or even take into account the interests of third parties. Indeed, the risk is that the parties to the negotiations affecting the size and makeup of the federal criminal docket will sacrifice the interests of others for their own benefit, creating what is known in economics as “negative externalities.”

Asset forfeiture through equitable sharing is an illustration of federal and state enforcers striking deals benefiting themselves at the expense of other important interests.<sup>92</sup> In states that limit or preclude police from keeping the proceeds of forfeited assets for their own use, equitable sharing means more funding for police than permitted under state law. The Justice Department benefits, too, by getting a 20% cut, plus more vigorous local drug enforcement.

This, however, is no “win/win” scenario. States necessarily lose in the process because forfeiture proceeds they would have received and been able to spend for broader public purposes go instead back to the arresting agency. Ultimately, of course, the public loses. Equitable sharing incentivizes police to engage in

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

92. See *supra* notes 76-84 and accompanying text.

less-effective policing in a variety of ways, such as by putting less effort into stopping the flow of illegal drugs than capturing lucrative proceeds of past drug sales.

The result of negotiated federal-state boundaries in criminal law has been to stretch existing federal judicial and correctional resources to the breaking point. The growth in the number of federal criminal prosecutions in recent decades has been dramatic: “The total number of federal cases has almost tripled from 29,011 in fiscal year 1990 to 83,946 in fiscal year 2010.”<sup>93</sup> Although the average prison sentence decreased from 62 months to 54 months from 1991 to 2010,<sup>94</sup> the prison population grew nonetheless because “the size of the federal docket has tripled over the same time period, and the proportion of offenders sentenced to prison has increased.”<sup>95</sup>

Although federal prosecutors have been given the tools necessary to manage the larger caseload, overworked federal trial judges have struggled to keep pace with their swollen criminal dockets. Due to disparate funding for federal judges and prosecutors, increased caseloads put greater pressure on the judiciary than on U.S. Attorneys’ offices: “Federal justice personnel almost doubled between 1982 and 1993, but the number of authorized federal judgeships in the district courts increased by only 26%.”<sup>96</sup> The resulting strain on federal judicial resources has been described as “one of the most serious problems facing [the judiciary] today”—problems that, according to the late Chief Justice William H. Rehnquist, ultimately stem from “[t]he trend to federalize crimes that traditionally have been handled in state courts.”<sup>97</sup>

Even more ominously, increased federal criminal litigation has produced an explosion in prison population that has made federal correctional institutions more dangerous and less effective in rehabilitating the prisoners who will

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93. U.S. SENTENCING COMM’N, REPORT TO CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 66 (2011).

94. *Id.* at 70.

95. *Id.* In the years since 2010, the annual number of offenders sentenced in federal court has “fallen steadily,” resulting in a fiscal-year 2015 total (71,003) that was almost eighteen percent less than in the 2011 fiscal year. 2015 OVERVIEW, *supra* note 35, at 1. Nevertheless, the federal prison population continued to increase from 2010-12. *See* PRISONERS IN 2015, *supra* note 44, at 3 tbl.1. From that point on, the number of federal prisoners shrank from 209,771 in 2010 to 196,455 in 2015. *See id.*

96. FEDERALIZATION TASK FORCE REPORT, *supra* note 4, at 35.

97. WILLIAM H. REHNQUIST, THE 1998 YEAR-END REPORT OF THE FEDERAL JUDICIARY (1998), reprinted at 1 FED. SENT’G REP. 134, 134 (1998). *See generally* FEDERALIZATION TASK FORCE REPORT, *supra* note 4, at 38 (“Nearly all of those who have examined the impact of federalization have concluded that the federal courts are being overburdened with cases traditionally handled in state courts.”).

eventually be back on streets across America.<sup>98</sup> According to a recent report by the Congressional Research Service, the last three decades have seen “a *historically unprecedented increase* in the federal prison population.”<sup>99</sup> Starting in 1980—which marked the beginning of a “nearly unabated, three-decade increase” in the federal prison population—the number of federal inmates increased from approximately 25,000 to over 205,000 in fiscal year 2015, with an annual influx of almost 6,000 prisoners.<sup>100</sup>

Since 1997 the Bureau of Prisons has had to rely on private prisons to alleviate prison overcrowding. As of 2015, roughly 12% of federal prisoners are being held in private prisons.<sup>101</sup> Prior to the recent change in presidential administrations, the Justice Department had decided to phase out private prisons. Not only do private prisons “compare poorly to our own Bureau [of Prisons] facilities” on a number of fronts, including “safety and security” and “correctional services, programs, and resources,” but they “do not save substantially on costs.”<sup>102</sup> At best, then, private prisons are a band-aid solution for the problems caused by decades-long increases in the number of people in federal lockup. In fact, however, they may represent a cure that is worse than the disease—a short-sighted approach that puts the safety of prison staff and inmates alike at greater risk, and returns to streets across America people who are more likely to reoffend than they might have been with more effective rehabilitation.<sup>103</sup>

Whether or not private prisons are an appropriate response to overcrowding may be debated, but the enormous cost of federalization for American taxpayers is beyond dispute. The skyrocketing federal prison population has required an additional \$7 billion in expenditures on corrections over the last generation, from \$330 million in fiscal year 1980 to almost \$7.5 billion in fiscal year

98. For a discussion of rehabilitation, see Francis T. Cullen, “Correctional Rehabilitation,” in Volume 4 of the present Report.

99. NATHAN JAMES, CONG. RESEARCH SERV., *THE FEDERAL PRISON POPULATION BUILDUP: OPTIONS FOR CONGRESS 1* (2016) (emphasis added). By comparison, with few fluctuations, the number of federal prisoners “remained at approximately 24,000” from 1940-1980. *Id.* at 2.

100. *Id.* As of December 31, 2015, the rated capacity for the entire federal prison system was 134,461, putting the federal system at 119.7% of capacity. See PRISONERS IN 2015, *supra* note 44, at 27, app. tbl.1. This is worse overcrowding than all but four states. *Id.*

101. See OFFICE OF THE INSPECTOR GENERAL, U.S. DEPT. OF JUSTICE, *REVIEW OF THE FEDERAL BUREAU OF PRISONS’ MONITORING OF CONTRACT PRISONS 1* (2016).

102. Memorandum from Sally Q. Yates, Deputy Att’y Gen., to Acting Director, Federal Bureau of Prisons, at 1 (Aug. 18, 2016).

103. Be that as it may, the new administration has pledged to expand the use of private prisons. See Editorial, *Under Trump, Private Prisons Thrive Again*, N.Y. TIMES (Feb. 24, 2017), [https://www.nytimes.com/2017/02/24/opinion/under-mr-trump-private-prisons-thrive-again.html?\\_r=0](https://www.nytimes.com/2017/02/24/opinion/under-mr-trump-private-prisons-thrive-again.html?_r=0).

2015.<sup>104</sup> To put these figures in perspective: “From 1980 to 2013, federal prison spending increased 595 percent, from \$970 million to more than \$6.7 billion in inflation-adjusted dollars. Taxpayers spent almost as much on federal prisons in 2013 as they paid to fund the *entire* U.S. Justice Department—including the Federal Bureau of Investigation, the Drug Enforcement Administration, and all U.S. Attorneys—in 1980, after adjusting for inflation.”<sup>105</sup>

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

### RECOMMENDATIONS

To correct the many problems associated with the overfederalization of criminal law—and more effectively achieve the vital goal of public safety—a series of sweeping reforms is necessary:

1. **Congress must chart a new, more effective path to protecting the public safety.** In a federalized system of criminal law enforcement, Congress gives prosecutors unchecked power to determine the scope of federal criminal law and to select from the much larger universe of potential defendants the few who will face unusually harsh federal sentences. Prosecutors, however, have shown little restraint in the use of these awesome powers. The result has been dramatic increases in federal criminal filings and prisoners over the last three decades—and skyrocketing costs to American taxpayers. Meaningful, long-lasting reform will not occur unless Congress boldly reasserts its institutional prerogatives by concentrating federal power and resources exclusively on the nation’s most serious criminal threats. The so-called Rohrabacher-Farr amendment barring the Justice Department from interfering with marijuana legalized under state law is a rare but important example of the kind of congressional leadership that is sorely needed to rein in the unrestrained use of federal enforcement authority.<sup>106</sup>
2. **Congress should sharply reduce the number and scope of existing federal criminal laws and create new crimes only as a last resort.** Instead of limiting their attention to offenses that can be effectively addressed only at the federal level, prosecutors make the proverbial “federal case” out

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104. JAMES, *supra* note 99, at 1.

105. HIGH COST, LOW RETURN, *supra* note 50, at 4 (emphasis added).

106. See Consolidated and Further Continuing Appropriations Act, Pub L. No. 113-235, § 538, 128 Stat. 2130, 2217 (2015).

of a surprising number of comparatively minor, small-time crimes each year—crimes that could be easily and more economically handled in the state system. Restricting the roster of federal crimes to areas of exclusive federal jurisdiction and areas where state law enforcement has proven inadequate will keep federal enforcers focused, as they ought to be, on the nation's more serious crimes instead of needlessly duplicating (or even interfering with) state enforcement efforts. New federal crimes should be created sparingly, and only in areas that both defy adequate response within the state system and are not effectively addressed by existing federal laws and regulations.

3. **Congress should repeal unusually severe federal sentencing laws because they distort the exercise of prosecutorial discretion and prevent wise exercises of judicial sentencing discretion.** Congress has enacted harsh statutory mandatory minimums, sweeping asset forfeiture laws, and other sentencing policies far more severe than most states' in the expectation that prosecutorial discretion would restrict them to the nation's most blameworthy offenders. Such confidence is unfounded: federal prosecutors pursue the offenses that generate the highest sentences, as opposed to the worst offenders, and they seek the highest supportable sentences instead of the sentences that "fit" the crime. Congress has repeatedly addressed itself to these problems in the past—examples include laws repealing the 100/1 "crack" cocaine sentencing rule, authorizing judges to sentence minor drug offenders below applicable mandatory minimums, and restricting civil asset forfeiture. The time has come for Congress to address itself more systematically to the serial misuse of strict federal sentencing policies and the many distortions they create in the proper functioning of the criminal justice system.
4. **Congress should use conditional federal funding to states, not new criminal laws, in situations where greater enforcement is desired.** Overfederalization resulted from the belief that enacting more federal criminal laws would expand upon existing levels of state enforcement. This view is mistaken. The vast majority of laws Congress has enacted are enforced only rarely, if at all, and such low-level enforcement invites arbitrariness in charging. Of even greater concern, federal enforcement is often wasted on comparatively minor offenses that are vigorously prosecuted by states, squandering resources that might have been better expended on prosecutions more deserving of federal attention. The most effective way for Congress to expand enforcement of crimes prosecuted at the state level is to grant states the funding necessary for increased enforcement.

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Expanded authority in an already overburdened federal system, one that necessarily reaches only a small fraction of total prosecutions nationwide, will be inefficient at best, if not wholly ineffective.

5. **Congress should require the attorney general to formulate binding, publicly available enforcement guidelines and to publish an annual national crime-fighting strategy with measurable goals and cost estimates.** When Congress delegates lawmaking power to executive branch agencies, it typically requires them to develop rules, regulations, or other authoritative guidance concerning their interpretation and intended use of delegated authority. This promotes rule-of-law values by giving notice to the regulated public and enabling oversight to ensure congressional objectives are pursued in a faithful and responsible manner. Unfortunately, the Justice Department does not operate in the law-like manner that other executive branch agencies do. Uncontrolled discretion exercised by line prosecutors results in substantial variation and arbitrariness in the enforcement of federal law nationwide—which, in turn, makes it difficult to have a coordinated, nationally uniform approach to crime reduction. Binding enforcement guidelines, coupled with an articulated crime-fighting strategy with benchmarks and cost estimates, are necessary to bring much-needed transparency and coordination to the enforcement of federal criminal law.
6. **Congress should eliminate perverse incentives for federal enforcers to give inadequate attention to pressing public-safety needs.** In a system of overfederalization, enforcers have wide latitude to pursue their own interests at the expense of the public interest committed to their charge. Broad asset forfeiture laws are a case in point. Forfeiture laws create powerful financial incentives to (a) pursue major *assets* instead of major *crimes*, (b) give severe sentences to minor players in the drug trade but not their more dangerous bosses who trade assets for undeserved lenience, and (c) prioritize crimes for which asset forfeiture is allowed (such as drug and white-collar offenses) over crimes for which forfeiture is unavailable (such as violent crime and deprivations of civil rights). Although forfeiture has netted the Justice Department billions of dollars in additional revenue, it is not in the public interest for the pursuit of forfeitable assets to take precedence over the public safety.

To keep federal agents and prosecutors focused exclusively on the public interest, Congress should require that all federal forfeiture proceeds be paid into the Treasury instead of being retained within the seizing agency.

Similarly, Congress should outlaw all sharing of federal forfeiture funds with state and local police departments—the purpose and effect of such sharing, after all, is to incentivize “policing for profit” at the state level, often in defiance of state law. These reforms will help ensure that public safety, not profit, is the foremost consideration for law enforcement.

- 7. State policymakers should mobilize to lobby Congress for more-effective responses to crime than new federal laws and higher penalties, and for federal cooperation with innovative state public-safety efforts.** States have, for the most part, been complicit in the federalization of crime, evidently in the belief that greater federal involvement could only aid their own crime-fighting efforts. This blind faith in federal involvement is unjustified in light of recent high-profile conflicts between federal and state enforcers. Using the broad tools at their disposal, federal authorities have obstructed state experiments with alternative means of reducing the harms caused by illegal drug use, as well as state efforts to eliminate incentives for police departments to use forfeiture laws to pad their budgets at the expense of more-pressing needs. Similar conflicts have arisen in recent efforts by the Trump administration to conscript state and local police as federal immigration agents despite objections that doing so will complicate efforts by police and state court officials to maintain law and order within immigrant communities.<sup>107</sup>

Particularly now, as they consistently prove themselves more innovative and responsive than their federal counterparts—other important examples of state-level innovation include drug and mental-health courts, and alternatives to imprisonment—states should realize that, in many areas, federal involvement is far from costless. Even apart from possible interference with the pursuit of important public-safety goals by the states, the funds spent on federal involvement could often be more effectively utilized at the state level, where the vast majority of enforcement activity takes place. Investing in more capacity within the state system to deal with antisocial conduct is a far better way of protecting the public than expanding a costly, one-size-fits-all federal system that deals only with a small fraction of the offenders prosecuted annually in state courts nationwide. A considerably smaller federal footprint in criminal law would mean greater freedom for continued public-safety innovation by states, a worthwhile goal in its own right, and could mean greater respect and federal funding for state law-enforcement initiatives.

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107. For a discussion of these issues, see Jennifer M. Chacón, “Crimmigration,” in the present Volume.