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Criminal Mischief: The Federalization of American Criminal Law†

by

KATHLEEN F. BRICKEY*

Introduction

The federalization of American criminal law is a twentieth century phenomenon. It is an outgrowth of structural changes in society and of shifting political winds. This Symposium presents an exceptionally timely opportunity for reexamining the forces that drive the movement to federalize more and more crimes,1 and the consequences that flow from yielding to them. One could cite any number of reasons to consider this an optimal time to reexamine federalization issues, but enumeration of a few will suffice.

Crime is very much on America’s mind. In January 1994 more than forty percent of Americans surveyed identified crime as the nation’s most pressing problem.2 Even though the violent crime rate declined slightly over the last few years3 and is somewhat below its peak in the 1980s,4 Americans believe that our nation is in the midst of an unprecedented crime wave. As the Senate Report accompanying the

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3. There was a minuscule drop in the violent crime rate between 1991 and 1992. FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORT 1992, at 10. It declined three percent in the first six months of 1993. Braun & Pasternak, supra note 2. A 1994 New York City Police Department survey of 22 urban police departments revealed that in 20 of the cities, the number of felonies committed in the first six months of the year was lower (in some instances dramatically lower) than the number committed in the first half of 1993. Clifford Krauss, Urban Crime Rates Falling This Year, N.Y. TIMES, Nov. 8, 1994, at A9.


[1135]
1995 Budget puts it, "a law enforcement emergency exists in this country."

Although the forty percent figure represents a significant jump over responses elicited in June 1992, the increase may be partly attributable to another reason why it is time to revisit the issue of federalized crime. That is the spectacle surrounding the protracted congressional debate on what ultimately became the Violent Crime Control and Law Enforcement Act of 1994. That debate brought the good, the bad, and the ugly sides of the federalization movement into full public view.

Chief Justice Rehnquist's warning that incautious federalization of criminal law threatens to overwhelm the federal justice system is another important consideration. The system's workload is in large measure controlled by what laws Congress passes and by the exercise of executive department discretion to enforce them, vigorously or not.

This Article explores the evolution and momentum of the federalization phenomenon and examines its implications for the federal justice system. The overarching issue is whether (and if so, how) the trend to expand the body of federal criminal law and enlarge the role of a national police power can be reconciled with long-standing principles of federalism. The Article concludes that, sadly, it cannot.

5. S. REP. No. 103-309, 103d Cong., 2d Sess. 29 (1994) [hereinafter SENATE REPORT].

6. The Act was first introduced in 1990 but remained stalled until November 1993, when it passed both houses of Congress. From then until final enactment of the measure in August 1994, controversy swirled around the bill. See Braun & Pasternak, supra note 2 (stating that the bill was "swollen with amendments" ranging from helpful, to neutral, to "just wacky").

7. Perhaps the lowest point in the proceedings came when Senator Alphonse D'Amato sang a parody of "Old MacDonald Had a Farm" on the floor of the Senate—standing beside a large picture of a pink pig feeding at a trough—to protest what he denounced as "pork" in the bill. Dirk Johnson, Voices from the Grass Roots: Anger over Partisan Politics, N.Y. TIMES, Aug. 27, 1994, at A1.

I. The Development of a Federal Law of Crimes

A. Navigating Uncharted Waters

Before the ratification of the Bill of Rights, the Constitution had little to say about federal criminal law.9 It vested Congress with power to punish counterfeiting the currency and securities of the United States, piracies and felonies committed on the high seas, and crimes violating the law of nations.10 It enjoined both Congress and the states from passing bills of attainder or ex post facto laws11 and provided for trial by jury in federal prosecutions12 and extradition of fugitives from justice.13

The proper role and scope of federal criminal jurisdiction was not entirely free from doubt.14 The Constitution did not directly confer power to exercise general criminal jurisdiction, and controversy surrounded the question whether federal courts had jurisdiction over common-law crimes.15 Thus, when Congress first entered the realm of

9. The Bill of Rights, of course, said quite a lot about criminal law and procedure. The Fourth Amendment guaranteed citizens freedom from unreasonable searches and seizures and forbade the issuance of search warrants except on probable cause. U.S. Const. amend. IV. The Fifth Amendment required the government to proceed by a grand jury indictment or presentment in cases of capital or other infamous crimes. U.S. Const. amend. V. It also prohibited exposing a defendant to double jeopardy and created the privilege against self-incrimination. Id. The Sixth Amendment guaranteed the right to a speedy and public jury trial and the right to counsel. U.S. Const. amend. VI. And the Eighth Amendment prohibited the imposition of excessive bail, cruel and unusual punishments, and excessive fines. U.S. Const. amend. VIII.

10. Id. art. I, § 8.
11. Id. art. I, §§ 9, 10.
12. Id. art. III, § 2.
13. Id. art. IV, § 2.
15. Many judges believed that federal courts had jurisdiction over common-law crimes. Martin Conboy, Federal Criminal Law, in A CENTURY OF PROGRESS, 1835-1935, at 205, 303 (1937). Cf. United States v. McGill, 4 U.S. (4 Dall.) 426, 429 (1806) ("There are . . . many crimes and offences against the authority of the United States, which have not been specifically defined by law; for I have often decided, that the federal Courts have a common law jurisdiction in criminal cases . . . ").

Others, however, considered this an unsupportable proposition. For instance, in United States v. Worrall, 2 U.S. (2 Dall.) 384, 393, 395 (1789), Justice Chase stated: [T]he question recurs, when and how, have the Courts of the United States acquired a common law jurisdiction, in criminal cases? The United States must possess the common law themselves, before they can communicate it to their Judicial agents: Now, the United States did not bring it with them from England; the Constitution does not create it; and no act of Congress has assumed it. Besides, what is the common law to which we are referred? Is it the common law entire, as it
federal criminal law, it navigated uncharted waters, and cautiously at
that.

Congress's reluctance to enact expansive criminal laws may have
been partly attributable to a recognition that the Founding Fathers
never envisioned a national police power. Indeed, they were skeptical
about general federal jurisdiction.\textsuperscript{16} Thus, what little criminal jurisdic-
tion Congress invoked was often shared with the states. State courts
were given concurrent, and sometimes primary, jurisdiction over des-
ignated federal crimes.\textsuperscript{17}

The early federal criminal laws addressed only issues of special
federal interest. To be sure, some of them were—like state crimes—
ordinary criminal offenses. But they were crimes committed within a
special federal sphere. Thus, for example, the Crimes Act of 1790
punished murder and other crimes committed in a fort or other place
controlled by the federal government, crimes committed outside the
jurisdiction of any state,\textsuperscript{18} forgery of United States certificates and
other public securities, perjury in federal court, treason, piracy, and
committing acts of violence against an ambassador.\textsuperscript{19}

The federal government's assumption of a limited role in main-
taining everyday law and order left primary jurisdiction over criminal
matters with the states.\textsuperscript{20} That seemed natural enough because crime
was a matter of principally local interest and impact. Murders, rob-
beries, rapes, and burglaries did not implicate any special federal in-
terest unless they were committed within a federal enclave.
Moreover, the criminal law was an expression of local mores and con-
cerns. Thus, when states legislated morality, Louisiana was free to le-

\textsuperscript{16} See generally Charles Warren, \textit{Federal Criminal Laws and the State Courts}, 38
\textit{Harv. L. Rev.} 545, 546-48 (1925) (many of the Constitution's staunchest supporters fa-
vored quite limited federal judicial power, and the Judiciary Act of 1789 represented a
compromise between advocates of that view and those who favored a full federal judicial
power).

\textsuperscript{17} \textit{Id.} at 548-52.

\textsuperscript{18} On the high seas, for example.

\textsuperscript{19} \textbf{Lawrence M. Friedman}, \textit{Crime and Punishment in American History} 71
(1994).

\textsuperscript{20} John S. Baker, Jr., \textit{Nationalizing Criminal Law: Does Organized Crime Make It
galize lotteries while Utah chose to outlaw them. Nevada could boost its economy by permitting prostitution and casino gambling while New Hampshire could choose to ban them. These were matters of inherently local interest, and the states were capable of protecting themselves against whatever evils they chose to proscribe and punish.

The mid- to late-nineteenth century ushered in the era of regulatory crimes. At first, most were predominantly state and local regulations that reflected much about the economy they were designed to protect. Thus, Mississippi criminalized the fraudulent baling of cotton, Rhode Island protected its oyster beds from destructive methods of harvesting, Minnesota required logging companies to adopt and use distinctive marks on their logs, and Maryland criminalized cutting or destroying tobacco plants that belonged to another.

During this era, federal criminal law remained a minor player. Narrowly drawn federal crimes were tailored to provide protections in matters of direct federal interest or matters that the states were powerless to address—theft from a federal bank by a bank employee, arson on a federal vessel outside of any state’s jurisdiction, immigration and customs offenses, tax fraud, and smuggling.

It was not until after the Civil War that Congress enacted criminal laws that reflected concerns extending beyond direct federal interests. Newly enacted federal civil rights acts guaranteed all citizens equal rights to enter into contracts, to own and convey property, to enjoy the protection of all “laws and proceedings for the security of persons and property,” to exercise the elective franchise free from unlawful interference, and to benefit from federal enforcement of the newly

21. For a history of the Louisiana Lottery Company, its connection to organized crime, and its ultimate demise via state and federal legislation, see id. at 532-36.

22. FRIEDMAN, supra note 19, at 114. There was, of course, a broad array of less parochial regulatory crimes, many of which were the product of municipal ordinances. These less visible crimes arose out of regulations relating to licensing taverns and pawnbrokers, reporting contagious diseases, selling rancid meat or diluted milk, and the like. Id. at 114-15.


24. Id.

25. FRIEDMAN, supra note 19, at 262. Federal criminal prosecutions were relatively few in number and were "quite a miscellaneous lot." Id. They ranged from sailors' desertion at sea to federal liquor violations, from violation of the revenue laws to cutting federal timber. Id.

26. Act of Apr. 9, 1866, ch. 31, § 1, 14 Stat. 27, 27 (reenacted by Act of May 31, 1870, ch. 114, § 18, 16 Stat. 140, 144) [hereinafter 1866 Act].

27. Act of May 31, 1870, ch. 114, § 1, 16 Stat. 140 [hereinafter 1870 Act]. Interestingly, the 1870 Act imposed mandatory minimum penalties for violating its misdemeanor
established rights to equal protection and equal privileges and immunities under the laws. In addition to imposing criminal liability for depriving any citizen of a right secured therein, one act conferred federal jurisdiction over state crimes where the affected citizens were denied their rights or where state courts would not enforce them. Thus, the federal government assumed concurrent jurisdiction over murder, assault, and a host of other state crimes.

During the same period, Congress enacted the Post Office Act of 1872, which forbade mailing lottery tickets or obscene matter or using the mails to defraud. The postal legislation was consistent with federalism principles. The states lacked jurisdiction to regulate the postal system and thus were powerless to shield their residents from nationwide frauds, the perils of interstate gambling, or the introduction of offensive articles within their borders. Although use of the mails served as a jurisdictional hook that made fraud or gambling a matter of federal interest, use of the mails was also critical to multistate transactions conducted at arm's length. The postal legislation was thus auxiliary to state law enforcement efforts. It supplemented, rather than supplanted, state criminal law.

provisions. Mandatory minimums have recently emerged as the federal sentence du jour. See infra text accompanying notes 104-108.


29. 1866 Act, supra note 26, § 3. The Act granted the district and circuit courts concurrent jurisdiction over civil and criminal actions affecting those citizens. This allowed what were otherwise essentially state criminal cases to be prosecuted in federal court. The common law and statutory law of the state where the crime occurred controlled if federal law did not provide a suitable punishment.

30. In addition to directly granting federal courts concurrent jurisdiction over some state crimes, see supra note 29, the Acts indirectly assumed such jurisdiction by reaching conduct otherwise punishable by state criminal law but motivated by an intent to deprive the victims of their civil rights. See, e.g., United States v. Harris, 106 U.S. 629 (1883) (mob violence).

To the extent that the civil rights acts symbolized a national commitment to end racial discrimination, the federal courts were uniquely positioned to speak with a national voice.

31. Baker, supra note 20, at 514. The Postal Act was followed the next year by the Comstock Law, which forbade using the mails to send obscene books, contraceptives, or articles for procuring abortion. FRIEDMAN, supra note 19, at 135.

32. Without such legislation, a purveyor of fraudulent investments in western mines might exploit a nationwide “sucker list” through the mails with impunity. Schwartz, supra note 23, at 74. The victims could be scattered throughout the country, have relatively minor individual losses, and be unable to convince the local prosecutor to incur the expense of extraditing the malefactor. Id. Whether the local prosecutor could develop the proof needed to establish the true worth of an investment in a mine thousands of miles away is also subject to conjecture. Id.

33. See id. at 73-75.
The civil rights legislation, in contrast, entered what had theretofore been the exclusive domain of the states. It put the federal government in the business of enforcing state criminal laws because the states were unwilling to act. However noble their purpose, then, the civil rights acts indelibly altered the role of federal criminal jurisdiction and signaled the coming presence of a national police power.

B. The Culture of Mobility

The rise of federal regulatory crimes in the late-nineteenth century was inextricably intertwined with the emergence of a "culture of mobility." State statutes designed to protect the local economy became less and less effective as more and more problems crossed state lines. Apart from abolishing slavery, the South made little or no accommodation for emancipated slaves. RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF BROWN v. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY 44 (1976). Southern states denied the former slaves the right to vote, failed to provide for their education, enacted restrictive laws governing their movement and behavior, and generally excluded them from participation in civic life. Id. at 45-46.

Worse, still, Blacks were denied justice both by the police and by the courts. With the rise of the Ku Klux Klan and vigilantism in the mid- to late nineteenth century, Blacks could not feel safe. See FRIEDMAN, supra note 19, at 187-92. According to a NAACP report on lynching prepared in 1919, during the 30-year period when lynching was at its peak, lynching mobs killed more than 100 blacks per year. Id. at 190-91.

The Supreme Court's narrow construction of the Civil War Amendments, U.S. CONST. amends. XIII, XIV, XV, nullified much of the civil rights legislation enacted to implement their protections. See, e.g., United States v. Harris, 106 U.S. 629, 638 (1883) (the Fourteenth Amendment's guarantee of equal protection was designed to protect citizens from arbitrary and tyrannical action by the state; it does not authorize Congress to enact legislation protecting citizens against conspiracies to deprive them of the equal protection of the laws); United States v. Cruikshank, 92 U.S. 542, 554-55 (1875) (the Due Process and Equal Protection Clauses of the Fourteenth Amendment guarantee citizens freedom from encroachment on fundamental rights by the states; they do not confer authority on Congress to protect citizens against conspiracies to hinder the free exercise and enjoyment of those rights); United States v. Reese, 92 U.S. 214, 217-22 (1875) (rather than conferring a right of suffrage, the Fifteenth Amendment only prohibits states from denying the right to vote on account of race; it does not empower Congress to generally punish interference with the exercise of the elective franchise). See CHARLES FAIRMAN, 7 HOLMES DEVISE, supra note 14, at 225-73.

How vigorously the government enforced what remained intact is open to question. In the fiscal year ending in June 1889, for example, there were a total of 14,588 criminal prosecutions in the federal district courts, more than a third of which were for internal revenue offenses. Only 12 were classified as civil rights cases. FRIEDMAN, supra note 19, at 262.

See Baker, supra note 20, at 513-14 (describing the role of civil rights legislation and the 1872 Post Office Act in altering the federal government's powers with respect to the enforcement of criminal laws).

See FRIEDMAN, supra note 19, at 116-21.

Id. at 209.
state borders. Iowa could try to halt the spread of "Texas fever" by making it a crime to bring Texas cattle into the state without first keeping them for at least one winter in a locale as far north as Kansas or Missouri. It could also try to protect livestock from contagious diseases by forbidding knowingly driving diseased animals into the state. But at some point it would become clear that Iowa could not protect its livestock from every conceivable infection. A more powerful regulatory mechanism was needed to accomplish that.

At this juncture, Congress stepped in. In 1884 Congress forbade railroads and boat lines from accepting or transporting diseased livestock. Shortly thereafter, it enacted the Interstate Commerce Act and the Sherman Act. And by the turn of the century, Congress was fully poised to radically enlarge the scope and concept of federal criminal jurisdiction.

The first part of the twentieth century brought with it the Mann Act (prohibiting transporting a woman across state lines for illicit purposes), the Dyer Act (prohibiting transporting a stolen motor vehicle across state lines), the Volstead Act (just plain Prohibition), and statutes forbidding interstate transportation of lottery tickets, interstate transportation of obscene literature, and selling liquor through the mail. As these examples illustrate, Congress had begun to rely on the commerce power (with ever increasing regularity) to enlarge federal criminal jurisdiction. The advent of railroads, automobiles, and airplanes made state boundaries "increasingly porous."

38. Id. at 116.
39. Id. The latter statute forbade bringing into the state any sheep that had a contagious disease or "any horse, mule, or ass, affected by the diseases known as nasal gleet, glanders, or button-farcey." Id.
40. Id. This move also signaled the bloating of the federal bureaucracy, as Congress established a Bureau of Animal Industry under the Commissioner of Agriculture. Id.
41. Baker, supra note 20, at 517.
47. Act of Mar. 3, 1917, ch. 162, 39 Stat. 1202. Congress had earlier made liquor that was transported into a Prohibition state subject to the laws of that state. Act of Aug. 8, 1890, ch. 728, 26 Stat. 313. After the turn of the century, Congress made it an offense to transport liquor into a state where its use was prohibited. Act of Mar. 1, 1913, ch. 90, 37 Stat. 699.
48. Friedman, supra note 19, at 263.
If the constitutionality of commerce-based criminal jurisdiction was ever in serious doubt, the issue was fairly short-lived. In 1925 the Supreme Court upheld the constitutionality of the Dyer Act in *Brooks v. United States.*\(^49\) Writing for a unanimous Court, Chief Justice Taft spoke of elaborate interstate auto theft conspiracies that were beyond the power of state and local governments to control. The "radical change in transportation" wrought by the automobile had enabled "evil minded persons" to abscond with vehicles to locales remote from the scene of the crime.\(^50\) Laws like the Dyer Act were necessary because even though auto theft could be punished as larceny under state criminal law, the jurisdiction where the theft occurred was powerless to pursue the thief across state lines. Its "jurisdiction stopped at the border."\(^51\) By crossing the state line, the thief could defy hot pursuit by local authorities. But it was precisely at the border that federal jurisdiction began.

By the 1930s the federalization of American criminal law was in full swing. During this era Congress enacted the Lindbergh Act (prohibiting the transportation of a kidnapping victim across state lines),\(^52\) the Fugitive Felon Act (prohibiting interstate flight to avoid


\(^{50}\) 267 U.S. at 438. This "helps to conceal the trail of the thieves, gets the stolen property into another police jurisdiction and facilitates the finding of a safer place in which to dispose of the booty at a good price." *Id.* at 438-39.

Seven years later, the House debate on the Lindbergh Act echoed the same sentiments. Representative LaGuardia observed that the advent of modern transportation and communication facilitated escape, removal of the loot, and the dispersal of witnesses. This necessitated federal intervention because the country had passed the time when "crime was localized and escape was slow." 75 *Cong. Rec.* H13,282, 13,289 (daily ed. June 17, 1932).

\(^{51}\) FRIEDMAN, *supra* note 19, at 264.

Although it might be possible to extradite the thief if he were apprehended in another state, extradition laws were unwieldy and could be costly to invoke. Note, *The Fugitive Felon Act: Its Function and Purpose*, 1964 *Wash. U. L.Q.* 355, 357-58. In addition, the ability to extradite depended on the willingness of the state into which the stolen vehicle had been driven to apprehend the thief. *Id.*; see also Note, *The Scope of Federal Criminal Jurisdiction Under the Commerce Clause*, 1972 *LAW FORUM* 805, 806.

\(^{52}\) Ch. 271, 47 Stat. 326 (1932). The Act was amended in 1934 to make it a capital crime and to create a presumption that a state line had been crossed if the victim was missing for seven days. FRIEDMAN, *supra* note 19, at 266. That presumption vested the federal government with jurisdiction to investigate. Today, the presumption arises if the victim is missing more than 24 hours. 18 U.S.C. § 1201 (1988).

Congressional debate on the Lindbergh Act presaged the current discussion of the centralization of crime control responsibility. Representative Michener criticized the bill, which purported to deal with the crime of kidnapping but in reality dealt with transporting a kidnapping victim in commerce. 75 *Cong. Rec.* H13,283 (1932). He urged Congress to
prosecution for enumerated violent felonies), the National Firearms Act (regulating the sale of guns), the National Stolen Property Act (prohibiting the transportation of stolen property in interstate commerce), and statutes that punished robbing a national bank, extortion by telephone, telegraph or radio, and much more.

These developments were critical because they transformed what had been uniquely local concerns into national ones. Because "[t]wentieth century criminals had wheels and wings," crime was now perceived as an interstate problem beyond the power of states to effectively address.

Thus, it was inevitable that from the New Deal forward, Congress would continue down the road to federalized crime. But with the advent of the omnibus crime bill, the pace at which new crimes appeared on the books accelerated. Omnibus crime bills can be hundreds of pages long and contain an infinite number of provisions defining new crimes, revising existing laws, financing crime control and prison projects, and whatever else is on Congress's mind.

exercise caution in enacting more federal criminal laws that punish conduct the states can effectively address. His concerns included reposing more authority in Washington and giving the federal government burdens that it should not assume. Id. Although conceding that he would vote for the bill, he emphasized that "this must not become a precedent for more legislation giving the Federal Government concurrent authority with the States in enforcing police regulations and laws dealing with matters in which the States are primarily interested, and which can be properly dealt with by State action." Id. at H13,283-84.

Representatives LaGuardia and Woodruff, in contrast, emphasized the interstate nature of much criminal activity and the states' inability to enforce their laws beyond their borders. Id. at H13,289, H13,300. Putting the Lindbergh Act in contemporary context, Representative Woodruff argued that "[t]he Lincoln Steals an Automobile and takes it outside the State he can be apprehended and prosecuted by Federal officials [under the Dyer Act], but if he commits murder, robbery, kidnapping, or any other crime he is free to come and go so far as the Federal authorities are concerned." Id. at 13,300. Therein lies the slippery slope.

56. Ch. 304, 48 Stat. 783 (1934).
58. FRIEDMAN, supra note 19, at 267.
59. Id. at 266.
60. For example, the Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181, was more than 350 pages long. By the time the Violent Crime Control and Law Enforcement Act of 1994 was pared down to eliminate "pork," racial justice in death penalty cases, and a host of other ills, the bill was just under 100 pages long and contained 32 separate titles. They covered such disparate subjects as community policing, prisons, crime prevention, drug courts, violence against women, the death penalty, mandatory minimum sentences, firearms, criminal aliens, rural crime, and marketing scams directed at senior citizens. Pub. L. No. 103-322, 108 Stat. 1796 (1994).

At the same time, Congress steadily increased the authorized penalties for hundreds of crimes. To preserve the deterrent value of criminal fines, which inflation had eroded, it became necessary to increase authorized fine levels. To preserve political capital, it became necessary to increase the severity of prison terms. Congress simply could not resist the citizens’ demands to be “tough on crime” because crime had assumed the spotlight as a national political issue.

69. Cf. H.R. Conf. Rep. No. 760, 97th Cong., 2d Sess. 579 (1982) (explaining that it was necessary to increase authorized fines for tax crimes because the fines had not been changed for years and inflation had robbed them of their deterrent value).
70. During the latest round of sentence inflation, Congress required mandatory life imprisonment for defendants convicted of a serious violent felony if they have previously been convicted of two or more serious violent felonies, or one or more serious violent felonies and one or more serious drug offenses. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 70001, 108 Stat. 1796, 1982 (1994). The prior convictions may have been obtained in state and/or federal court. Id. Congress also conditioned states’ eligibility for prison construction grants on the enactment of stringent sentencing laws and the observance of more severe sentencing practices. See infra note 200.
71. Friedman, supra note 19, at 274. Herbert Hoover was the first President to mention crime in his inaugural address in 1929. Id. at 273. Observing that crime was on the increase, he proposed to establish a federal commission to study this phenomenon. This resulted in the creation of the Wickersham Commission, which in 1931 published 14 reports on various aspects of the crime problem. Id. Although most of the Commission’s recommendations went unheeded, id. at 274, the reports documented widespread use of police brutality to extract involuntary confessions and led to the demise of third degree interrogation techniques. See President’s Comm’n on Law Enforcement & the Admin. of Justice, The Challenge of Crime in a Free Society 93 (1967) (stating that following publication of the Wickersham reports, the Supreme Court issued several rulings
II. The Impact of Federalization on the Federal Justice System

A. The Dimensions of Federalization

The federalization of American criminal law is a multifaceted phenomenon. It has a snowballing effect. Enforcement of criminal laws requires resources at every step of the way—police officers to investigate and apprehend suspects, prosecutors to bring them to justice, public defenders to represent the indigent, court reporters to record hearings, trial judges to preside over the proceedings and sentence convicted defendants, probation officers to prepare sentencing reports and supervise unincarcerated offenders, appellate judges to hear criminal appeals, an entire prison system to house convicted offenders and defendants awaiting trial, a parole board to determine when an offender is ready for early release, a commission to establish sentencing guidelines, and specialized bureaucracies for specialized crimes and crime-fighting programs.

B. The Federal Prison System

The practical impact of the penchant to federalize crime is nowhere better illustrated than in the story of our federal prisons. In the 1800s the federal role in criminal law enforcement was so minor that, with the exception of facilities for miscreant soldiers and sailors, the...
government did not operate a single prison until the end of the century. Instead, it boarded federal prisoners at state and local jails at very little expense. In 1887, however, Congress made it illegal for states to contract out the labor of federal prisoners housed in their jails. Responding in kind, the states began imposing per diem charges for each federal prisoner they held, which in turn provided the incentive to establish a federal prison system.

As had been true of early congressional forays into substantive criminal law, the beginnings were modest and cautious. The government opened its first prison in 1895 and added two more in the early 1900s. Those three facilities composed the sum total of the federal prison "system" until 1925. But the number of federal prisoners to be housed was also modest—fewer than 2,000 in 1890 and about 3,000 by 1915. A comparison of state and federal prison populations in 1910 confirms that these figures represent a mere drop in the bucket. State penal facilities housed more than 35 times more prisoners (more than 66,000) than federal facilities held (a mere 1,900).

Then came a watershed year. Congress presaged the growth of a true prison system when it ushered in the Federal Bureau of Prisons in 1930. Between then and 1989, the number of federal prisons rose from 5 to 47, and the federal prison population grew from 13,000

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75. FRIEDMAN, supra note 19, at 269. The first federal prison was originally a military fort, Fort Leavenworth, in Kansas.
76. Id. In January 1877 federal prisoners accounted for half of the 50 inmates in the Alameda County jail in California. Id.
77. Id.
78. Id. In 1905 California charged the federal government forty cents per day per prisoner. Id.
79. Id.
80. Id.
81. Id. at 270.
82. Id.
83. Id. at 269. The Bureau was located within the Department of Justice.
84. FRIEDMAN, supra note 19, at 270.
85. Id. These were nonmilitary prisoners. There were an additional 13,000 military prisoners in 1930. By 1940 the number of nonmilitary prisoners had reached 20,000. Id.
to more than 53,000. Within the next five years alone, the number of federal correctional facilities nearly doubled. But the demand for more prison space is endless. The Bureau is slated to open nine new prisons in 1995 and to begin construction or construction planning at three other sites to relieve overcrowding and accommodate additional anticipated increases in the prison population. The system will house on average more than 92,000 offenders in facilities it controls in 1995. In addition, an average of more than 10,500 sentenced federal offenders will be housed in state and local jails and other contract facilities.

The federal prison system is a seemingly bottomless pit. It is the vortex of a self-perpetuating cycle in which an ever increasing number of federal offenders are placed (and will continue to be placed) in an ever increasing number of federal, state, and local penal facilities. How did we reach this sorry state of affairs?

C. Who Are These Federal Offenders?

I. The Government's War on Drugs

The federal government's "war on drugs" is the single most significant contributor to this self-perpetuating cycle. The drug war has skewed the federal criminal (and civil) justice system at every possible level. The question is whether the government will heed its lesson.

The first major push to eradicate drug trafficking was the Harrison Narcotic Drug Act, which was passed in 1914. The Act regu-
lated the production and use of opium and coca leaves and their derivatives.\textsuperscript{93} The Harrison Act was followed by the Narcotic Drugs Import and Export Act of 1922,\textsuperscript{94} which added cocaine to the list of prohibited drugs. The Marijuana Tax Act of 1937\textsuperscript{95} enlarged the class of controlled substances to include marijuana. Then came the Opium Poppy Control Act,\textsuperscript{96} which forbade unlicensed persons from growing opium poppies; a 1946 law that made synthetic opiates like methadone subject to the laws governing opium;\textsuperscript{97} the Narcotic Manufacturing Act of 1960,\textsuperscript{98} which established a licensing system for narcotic drug manufacturers; and 1965 amendments to the Federal Food, Drug, and Cosmetic Act,\textsuperscript{99} which focused on dangerous drugs like hallucinogens, barbiturates, and tranquilizers.

Congress overhauled this unwieldy patchwork of drug statutes in the Comprehensive Drug Abuse Prevention and Control Act of 1970.\textsuperscript{100} The Act classifies substances that had previously been defined as narcotics and dangerous drugs into five categories of controlled substances, based upon their potential for abuse and the extent of their accepted medical use.\textsuperscript{101} The Act criminalizes manufacturing, distributing, dispensing, and possessing controlled substances in violation of its comprehensive regulatory scheme.\textsuperscript{102}

A decade and a half later Congress took a no-holds-barred approach to drug crimes in the Anti-Drug Abuse Act of 1986,\textsuperscript{103} which increased penalties and instituted mandatory minimum sentences for

\textsuperscript{93} Ch. 1, 38 Stat. 785 (1914).
\textsuperscript{94} Ch. 202, 42 Stat. 596 (1922).
\textsuperscript{95} Ch. 553, 50 Stat. 551 (1937).
\textsuperscript{96} Ch. 720, 56 Stat. 1045 (1942).
\textsuperscript{97} Act of Mar. 8, 1946, ch. 81, 60 Stat. 38.
most drug offenses. The penalties are severe. A first time offender who is convicted of manufacturing, distributing, or possessing for distribution 100 kilograms of marijuana, for example, is subject to a mandatory minimum prison term of five years. A first time offender convicted of a like offense involving one kilogram of heroin or five kilograms of cocaine will receive a mandatory term of at least ten years. If the offender has two or more prior state and/or federal felony drug convictions, the penalty is a mandatory term of life imprisonment.

(2) Fighting the War on Drugs

Enactment of the Comprehensive Drug Abuse Prevention and Control Act of 1970 signaled the government's resolve to eradicate drug trafficking in this country. By 1973 drug enforcement had assumed such importance that it required a new bureaucracy, the Drug Enforcement Administration (DEA). Its mission is to restrict the supply of controlled substances through coordination with state, local, and other federal authorities. It seeks to immobilize major drug trafficking operations to the maximum extent possible and to prevent the

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105. Generally, the severity of the penalty is linked to the quantity of the controlled substance involved.

106. 21 U.S.C. § 841(b)(1)(B). The maximum term for this offense is forty years. Id.

107. Id. § 841(b)(1)(A). The maximum sentence for these offenses is life imprisonment. In both instances, the mandatory minimum is raised to twenty years if death or bodily injury ensues. Id. These mandatory penalties for first-time drug offenders are more severe than "sentences typically meted out to first-time robbers or rapists." Steven Wisotsky, Crackdown: The Emerging "Drug Exception" to the Bill of Rights, 38 Hastings L.J. 889, 904 (1987).


109. When the Harrison Act was passed, enforcement authority was vested in the narcotics division of the Prohibition unit of the Internal Revenue Service. A little over a decade later, the division was absorbed into the new Prohibition Bureau of the Treasury Department. By 1930 narcotics enforcement had been transferred to a newly created separate agency, the Federal Bureau of Narcotics, which was still located in the Treasury Department. Quinn & McLaughlin, supra note 92, at 599. In 1968 this Bureau and the Drug Abuse Control Bureau of the FDA were consolidated into the Bureau of Narcotics and Dangerous Drugs, a Justice Department agency. Id. at 605-06.
diversion of legally produced controlled substances into illicit channels.\textsuperscript{110}

Although the DEA remained the lead enforcement agency, the drug war's "insatiable appetite for resources and power"\textsuperscript{111} led to the proliferation of overlapping enforcement efforts by uncoordinated and uncooperative agencies. The problem became so serious by 1990 that Congress began adding special appropriations for Organized Crime Drug Enforcement (OCDE) to the federal budget.\textsuperscript{112} The OCDE is designed to coordinate the enforcement activities of the DEA, the Federal Bureau of Investigation (FBI), the Immigration and Naturalization Service (INS), the United States Marshals Service, the United States Customs Service, the Bureau of Alcohol, Tobacco and Firearms, the Internal Revenue Service (IRS), and the United States Coast Guard.\textsuperscript{113} By any account, that is an awesome list of federal police forces to assign to a common beat.

As the war on drugs escalated, federal enforcement efforts took on international dimensions. The DEA entered the realm of foreign investigations in an effort to gather intelligence about narcotics production and trafficking and to disrupt the production of controlled substances destined for the United States as close to the source as possible. Toward that end, the agency began assigning agents to foreign countries, principally in South America.\textsuperscript{114}

Because much of the illicit drug supply comes from other countries, drug interdiction at the most vulnerable borders of the United States inevitably became an integral part of the enforcement scheme. But since the South American DEA operations could not shut down illicit production and exportation of drugs and the Customs Service and the INS could not make United States borders impervious to il-

\textsuperscript{110} 1995 Budget, \textit{supra} note 83, at 594.

\textsuperscript{111} Wisotsky, \textit{supra} note 107, at 922.

\textsuperscript{112} \textsc{Senate Report}, \textit{supra} note 5, at 36. By 1994 the appropriation for this program alone was well over $350 million.

\textsuperscript{113} \textsc{Senate Report}, \textit{supra} note 5, at 34-36. If the Founding Fathers did not contemplate a national police power, \textit{see supra} text accompanying notes 14-17, they would surely be astonished by all of these federal police forces.

\textsuperscript{114} In 1992, 343 DEA special agents were assigned to 74 offices located in 50 foreign countries. \textsc{The White House, National Drug Control Strategy, A Nation Responds to Drug Use, Budget Summary 92} (Jan. 1992). The DEA's 1993 budget request included funding for an additional 53 special agents and 13 technical personnel to assign to Latin America in conjunction with the Andean Strategy. \textit{Id.} at 93.

\textit{See also} \textsc{Senate Report}, \textit{supra} note 5, at 39 (expressing concern that in addition to agents permanently assigned to Bolivia and Peru to conduct Operation SNOWCAP, the DEA had temporarily deployed 70 agents to support that operation).
licit importation of controlled substances, it "logically" followed that the DEA should try to catch the traffickers in between. Hence, United States drug interdiction on the high seas.\textsuperscript{115}

But the Coast Guard was ill-equipped to handle the job alone. Thus, Congress militarized civilian law enforcement in 1981 by allowing the armed services to supply equipment and personnel in aid of the cause.\textsuperscript{116} The Department of Defense has provided pursuit planes, helicopters, and other equipment to civilian agencies, and the Navy has used sophisticated radar planes to patrol coastal areas. Indeed, Navy vessels, including a nuclear powered aircraft carrier, have played a role in the interdiction effort.\textsuperscript{117}

With the war on drugs thus in high gear, it would be fair to say that "drug enforcement became the top priority, indeed the organizing focus, of the entire federal criminal justice system."\textsuperscript{118} Despite

\textsuperscript{115} See Wisotsky, supra note 107, at 892-94.

\textsuperscript{116} The Posse Comitatus Act prohibits the military from engaging in civilian law enforcement activities. 18 U.S.C. § 1385. But 1981 amendments to Title 10 of the United States Code permitted the military to gather intelligence and supply equipment and personnel at the request of law enforcement officials who have jurisdiction over drug and immigration offenses. See 10 U.S.C. §§ 371-378. The Defense Drug Interdiction Assistance Act later enlarged the military's authority to provide resources for drug interdiction. 10 U.S.C. § 371 et seq.

Some members of Congress wanted direct military participation in drug enforcement efforts, while others only wanted the military to play a backup role. At one point, a House bill to enhance international interdiction contained a provision that would have imposed a 45-day deadline on the President to "substantially halt the unlawful penetration of United States borders by aircraft and vessels carrying narcotics." H.R. 5484, 99th Cong., 2d Sess. § 208(b) (1986).

\textsuperscript{117} Wisotsky, supra note 107, at 893. The Navy deployed a task force of 69 ships in Central American waters in 1983. George Stein, Naval Task Force Enlists in Drug War, MIAMI HERALD, Aug. 24, 1983, at 13A. And for the first time in recent history, a Navy destroyer fired upon a civilian vessel, all in pursuit of the interdiction effort. Liz Balmaseda, Navy Bullets Riddle Pot-Smuggling Ship, MIAMI HERALD, July 17, 1983, at A1. Cf. U.S. Warships May Join Drug Battle Off Colombia, WASH. POST, Nov. 24, 1989, at A27 (describing a proposal to deploy warships to the Colombian coast); Melissa Healy, Navy May Send Ships to Fight Colombia Drugs, L.A. TIMES, Nov. 23, 1989, at A1 (same); Michael Isikoff, Civil Air Patrol Enlists in Drug War, WASH. POST, Apr. 20, 1989, at A17 (describing the deployment of 3,000 Civil Air Patrol pilots to fly "noncombat" missions for the Air Force to identify cannabis plants); J. Frazier Smith, National Guard Units Enlist in Drug War, USA TODAY, Mar. 31, 1989, at 1A (reporting that the states will share $40 million in federal funds appropriated to finance the participation of National Guard units in the drug war).

\textsuperscript{118} Wisotsky, supra note 107, at 898. The drive to escalate the war on drug traffickers reached a new level of mean spiritedness in the proposed Arctic Penitentiary Act of 1982, which would have established a prison facility in Alaska for federal and state offenders convicted, \textit{inter alia}, of distributing narcotics to a person under 21 years of age. All offenders sentenced to the Arctic Penitentiary would have served a term of life without parole. H.R. 7112, 97th Cong., 2d Sess. (1982).
these extraordinary efforts, the drug problem is very much with us today. But the allocation of all of these resources to federal drug enforcement has nonetheless produced dramatic effects.

Between 1974 and 1990, for example, while the total number of federal criminal defendants rose slightly less than seventeen percent, the number of drug defendants increased more than seventy-five percent.\textsuperscript{119} During that same time the total number of federal criminal convictions rose nearly twenty-nine percent, while the number of drug convictions increased more than ninety-six percent.\textsuperscript{120}

\begin{figure}[h]
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\includegraphics[width=\textwidth]{Figure1.png}
\caption{United States District Court Total Drug Defendants}
\end{figure}


The data for the period between 1980 and 1990 is even more dramatic. While the overall rate of criminal cases filed in United States District Courts rose just sixty-nine percent during that decade, the number of drug cases increased nearly three hundred percent.\textsuperscript{121}

\textsuperscript{119} \textit{Federal Offenders in the United States Courts 1986 through 1990}, at 25.
\textsuperscript{120} \textit{Id.}
\textsuperscript{121} In his 1989 Year-End Report, Chief Justice Rehnquist observed that in some districts, drug cases constitute almost two-thirds of all new criminal filings. Hon. William H. Rehnquist, \textit{1989 Year-End Report on the Judiciary 4}, reprinted in \textit{The Third Branch} (Administrative Office of the U.S. Courts), Jan. 1990, at 1. Cf. Michael Tackett, \textit{Drug War Chokes Federal Courts; Assembly-line Justice Perils Legal System}, \textit{Ch. Trib.}, Oct. 14, 1990, at 1 (the seven federal district judges in the Western District of Texas handle more than three times the national average of cases and nearly triple the average number of trials; between 1988 and 1989 the District experienced an 80% increase in the number of drug defendants).
Thus, even if new drug offenders step in to take their place, federal drug enforcement efforts have succeeded in getting an unprecedented number of drug traffickers and users off the streets.

(3) The Price of Good Intentions

As might have been expected, the results are not cost free. In addition to consuming a tremendous outlay of resources, the drug war has had an insidious effect on the federal justice system. The influx of thousands of new drug prosecutions attributable to this remarkable enforcement effort threatens to overwhelm the federal courts. In the local District of Columbia courts, for example, felony drug prosecutions rose five hundred percent in four years, and felony drug convictions rose more than six hundred fifty percent.

When courts are compelled to absorb so much so quickly, what would otherwise be ripple effects become major dislocations. Adding all of these cases to the courts' dockets compels judges to reallocate the way they use their time in countless important ways. For example, the Speedy Trial Act requires that courts give criminal cases priority. Thus, if drug cases are not handled expeditiously, they face dismissal. But giving thousands of drug cases priority must be done at the expense of civil justice, which becomes a casualty of the war on drugs. That, in turn, diminishes respect for the courts and prevents

122. In the view of one commentator:

The publicized conviction of a drug dealer, by instantly creating a vacancy in the lucrative drug market, has the same effect as hanging up a help-wanted sign saying, "drug dealer needed—$5,000 a week to start—exciting work."

123. Id. at 4. See also REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 35 (1990) [hereinafter FEDERAL COURTS STUDY] (stating that "[t]he federal courts' most pressing problems . . . stem from unprecedented numbers of federal narcotics prosecutions").

124. Wald, supra note 122, at 5.


126. "At some point, the war on drugs will be a casualty of itself. Overload causes backlog. Backlog threatens timely prosecution and, under the Speedy Trial Act, can lead to dismissals." FEDERAL COURTS STUDY, supra note 123, at 36.

127. Id. The Federal Courts Study Committee found that some districts with particularly large drug dockets are "virtually unable to try civil cases" and that the situation will only worsen in the future. Id. See also Tackett, supra note 121 (describing a major environmental case filed by the state of Florida in June 1986 that had not been tried by October 1990 because the criminal caseload crowded it off of the trial calendar). The average time it took for federal civil cases to go to trial increased from 18 to 21 months between 1991 and 1992. Robert R. Raven, Don't Wage War on Crime in Federal Courts, THE RE-
them from performing important and historical roles.  

The problem is exacerbated by the piling on of mandatory minimum sentences. Historically, eighty-five to ninety percent of federal criminal cases are resolved through plea bargains. But a drug defendant who faces a lengthy mandatory minimum prison term has little incentive to negotiate a guilty plea, even if the prospect of acquittal is dim. Thus, it is not just the volume of new drug filings that burdens the courts. It is the reality that a high percentage of them result in jury trials.

The impact of these drug filings on the court system is not limited to the trial court level. While the total number of criminal appeals in the federal system rose about one hundred thirty percent between April 1995 and April 1995, it is not just the volume of new drug filings that burdens the courts. It is the reality that a high percentage of them result in jury trials.

128. "The careful and considered decisions courts should be making about societal protection and individual liberties will be drowned in a sea of drug arrests." Wald, supra note 122, at 6.

129. See supra notes 103-108 and accompanying text. Although more than 60 statutes impose mandatory minimum sentences, few are actually used in practice. Approximately 94% of all mandatory minimum terms are imposed under four statutes: 21 U.S.C. § 841 (manufacture and distribution of controlled substances); 21 U.S.C. § 844 (possession of controlled substances); 21 U.S.C. § 960 (importing or exporting controlled substances); and 18 U.S.C. § 924(c) (possessing a firearm during a drug or violent crime). Fewer than half of the 60 statutes were ever invoked between 1984 and 1989. U.S. SENTENCING COMM'N, SPECIAL REPORT TO CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 10 (Aug. 1991) [hereinafter SENTENCING REPORT]. Notwithstanding that fact, nearly 60,000 defendants were sentenced to mandatory minimum sentences during roughly that same period. Id. at 13.

A recent survey revealed that more than 50% of appellate judges and nearly 70% of district judges strongly support the repeal of most, if not all, mandatory minimum sentences. Judges Irked by Tough-on-Crime Laws, ABA J., Oct. 1994, at 18.

130. Wald, supra note 122, at 9.

131. FEDERAL COURTS STUDY, supra note 123, at 36. The Courts Study Committee found that drug cases account for some 44 percent of federal criminal trials and that most of them are jury trials. Id. See also SENTENCING REPORT, supra note 129, at 93-103 (of judges expressing negative comments about mandatory minimums, "result in more trials" was the third most frequent criticism; among Assistant U.S. Attorneys with negative views, that was by far the most frequent criticism; among defense attorneys who had unfavorable views, that was a close second to "too harsh"). See also id. at 57-60 for an analysis of case processing when the underlying conduct fits within the mandatory minimum statute.

The district courts are further burdened by federal Sentencing Guidelines, which also disrupt the plea negotiation process, see Wald, supra note 122, at 9; FEDERAL COURTS STUDY, supra note 123, at 137, and add to the length of plea and sentencing hearings, see FEDERAL COURTS STUDY, supra note 123, at 137. Federal district judges surveyed by the Federal Courts Study Committee reported that since the Guidelines went into effect, guilty plea and sentencing hearings consume 25 to 100 percent more time than did pre-guideline hearings. Half of the judges surveyed reported that the Guidelines had contributed to a decrease in the percentage of guilty pleas. Id.
1974 and 1990, the number of drug appeals more than tripled. Drug cases now account for almost fifty-five percent of all criminal appeals. Thus, whereas the District of Columbia Circuit Court of Appeals previously spent five percent of its time on criminal cases, it now devotes twenty-five percent of its time to drug cases alone.

132. U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 557 (1991); U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 450 (1987). The Supreme Court seems to be the only court unaffected by the priority federal officials have accorded drug enforcement. Although the number of petitions for review increased 35% between 1974 and 1990, the number of criminal petitions increased slightly less than 7%. The number of criminal petitions actually granted by the Court declined nearly 39%. U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 559 (1991); U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 603 (1975).

133. Wald, supra note 122, at 5. A high percentage of criminal appeals are Sentencing Guideline appeals. In its infinite wisdom, Congress provided for appeals of sentences by both the government and the defendant to resolve disputes about whether the trial judge misapplied or made an unwarranted departure from the applicable guideline rule. 18 U.S.C. § 3742(a)-(b). Cf. HENRY J. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 36 (1973) ("I have not yet mentioned the worst spectre of all—appellate review of sentences. . . . I would hope there will be enough good judgment in Congress to realize that adoption of such a measure would administer the coup de grâce to the courts of appeals as we know them.").

Although the appellate courts have yet to succumb, Sentencing Guideline appeals have added a significant burden to their dockets. While the total number of criminal appeals is rising steadily, the increase is attributable entirely to the Guidelines. The number of non-Guideline appeals decreased from 5,700 in 1988 to just under 1,700 in 1991. During that same time, the number of Guideline appeals increased from 225 to 8,200. Thus, in 1991, more than 80% of the nearly 10,000 criminal appeals were Guideline appeals. ADMINISTRATIVE OFFICE OF THE U.S. COURTS, 1991 ANNUAL REPORT OF THE DIRECTOR 83 tbl. 3 (1991).
If the war on drugs has threatened the quality of civil and criminal justice in the courts, its effect on prison populations has been "cataclysmic." Between 1980 and 1990, the federal prison population...
more than doubled.\textsuperscript{135} Between 1990 and 1995, it almost doubled again.\textsuperscript{136} Something is out of control.

\textbf{Figure 3}


\begin{figure}
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\caption{Graph showing the federal prison population from 1960 to 1991.}
\end{figure}


\begin{footnotesize}
\begin{enumerate}
\item Although this Article will be published before the 1995 year-end figures are available, projected increases in the federal prison population over this period range from about 80 to 90\%. \textit{Compare} U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS 1992, at 621 tbl. 6.68 (projecting a 1995 prison population of roughly 104,000) \textit{with} Theresa Walker Karle & Thomas Sager, \textit{Are the Federal Sentencing Guidelines Meeting Congressional Goals?: An Empirical and Case Law Analysis}, 40 EMORY L.J. 393, 418 (1991) (projecting a 1995 prison population of nearly 117,000).
\end{enumerate}
\end{footnotesize}
D. Why Are These Offenders in the Federal System?

In view of the priority that drug enforcement receives at the federal level, the magnitude of the enforcement efforts and the resulting dislocation of resources, one might assume that the exercise of federal jurisdiction is demonstrably more effective or efficient than state law enforcement. To the extent that particular offenses have interstate or international characteristics, that would surely be true. The states lack jurisdiction to pursue the malefactor beyond their borders.

But can the same be said of run-of-the-mill drug crimes? A review of the record reveals that prosecutorial practices in small drug cases vary widely from district to district. In the Southern District of California in 1992, for example, federal prosecutors obtained two hundred convictions for simple possession. Those cases represented fourteen percent of the court's caseload that year. In contrast, in the neighboring Central District of California, prosecutors obtained only two convictions for simple possession. In a bizarre turn of events, the Southern District of New York observes the practice of designating one day each week as "federal day." Everyone who is arrested for a drug offense by the local police on that day is charged with a federal rather than state drug crime. And in another district, almost every case involving crack cocaine is prosecuted in federal court.

Moreover, some of these drug trials do not resemble true federal trials. Although the presiding judge and the criminal statute under which the defendant is charged are federal, a state prosecutor who has been designated as a federal prosecutor may try the case, and all of


139. Sara Sun Beale, Report on Federal Criminal Caseload/Scope of Federal Criminal Jurisdiction, FEDERAL COURTS STUDY COMMITTEE, SUBCOMMITTEE ON WORKLOAD WORKING PAPER at 7 (1990) [hereinafter Beale, Report]. Senator Biden introduced legislation that would have created a national federal day each month to bring all locally arrested drug offenders into the federal system. Bishop, supra note 138, at B16.

the witnesses the prosecution calls may be state and local law enforcement officials.\textsuperscript{141}

What is gained by federalizing these crimes? The federal courts are literally flooded with minor drug cases.\textsuperscript{142} Yet the states are scarcely unable or unwilling to act. Since the 1970s the states have experienced a parallel increase in drug enforcement activity. In 1988 state law enforcement officers made more than one million drug trafficking arrests.\textsuperscript{143} That same year more than 100,000 defendants were convicted on state drug trafficking charges.\textsuperscript{144} In 1992 nearly a third of all state felony convictions were for drug crimes.\textsuperscript{145}

Although the increase in drug arrests puts a strain on state prosecutors' offices, there is no evidence that they are functioning less effectively. In fact, in some instances there is evidence to the contrary. A survey of state prosecutors in high drug arrest areas revealed that many responded by developing new and innovative programs for managing heavy drug caseloads.

Consider, for example, drug arrest dispositions for Los Angeles, Manhattan, San Diego, and Washington, D.C. for the years 1982 and 1987. In all four cities—all of which experienced a significant increase in drug trafficking and use in the mid-1980s when crack cocaine appeared—the prosecutors responded by indicting a higher percentage of defendants arrested for felony drug crimes.\textsuperscript{146}

\begin{table}[h]
\centering
\begin{tabular}{|c|c|c|}
\hline
Jurisdiction & 1990 & 1992 \\
\hline
State & 274,613 & 280,232 \\
\hline
Federal & 16,311 & 18,698 \\
\hline
\end{tabular}
\caption{State and Federal Convictions for All Felony Drug Offenses}
\end{table}

\textsuperscript{141} Id.
\textsuperscript{142} Federal Courts Study, supra note 123, at 36.
\textsuperscript{143} U.S. Dep't of Justice, Bureau of Justice Statistics, Sourcebook of Criminal Justice Statistics 1989, at 418.
\textsuperscript{144} U.S. Dep't of Justice, Bureau of Justice Statistics, Sourcebook of Criminal Justice Statistics 1991, at 544 tbl. 5.46.
\textsuperscript{146} Barbara Boland & Kerry M. Healey, U.S. Dep't of Justice, Office of Justice Programs, National Institute of Justice, Prosecutorial Response to Heavy Drug Caseloads: Comprehensive Problem-Reduction Strategies 1 (1993) [hereinafter Heavy Drug Caseloads]. See also Jan Chaiken et al., U.S. Dep't of
Although the increase in the number of felony arrests was dramatic, the number of felony drug convictions was disproportionately higher. And the judges who sentenced drug defendants imposed prison terms at the same or a greater frequency than they had in the past. In consequence, although felony drug arrests increased one hundred thirty-six percent over the five-year period, the number of drug felons sentenced to prison increased by three hundred seventeen percent. Thus, those arrested for drug felonies in 1987 were more than twice as likely to go to prison as those arrested in 1982.\textsuperscript{147}

If the states are enforcing their laws, and it seems that they are, why are so many small drug cases made matters of federal concern? Why is the federal government duplicating state drug enforcement efforts, inundating federal courts with cases that could (and should) be tried in state courts?\textsuperscript{148}

There are no simple answers, but it is possible to identify some contributing factors. As an initial matter, federal criminal dockets have been “more subject to the changing winds of politics, to fashions and movements” than those of the states.\textsuperscript{149} Although historically state criminal dockets reflect a steady flow of assault, burglary, theft, and kindred crimes, the federal docket is “all fits and starts.”\textsuperscript{150}

Prohibition swelled federal dockets in the early part of the century. Between 1921 and 1933, more than (and in some years well over) half of the cases on the criminal docket were Prohibition prose-
cutions. The number of Prohibition cases peaked in 1932 when nearly 66,000 prosecutions were commenced.\textsuperscript{151} When Prohibition fell by the wayside, other concerns of the day stepped in to take its place. Auto theft, which later constituted the largest single category of federal criminal cases, waned as a pressing concern by 1973, when an enormous increase in the number of narcotics cases had occurred. Thus, federal criminal law "has been more ancillary, less fundamental in its focus"\textsuperscript{152} than has the law of the states.

A closely related factor is what Congress has chosen to criminalize.\textsuperscript{153} Many federal criminal statutes overlap with or merely duplicate state law prohibitions unrelated to any substantial federal interest.\textsuperscript{154}

\textsuperscript{151} Edward Rubin, \textit{A Statistical Study of Federal Criminal Prosecutions}, 1 \textit{Law \& Contemp. Probs.} 494, 497 (1933-34). The total number of federal prosecutions in 1932 was just over 92,000. \textit{Id.}

Between 1913 and 1932, the peak of Prohibition enforcement, federal police protection costs rose tenfold, while total federal governmental expenditures rose only about fourfold. Baker, \textit{supra} note 20, at 583-84 n.437. With the demise of Prohibition, federal police expenditures dropped in 1936 to little more than half of what they had been in 1931, while overall federal expenditures nearly doubled. \textit{Id.}

The only category of prosecutions that competed briefly with Prohibition cases were war cases (i.e., prosecutions involving selective service, trading with the enemy, and the like), which peaked in 1920 at almost 20,000, compared with 72,000 Prohibition prosecutions. Rubin, \textit{supra}, at 496.

\textsuperscript{152} \textit{Friedman, supra} note 19, at 268.

\textsuperscript{153} The Violent Crime Control and Law Enforcement Act of 1994 opens a new chapter on federalization issues. The Act federalizes drive-by shootings in furtherance of a major drug offense. Pub. L. No. 103-322 § 6008 (1994). But drive-by shooting is a matter of federal interest only if the actor shoots into a crowd of two or more people. The Act also federalizes participating in a criminal street gang whose members engage in a continuing series of offenses—including serious federal or state controlled substances felonies and federal or state violent felonies. \textit{Id.} § 150001.

\textsuperscript{154} The federal carjacking statute, 18 U.S.C. § 2119 (Supp. V 1993), is the quintessential example. The statute was enacted in response to a vicious auto theft in Maryland in which a woman was dragged to her death by her car after her arm became tangled in her seatbelt outside the car. Although the crime received national media attention, it was otherwise purely local. Local authorities successfully apprehended, convicted, and sentenced the offenders to life imprisonment. Graciela Sevilla, \textit{Basu's Slayer Sentenced to Life Without Parole}, WASH. POST, Aug. 19, 1993, at B1; Graciela Sevilla, \textit{Basu Case Defendant Gets Life; Judge Cites Fatal Carjacking's Legacy of "Distrust, Fear and Rage"}, WASH. POST, June 30, 1993, at B1; \textit{Senate Passes Carjacking Bill, Sends It to Bush}, L.A. TIMES, Oct. 9, 1992, at A24 [hereinafter \textit{Carjacking Bill}].

Justice Department policy also contributes to the high number of drug cases in federal courts. For example, while it would be appropriate to decline to prosecute solely because of insufficient evidence, it would not be appropriate to decline based on any other single factor, "absent unusual circumstances." Thus, prosecutors should not decline to prosecute solely because the amount of the controlled substance involved is minuscule. That is "only one of several factors" to be considered. And for purposes of determining the relative effectiveness of state and local prosecutions, the policy directs prosecutors to consider state penalties for the offense, state judges' customary sentencing practices, and applicable state parole eligibility standards.

The Justice Department's articulated policy makes it clear that the Department takes an expansive view of its jurisdiction. It makes no effort to channel prosecutorial discretion toward cases that

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The federal carjacking statute uses interstate commerce as its jurisdictional base. The statute applies to the armed taking of a motor vehicle that has been transported, shipped, or received in interstate commerce (virtually all motor vehicles), by force or violence. 18 U.S.C. § 2119. Thus, the statute applies to purely intrastate crimes and expands federal jurisdiction beyond where it is needed.

155. The United States Attorneys' Manual identifies eight factors to be considered in deciding whether a drug case should be pursued as a federal prosecution or be referred for state or local prosecution. They are:

- (1) sufficiency of the evidence;
- (2) degree of federal involvement;
- (3) effectiveness of state and local prosecutors;
- (4) willingness of state or local authorities to prosecute cases investigated primarily by federal agents;
- (5) amount of controlled substances involved;
- (6) violator's background;
- (7) possibility that prosecution will lead to disclosure of violations committed by other persons; and
- (8) the district court's backlog of cases.

UNITED STATES ATTORNEYS' MANUAL § 9-101.200.

Although the policy encourages federal prosecutors to cooperate with state and local prosecutors, it cautions them to exercise care in determining which jurisdiction is most appropriate in view of the government's "significant responsibilities" in the drug enforcement sphere. Id. ¶ F. The policy does, however, recognize that in some instances a state prosecution would be appropriate even though substantial federal interests exist.

156. Id. ¶ A.
157. Id.
158. Id. ¶ C.
159. Congress clearly encourages the view that federal law enforcement agencies should play a major role in everyday policing. If there were any doubt on that point, the Senate report accompanying the 1995 federal budget dispels any possible ambiguity. After proclaiming that the country is experiencing "a law enforcement emergency," the report urges United States Attorneys to make the restoration of 123 Assistant U.S. Attorneys' slots, lost earlier because of a budget freeze, a top priority. That is imperative, according to the report, "if U.S. Attorneys are to continue to prosecute America's most violent offenders." SENATE REPORT, supra note 5, at 29.

The budget also includes funds to support the hiring of additional FBI agents to enable the agency to expand its efforts against violent crime. Id. at 36. The report supports the FBI's plans to reassign up to six hundred agents to street assignments because that
have interstate or international dimensions, involve organized crime, or involve large quantities of drugs. Given crowded state dockets and generally more lenient state drug penalty provisions, "these directives are consistent with federal prosecution of a very large number of drug cases." \(^{160}\) Sadly, "[t]he principal factor limiting federal drug prosecutions has not been theory, but rather resources." \(^{161}\)

The policy’s reference to state penalties and sentencing practices suggests another dynamic at work. Prosecutors may be making decisions on the basis of which jurisdiction will put the defendant in the most disadvantageous position. \(^{162}\) As noted above, penalties for state drug offenses are relatively light when compared with their sometimes draconian federal counterparts. Thus, the decision whether to retain federal jurisdiction or refer the case to the state is critical. \(^{163}\)

Similarly, the government might choose to retain a case for federal prosecution because of more lenient federal standards governing the issuance of search warrants, the granting of permission to engage in electronic surveillance, and the use of informants. \(^{164}\) Furthermore,

"will greatly enhance efforts to investigate violent crimes, gangs, health care fraud, drug trafficking, and terrorism." \(\text{Id. at 37}\).

These statements contain a bit of hyperbole. Empirically, only 5% of the more than 38,000 offenders newly committed to federal prison in 1991 were convicted of violent crimes. U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, NATIONAL CORRECTIONS REPORTING PROGRAM, 1991, at 53, 55. In contrast, 30% of the more than 400,000 offenders newly committed to state prison in 1991 were convicted of violent crimes. \(\text{Id. at 7, 18}\).


161. \(\text{Id.}\).

162. Due process challenges to such tactics generally fall on deaf ears. In United States v. Batchelder, 442 U.S. 114, 125 (1979), the Court held that just as the defendant has no due process right to choose which of two overlapping statutes the prosecutor must invoke, he has no constitutional right to choose the penalty to which he is subject. That principle has been extended in this context to the choice of forum in which the defendant will be prosecuted. United States v. Ucciferri, 960 F.2d 953, 954 (11th Cir. 1992). As long as the prosecutor does not discriminate against any class of defendants, the decision regarding what and where to charge lies within the sound exercise of prosecutorial discretion.

163. In United States v. Williams, 963 F.2d 1337 (10th Cir. 1992), for example, two young defendants were federally prosecuted for distributing and possessing for distribution crack cocaine. Under federal law, they were subject to a mandatory minimum sentence of ten years, and the probation officer calculated their respective Sentencing Guideline ranges as 13-15 years and 15-19 years. 963 F.2d at 1342. Had they been prosecuted under state law, they would have been subject to an indeterminate sentence of 1-15 years and, under the state’s nonbinding sentencing matrix, would likely have been sentenced to a maximum of 18-20 months. United States v. Williams, 746 F. Supp. 1076, 1079 (D. Utah 1990), rev’d, 963 F.2d 1337 (10th Cir. 1992).

it has the tactical advantages of a nationwide subpoena power, contempt and immunity powers, and forfeiture authority.\textsuperscript{165}

Another prosecutorial practice that brings more drug cases into the system is transferring charges originally filed in state court to federal court.\textsuperscript{166} That raises the spectre of prosecutors using the threat of federal prosecution to coerce state defendants to accept state plea bargains.\textsuperscript{167}

There are other law enforcement strategies designed specifically to bring state offenders into the federal system as well. In 1991, for example, the Justice Department launched Project Triggerlock, a major effort to use federal firearms laws against violent offenders. The avowed purpose was to federally prosecute "[v]iolent offenders typically prosecuted in State court" in order to capitalize on the availability of federal mandatory minimum sentences without the possibility of parole.\textsuperscript{168} During the first six months of the operation, more than 2,600 defendants were charged with federal firearms violations.\textsuperscript{169}

\section*{III. Is There Hope for the Future?}

As Project Triggerlock illustrates, the impending crisis in the federal justice system is attributable to more than just drug enforcement. It is the product of a pervasive failure to recognize that federal courts are an exhaustible resource designed to play a specialized role in the justice system. It is also partly a function of the federal government's taking on a major responsibility for maintaining everyday law and order. That in turn is a function of an unproven assumption that the federal government can do a better job than the states. And it is the result of the all too irresistible urge to do something politically popular.\textsuperscript{170}

\begin{itemize}
  \item \textsuperscript{165} Federal Courts Study, \textit{supra} note 123, at 38 (dissenting statement of Mr. Dennis, joined by Congressman Moorhead).
  \item \textsuperscript{166} See, \textit{e.g.}, United States v. Ortiz, 783 F. Supp. 507, 509 (C.D. Cal. 1992).
  \item \textsuperscript{167} Cf. \textit{ Petty Pusher Goes Out Big Time}, PHILA. DAILY NEWS, July 17, 1992, at 7 (state drug defendant who rejected a plea bargain that would result in a sentence of four years and who asked to go to trial was charged with a federal drug crime and was sentenced to life without parole; the U.S. Attorney and state prosecutor said the result in this case "should cause many more defendants, who are in fact guilty, to plead guilty in state court to avoid [having] their cases . . . transferred to federal court").
  \item \textsuperscript{168} 1991 ATT'Y GEN. ANN. REP. 19 (1991).
  \item \textsuperscript{169} Id. The six month number almost equalled the number of defendants charged with weapons offenses in all of 1989. \textit{U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS} 1991, at 500 tbl. 5.15.
  \item \textsuperscript{170} Although it has been suggested that there is little, if any, political opposition to federalizing criminal law, Baker, \textit{supra} note 20, at 584, the move to federalize has some
\end{itemize}
If the federal justice system is to function effectively and continue to dispense justice, the legislative and executive branches of government must exercise restraint. In particular, Congress must show more regard for the states. In enacting death penalty provisions for dozens of crimes, for example, Congress chose to override the decisions of fourteen states and the District of Columbia to ban capital punish-


Similarly, the National Conference of State Legislatures is concerned about needless federal invasion of jurisdiction in areas for which states traditionally assume responsibility. Id. at 446, 448 (statement of Chuck Hardwick, Vice Chairman of the Law and Justice Committee of the National Conference of State Legislatures). The Conference advocates state retention of primary responsibility for and jurisdiction over criminal activity. Id. at 447. See also William Claiborne, States Wary of Anti-Crime Bill; Legislators Balk at Measure's Costs, Requirements, WASH. POST, July 29, 1994, at A11; Moore, supra note 1.


The Justice Department took issue with several provisions of the Crime Bill, including the D'Amato proposal to federalize most state crimes committed with a gun, see infra note 183, and the broadly worded street gang provision. Jamie S. Gorelick, Luncheon Address (May 20, 1994), reprinted in American Law Institute, Remarks and Addresses at the 71st Annual Meeting 69, 80 (1994) [hereinafter Gorelick Address].

FBI Director Louis Freeh also criticized the Crime Bill, which would make FBI agents responsible for investigating drive-by shootings, domestic abuse, youth gang participation, selling guns to juveniles, and other street crimes. These crimes are typically investigated by state and local police whose training is different than that required to investigate complex financial fraud and international terrorism. "Rapid, unchecked federalization of criminal activity could overwhelm the limited resources of federal law enforcement agencies, including the FBI," he said. FBI Criticizes Trend Toward "Federalizing"; Agents Don't Want to Be Street Cops, HOUS. CHRON., Dec. 19, 1993, at 2.


Congress was clearly aware that it was at cross-purposes with the considered policy of those states. Yet the demand for “toughness” on crime carried the day.

Congress should also resist the temptation to view federal crimes as interstitial gap fillers. The Violence Against Women Act, for example, punishes crossing a state line with intent to injure or harass a spouse or intimate partner if the actor intentionally commits a crime of violence that injures the spouse or partner. After concluding that local law is inadequate to protect women, one representative identified an additional reason to pass the Act. “The bill also fills significant gaps in some existing state laws,” including the crime of rape.


Representative Gekas had so little regard for important state policy choices that he offered an amendment to the 1994 Act that would have required cities and towns that receive community-based policing grants to authorize the death penalty for defendants convicted of killing a police officer. The amendment was killed by a voice vote. Report on Markup of H.R. 3355, Violent Crime Control and Law Enforcement Act of 1994 (Pub. L. No. 103-322 approved Sept. 13, 1994) in House Comm. on Judiciary, Oct. 28, 1993 (markup number 100252), available on 1994 Legi-Slate, Inc., electronic data base.

174. The statutory procedure for implementing a federal death sentence is the procedure prescribed by the law of the state in which the crime occurred—unless the state has no death penalty procedure. In that event, the court will select another state that provides for implementation of a death sentence, and the sentence will be carried out in that state in accordance with its procedures. Pub. L. No. 103-322, § 6002 (codified as amended at 18 U.S.C. § 3596). Congress also contemplated the use of state and local facilities for implementing the sentence. Id. (codified as amended at 18 U.S.C. § 3597).

175. Id. § 40221 (codified as amended at 18 U.S.C. § 2261). The Act also criminalizes crossing a state line to engage in conduct that violates protective orders that relate to protection against credible threats of violence, repeated harassment or bodily injury, or conduct that would violate the order if it were committed in the jurisdiction in which the order was issued. Id. (codified as amended at 18 U.S.C. § 2261).

In addition, the Act creates a civil rights cause of action for victims of gender motivated violence. The provision grants federal and state courts concurrent jurisdiction over the cause of action. Id. § 40302 (codified as amended at 42 U.S.C. § 13981). The National Conference of State Chief Justices criticized the Act for federalizing divorce law. Moore, supra note 1.

Regardless of one’s views on how expansively state law should define the crime of rape, it is highly questionable whether this reasoning is consistent with principles of federalism. It is an overt attempt to substitute the judgment of Congress for those of state legislatures and courts on a matter peculiarly within the domain of the states.

Congress should also refrain from tacking on marginally relevant jurisdictional elements to bring matters of primarily local interest into the federal sphere. Thus, for example, Congress should avoid using interstate commerce as a jurisdictional hook to federalize domestic abuse or invoking its power to regulate controlled substances in order to federalize drive-by shootings and participation in local street gangs. Statutes such as these should be narrowly drawn to address situations in which federal prosecutorial resources can make unique contributions to state and local law enforcement efforts.

Congress should heed Chief Justice Rehnquist’s warning that “we can no longer afford the luxury of state and federal courts that work at cross-purposes or irrationally duplicate one another.” The state and federal justice systems are interdependent, and there is a real need to achieve a balance between their respective jurisdictions. Federal courts should be viewed as “distinctive forums of limited jurisdiction, meant to complement state courts rather than supplant


178. See supra notes 154 and 170. The issue is not whether violent crimes should be punished. It is whether the federal system should exercise overlapping jurisdiction with the states.

179. A draft report of the Judicial Conference’s Committee on Long Range Planning recommends that Congress should repeal existing criminal provisions that do not serve an essential federal purpose. COMMITTEE ON LONG RANGE PLANNING, JUDICIAL CONFERENCE OF THE UNITED STATES, PROPOSED LONG RANGE PLAN FOR THE FEDERAL COURTS, DRAFT FOR PUBLIC COMMENT 22 (Nov. 1994) [hereinafter LONG RANGE PLAN]. See infra note 181.


181. Id. The draft report of the Judicial Conference’s Committee on Long Range Planning encourages cooperative efforts with the states to develop a policy regarding which offenses should be prosecuted in federal courts and which in state and local courts. To implement this recommendation, the report endorses allocating increased resources to the states for local prosecution of offenses now prosecuted in federal court because of scarce state resources; increased use of the practice of cross-designating state and federal prosecutors to promote efficiency; and granting state courts jurisdiction over some federal crimes for which concurrent jurisdiction is not now authorized. LONG RANGE PLAN, supra note 179, at 22-23.
them." That is true not only because of federalism principles, but also because of the strain that expansive use of federal criminal jurisdiction puts on the system.

But it is not only Congress that needs to exercise restraint. The executive branch must do so as well. To swell the federal docket—and randomly at that—with thousands of cases that can be handled ef-


The federal court system is distinctive in several respects. Article III of the Constitution assigns federal courts a role that the states cannot play. It grants them jurisdiction over cases arising under the Constitution, federal law, and treaties, for example. They also have power to adjudicate all cases arising under admiralty and maritime jurisdiction, as well as other matters beyond the reach of state and local courts. U.S. Const. art. III, § 2.

Moreover, federal courts are more likely to address issues of truly national concern. State courts did not (and in all probability would not) desegregate public schools, for example. Federal courts have the prestige and capacity to do so, and Congress should not lightly undermine their ability to address important social concerns.

The structure of the federal court system also affects its capacity to absorb an ever-increasing criminal caseload. The federal courts are unitary. The same district courts that hear cases of national significance also hear cases involving simple possession of a small quantity of drugs. Since the Speedy Trial Act requires the courts to give the drug possession case (and all of the other cases on the criminal docket) priority over everything else, 18 U.S.C. § 3161, to inundate federal courts with additional criminal cases is to directly interfere with their capacity to perform their unique roles. Cf. Tackett, supra note 121 (although civil filings outnumber criminal filings by 4-1 in the district court in Tallahassee, Florida, more than 80% of the trials it conducted were criminal, and 90% of them were drug prosecutions).

183. See supra note 182. Congress is heedless of the federal system’s limited capacity. An amendment to the 1994 Crime Bill offered by Senator Alphonse D’Amato, for example, would have made almost every state crime committed with a gun a federal offense. The amendment would have made touching a firearm at the scene of a crime of violence at any time during the commission of the crime, or having a firearm readily available at the scene of a drug trafficking crime (including possession), a federal felony if the crime was already punishable under state law by imprisonment for more than one year. That would have brought more than 600,000 state crimes a year—enough to overwhelm the courts—within the ambit of federal jurisdiction. Naftali Bendavid, Reading Crime Bill’s Fine Print; Overlooked Amendments Draw Fire as Unconstitutional, Overly Harsh, Legal Times, Mar. 7, 1994, at 1.

Although the amendment was ultimately rejected, in 1993 the Senate overwhelmingly approved a crime bill containing an identical provision. H.R. 3355 as passed by the Senate (Engrossed Amendments), Nov. 19, 1993, Item 340, § 2405. The bill was approved by a vote of 95-4. Status report on H.R. 3355 on Nov. 19, 1993, available on Legi-Slate, Inc., an electronic data base.

fectively by the states is a misallocation of limited resources. The government cannot do everything at once. Nor can it necessarily do it better than the states. Executive decisions to exercise federal criminal jurisdiction must be tempered by pragmatism. Notwithstanding the

which nets small-time dealers, a waste of money; federally prosecuting an individual for a $10 drug sale will not solve the problem.

185. The draft report of the Judicial Conference’s Committee on Long Range Planning encourages cooperation between the judicial and executive branches in devising standards on which the Justice Department can rely in promulgating prosecutorial guidelines. The recommendation specifically disapproves of relying on potentially more severe sentences and greater prison capacity as grounds for invoking federal rather than state criminal jurisdiction, absent other special circumstances. LONG RANGE PLAN, supra note 179, at 23.

186. In March 1988, for example, the National Drug Policy Board adopted a zero tolerance drug policy. The zero tolerance initiative targets everyone who enters or leaves the country while possessing illicit drugs. See “Zero Tolerance” Drug Policy and Concomitant of Property: Hearing Before the Subcomm. on Coast Guard and Navigation of House Comm. on Merchant Marine and Fisheries 10, 11-12, 100th Cong., 2d Sess. 63 (1988) (statement of William Von Raab, Commissioner, United States Customs Service, and statement of Admiral Paul A. Yost, Jr., Commandant, U.S. Coast Guard).

Shortly after the Board adopted this policy, the Justice Department urged federal, state, and local prosecutors to step up enforcement efforts against drug users who are not involved in trafficking. Michael Isikoff, “Zero Tolerance” Held in Low Regard; Most Prosecutors Polled Call Reagan Policy Unimportant in Drug War, WASH. POST, July 31, 1988, § 1, at A18. Rebuffing the Department, nearly 75% of the top state and local prosecutors ranked the initiative as either not very important or totally unimportant as a law enforcement strategy. Id.

As implemented by the Justice Department, the zero tolerance policy has two major repercussions. First, offenders who have a measurable quantity of drugs, regardless of whether the amount is small or whether the drugs are possessed for personal use, will be charged criminally and subject to a mandatory minimum penalty. See supra notes 104-108. This brings into the system countless simple possession cases that were formerly handled by confiscating the drugs and imposing an administrative fine. REPORT OF THE JUDICIAL CONFERENCE OF THE UNITED STATES TO THE CONGRESS, IMPACT OF DRUG RELATED CRIMINAL ACTIVITY ON THE FEDERAL JUDICIARY 42 (1989) [hereinafter JUDICIAL CONFERENCE REPORT]. More than 20% of federal prisoners are low-level nonviolent drug offenders serving their first sentence. See supra note 134.

A zero tolerance drug strategy will keep the courts hopelessly mired in a sea of minor offenses. If Congress and the executive branch insist on transforming federal courts into police courts that dispense assembly line justice, the system’s ability to recruit high caliber federal judges is bound to be seriously jeopardized. Cf. Hon. William H. Rehnquist, 1989 Year-End Report on the Federal Judiciary 8-9, reprinted in THE THIRD BRANCH (Administrative Office of the U.S. Courts), Jan. 1990 (expressing concern about low morale on the federal bench that is attributable partly to inadequate resources and partly to “a growing caseload of criminal, often drug-related, cases”); Tackett, supra note 121 (U.S. District Judge Lawrence Irving resigned his position out of frustration; “It’s become a numbers game. . . . You are a robot now on the bench.”).

Second, the zero tolerance policy targets asset seizure under forfeiture laws, regardless of the quantity of drugs or the value of the asset. Michael Goldsmith & Mark J. Linderman, Asset Forfeiture and Third Party Rights: The Need for Further Law Reform, 1989 DUKE L.J. 1254, 1272. When the government obtains a pretrial restraining order to preserve the defendant’s assets for forfeiture, that imposes an additional strain on the federal
courts’ liberal approach to commerce clause jurisdiction, which gives the government “carte blanche for federal invasion of the traditional jurisdictional realm of the states,” federal jurisdiction must be exercised judiciously. The federal law enforcement community must resist making preemptive intrusions into state jurisdiction that are


The federal defender system is another tale of woe. Roughly 75% of all federal defendants require appointed counsel. JUDICIAL CONFERENCE REPORT, supra, at 41-42. Thus, it stands to reason that bringing more criminal defendants into the system will require more criminal appointments. Cf. id. (observing that the number of appointments has been rising steadily since 1980); Tom Watson, No Dollars for the Defense; Federal Shortfall Means CIA Bar May Go Unpaid, LEGAL TIMES, June 8, 1992, at 1 (“[T]he caseload is going up, as is the number of people needing to be defended.”) (quoting Chairman of House Appropriations Subcommittee that oversees the judiciary).

Yet the same Congress that enacted the Violent Crime Control and Law Enforcement Act of 1994 (which added more crimes to the books) and that provided budgetary support for hiring 123 additional Assistant U.S. Attorneys, 436 special FBI agents, and 311 special DEA agents, SENATE REPORT, supra note 5, at 29, 36, 39, decreased the federal defender budget to an amount below the 1994 appropriation. Id. at 101. Enigmatically, the $27,000,000 reduction in the defenders' budget “reflects downward revisions in the number of projected representations.” Id. at 102.


188. The draft report of the Judicial Conference's Committee on Long Range Planning recommends that federal prosecution should be pursued in federal court only when state prosecution is inappropriate. Specifically, the report identifies five types of offenses that should be prosecuted in federal court: (1) offenses against the federal government or its agents, or offenses against interests "unquestionably associated with" the federal government; (2) offenses that have significant multistate or international aspects; (3) offenses that pertain to a sophisticated enterprise and for which federal prosecution would be more effective, even if the conduct is primarily intrastate; (4) offenses related to serious, high-level, or widespread public corruption that tends to erode public confidence in the effectiveness of state or local prosecution; and (5) offenses that invoke very sensitive local issues and engender the perception that a federal prosecution would be more objective. LONG RANGE PLAN, supra note 179, at 20-22.

189. Federal prosecution may have a preemptive effect because of state double jeopardy rules. Although the dual sovereignty doctrine permits successive federal and state prosecutions, Abbate v. United States, 359 U.S. 187 (1959), many states prohibit state prosecution for conduct that has previously been the subject of a federal prosecution. See, e.g., ALASKA STAT. § 12.20.010 (1990); ARK. CODE ANN. § 5-1-114 (Michie 1993); CAL. PENAL CODE § 656 (West 1992); COLO. REV. STAT. § 18-1-303 (1990); DEL. CODE ANN. tit. 11, § 209 (1987); GA. CODE ANN. § 16-1-8 (1992); HAW. REV. STAT. § 701-112 (1985); ILL. ANN. STAT. ch. 720, para. 5/3-4 (Smith-Hurd 1993); IND. CODE ANN. § 35-41-4-5 (Burns 1994); KAN. STAT. ANN. § 21-3108 (1988); KY. REV. STAT. ANN. § 505.050 (Baldwin 1993); MONT. CODE ANN. § 46-11-504 (1986); N.J. STAT. ANN. § 2C:1-11 (West 1982); 18 PA. CONS. STAT. § 111 (1983); UTAH CODE ANN. § 76-1-404 (1990); VA. CODE ANN. § 19.2-294 (Michie 1990); WIS. STAT. ANN. § 939.71 (West 1982).
stimulated by the desire to reap political dividends by being tough on crime.\textsuperscript{190}

\textbf{Conclusion}

The original role of federal criminal law was auxiliary to that of the states. Federal law addressed matters of substantial federal concern that were beyond the reach of the states. The evolution of a national police power paralleled the rise of economic regulation.\textsuperscript{191} Increased economic regulation inspired a Congress enamored with commerce-based jurisdiction to add more and more crimes to the books. Thus, as economic regulation ascended, criminal law flourished as well. But somewhere along the line, federal criminal law lost its compass. Congress, disregarding the auxiliary nature of federal law enforcement,\textsuperscript{192} placed federal criminal law on an evolutionary collision course with state criminal law. Thus, instead of complementing state criminal law, federal law began competing with it.\textsuperscript{193}

Federal duplication of state criminal law unduly burdens the federal justice system, which is ill-equipped to supplant local law enforcement. The system is strained to capacity, in large measure because of the government’s war on drugs. Whether the situation will improve or only worsen in the future depends on whether the legislative and executive branches develop the courage to heed the lessons of that experience.

The federal government’s assumption of a major responsibility for maintaining local law and order is not only harmful to the federal justice system. It is also harmful to the states. When the government preempts local prosecutions in areas of overlapping jurisdiction, it in-

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\begin{footnotesize}
\textsuperscript{190} Levine, \textit{supra} note 187, at 66.
\textsuperscript{191} The rise of economic regulation was a function of changes in the nature of commerce that linked society in a sense that it had never been linked before.
\textsuperscript{193} \textit{Cf. Baker, supra} note 20, at 538.

Replete with provisions that duplicate state and local law, the federal criminal code is in a state of “utter disarray.” \textit{Friendly, supra} note 133, at 58. Although President Lyndon Johnson initiated a serious effort to study and recodify the federal criminal code, the project ultimately failed. \textit{See generally} Robert Drinan et al., \textit{The Federal Criminal Code; The Houses Are Divided}, 18 Am. Crim. L. Rev. 509 (1981).
\end{footnotesize}
terferes with a state’s ability to exercise discretion in a way that is responsive to local concerns. Excessive use of federal jurisdiction diminishes the prestige of local law enforcement authorities and thus may interfere with their development of responsibility for and capacity to handle complex matters or detract from the distinctive role states play as “laboratories of change.”

However, there are constructive ways that the federal government can (and sometimes does) contribute to more effective state law enforcement—through the development of model state laws, cooperative financing of state law enforcement functions, and other similar endeavors. To the extent that this kind of interaction influences how state and local governments set priorities and policies, they occ-

195. Id.
196. Gorelick Address, supra note 170, at 75. See supra notes 143-147 and accompanying text.
198. In 1978, for example, the Law Enforcement Assistance Administration (LEAA) funded a successful program to reduce overcrowding in jails. See Nicholas L. Demos, Are More Jails the Best Answer?, 22 Judges’ J. 12 (1983). See also Law Enforcement Assistance Administration, National Institute of Justice, Bureau of Justice Statistics, Programs Meeting Effectiveness Criteria of Section 401(A): Justice System Improvement Act 1979 (1980).
199. See supra note 188.
200. One example from the 1994 Crime Bill is a provision that conditions the availability of federal funds for state prison construction on the applicant state’s enactment of “truth in sentencing” laws requiring convicted defendants to serve at least 85% of the sentence imposed. To be eligible, the state must, in addition, have sentenced a higher percentage of violent offenders to prison, have increased the average prison term imposed on violent offenders, and have increased the percentage of sentence that violent offenders will serve, all since 1993. H.R. 3355 §§ 20101-20102, Pub. L. No. 103-322, 108 Stat. 1796, 1814-1817 (1994).

These sentencing strategies can backfire by causing other convicted criminals to be released early because of prison crowding. See New Sentencing Law Has Unintended Ef-
cur only with those governments' consent. The use of cooperative means to achieve a desired end is compatible with established principles of federalism. Liberal or preemptive exercise of concurrent federal jurisdiction is not.

The current debate over the appropriate role and scope of federal criminal law addresses an age-old issue. When Charles Warren spoke of the "congested condition" of federal court dockets and "the small prospect of any relief to the heavily burdened Federal Judiciary" if Congress continues to enact more crimes, it was 1925.201 Henry Hart, Jr., spoke of the need to reconsider and clarify the bases of federal jurisdiction at a Harvard Conference on Federalism: "The time has long been overdue for a full-dress re-examination by Congress of the uses to which [federal] courts are being put."202 That was 1954. "It is now overdue by nearly twenty years more," Henry Friendly observed in 1973.203

Today, it is overdue by another twenty years more. Unless Congress heeds the warnings of those who speak for the institutions most profoundly affected by the move to federalize,204 the legacy of the federal justice system (and federalism itself) will remain in jeopardy.

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203. FRIENDLY, supra note 133, at 4.
204. See supra note 170.