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Reporter's Draft for the Working Group on Principles to Use When Considering the Federalization of Criminal Law

by

SARA SUN BEALE*

Introduction

By virtually every measure, the federal government is playing an increasingly important role in the enforcement of criminal law. Participants at the Three-Branch Roundtable on "Overlapping and Separate Spheres ... State and Federal Jurisdiction" generally agreed that the time is ripe for a reexamination of the principles used to federalize criminal law. They identified two main concerns justifying such a reexamination: (1) the increasing criminal caseload is placing a strain on the federal courts, the Bureau of Prisons, and other components of the federal criminal justice system; and (2) the increasing federalization of crime has the potential to cause an unplanned but nonetheless fundamental change in the relationship between the federal government and the states and in the character of the federal courts. In the first Section of our Report, we describe the changes that have occurred in the federal criminal caseload, the impact of the increased caseload on various elements of the federal criminal justice system, and some of the factors responsible for these changes. In the second Section of our Report, we summarize the discussion that occurred at

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the Roundtable and comments received from participants in the wake of the Conference.

I. A Historical and Statistical Overview of the Change in the Federal Criminal Caseload

A. The Historical Development of Federal Criminal Jurisdiction

Until the Civil War, only a small number of federal offenses existed, and there was little if any overlap between the offenses subject to state and federal prosecution. Federal crimes were limited to those necessary to prevent injury to or interference with the federal government itself or its programs. Since the federal government was small and it conducted few programs, the list of offenses required to protect federal interests was correspondingly restricted.1 Except in those areas where federal jurisdiction was exclusive (the District of Columbia and the federal territories), federal law did not reach crimes against individuals, which were the exclusive concern of the states.

Not all federal crimes were prosecuted in the federal courts during this period. Many early federal criminal statutes provided for concurrent state court jurisdiction.2 Although legislation authorizing state court jurisdiction over federal crimes was originally supported as a means of curbing federal judicial power, it came to be viewed as an infringement on state sovereignty.3 In 1874 Congress reacted by enacting legislation declaring that the federal courts had exclusive jurisdiction over federal offenses.4

After the Civil War, Congress expanded the scope of federal criminal jurisdiction, extending it for the first time to subjects clearly within the police powers of the states. The unprecedented postwar growth in interstate transportation and commerce created new national problems that demanded national solutions. The first legisla-

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1. The principal antebellum federal crimes were (1) acts threatening the existence of the federal government (e.g., treason); (2) misconduct of federal officers (e.g., bribery); (3) interference with the operation of the federal courts (e.g., perjury); and (4) interference with other governmental programs (e.g., theft of government property and revenue fraud). See generally Sara S. Beale, Federal Criminal Jurisdiction, in 2 ENCYCLOPEDIA OF CRIME AND JUSTICE 775-79 (1983).
2. See, e.g., Carriage Tax Act of 1794, ch. 45, § 10, 1 Stat. 373 (authorizing prosecution in state court of any case arising more than 50 miles from the nearest federal court).
tion aimed at the victimization of private citizens involved use of the mails to effectuate fraudulent schemes or to distribute lottery circulars and obscene publications. The next step was the adoption of penalties for misconduct involving the use of interstate facilities, such as railroads, which were subject to federal regulation under the Commerce Clause. The earliest provisions were quite narrow, but during the 1880s Congress enacted two much broader provisions, the Sherman Antitrust Act and the law creating the Interstate Commerce Commission (ICC). The ICC Act was especially significant because it set the pattern for later legislation, establishing a federal administrative agency, a regulatory framework, and a comprehensive range of criminal as well as civil penalties.⁵

The constitutionality of the new laws was challenged on the grounds that they allowed federal prosecution of conduct—such as fraud—that was traditionally subject only to state regulation. The Supreme Court generally upheld the new legislation,⁶ holding that Congress could employ its power over interstate commerce to assist the states in matters such as the suppression of lotteries.⁷

The next major expansion of federal criminal jurisdiction resulted from the ratification of the Eighteenth Amendment, which prohibited the sale or distribution of liquor and explicitly granted “concurrent” enforcement authority to the states and the federal government. Prohibition resulted in a phenomenal increase in the number of federal prosecutions in the 1920s and 1930s. In the peak year, 1932, there were 65,960 Prohibition-related criminal cases in the federal courts.⁸

Although the Eighteenth Amendment was repealed in 1933, federal jurisdiction never receded entirely to its narrow pre-Prohibition scope. The country was in the grip of a national depression, and an

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⁵. More recently, Congress followed the same pattern in legislation dealing with national labor relations, occupational health and safety, water pollution, and coal mine safety; in each case the legislation rested on the commerce power.

⁶. One major exception was the Supreme Court’s treatment of the civil rights legislation, which rendered it largely ineffective until more liberal decisions in the middle of the next century. See generally 1 Bernard Schwartz, Statutory History of the United States: Civil Rights 10, 99-172, 443-791 (1970).

⁷. Champion v. Ames, 188 U.S. 321 (1903). The Court emphasized that the federal laws in question “supplemented the action” of the states, which might otherwise be “overthrown or disregarded by the agency of interstate commerce.” Id. at 356-57. An earlier case, In re Rapier, 143 U.S. 110 (1892), upheld federal prohibitions against the misuse of the mails on a similar but narrower ground, concluding that federal authority could be employed to prohibit misuse of facilities provided by the federal government.

influential congressional committee reported that the prevalence and severity of the crimes being committed and the inability of the existing agencies to cope with them required federal action in "a field which had, until then, been regarded as primarily a matter of local or State concern." As a result of this committee's work, a large number of new federal laws were adopted in the 1930s, many of which dealt for the first time with crimes of violence against private individuals and businesses. These included the statutes dealing with bank robbery, extortion and robbery affecting interstate commerce, interstate transmission of extortionate communications, interstate flight to avoid prosecution, and interstate transportation of stolen property. During the same period, Congress also enacted the Lindbergh kidnapping law, the securities laws, and the first federal firearms legislation. None of these enactments broke any new theoretical ground, since the authority to enact criminal legislation under the Commerce Clause was now well established. They did, however, reflect a growing willingness on the part of the Congress that had enacted the New Deal social and economic legislation to assert jurisdiction over an increasingly broad range of conduct clearly within the traditional police powers of the states.

In the 1960s and 1970s Congress employed the commerce power to attack organized crime with a series of new criminal statutes. The first of these was the Travel Act, which authorized federal criminal penalties for interstate travel intended to facilitate gambling, narcotic traffic, prostitution, extortion, and bribery—illegal activities frequently associated with organized crime. A few years later, Congress authorized criminal penalties for extortionate credit transactions ("loan sharking"), which provided a source of funds for organized crime. Finally, Congress enacted the Racketeer Influenced and Corrupt Organizations Act (RICO), which provided heavy penalties (including forfeiture) upon proof of a pattern of racketeering activity with the requisite effect on an interstate enterprise. RICO also cre-

10. See id. at 40-54.
12. The Travel Act was the first compound offense, i.e., an offense that defined the violation of existing federal and state offenses as elements of a new federal offense. Later offenses using this technique include RICO and continuing criminal enterprise (CCE).
ated a civil treble damage action for private plaintiffs injured by racketeering.

Though RICO ultimately generated more cases, the loan sharking provisions broke new theoretical ground as Congress criminalized a whole class of activity (loan sharking) based upon a finding that the class of activity affected interstate commerce. No proof was required that the conduct involved in an individual prosecution had an effect on commerce. Upholding the loan sharking statute in 1971, the Supreme Court stated that the courts' only function in reviewing such class-based legislation is to determine whether the prohibited class of activity is within the reach of federal power; if so, courts have no power to excise trivial individual instances of the class.\(^\text{15}\)

A comprehensive federal drug control statute was enacted in 1970 on the basis of a similar finding that the class of activity proscribed has an impact on interstate commerce.\(^\text{16}\) Numerous other pieces of anti-drug legislation have been enacted since that time, including provisions adding new crimes and others increasing the penalties for existing offenses. Congress also enacted a series of criminal statutes dealing with currency reporting and money laundering to provide support for the drug and tax laws.\(^\text{17}\)

A concomitant development also occurred: beginning in the 1960s Congress appropriated federal funds to support state and local law enforcement. Pilot programs were first established under legislation passed in 1965, and in 1968 Congress enacted the Omnibus Crime Control and Safe Streets Act, which established the Law Enforcement Assistance Administration (LEAA).\(^\text{18}\) This legislation authorized the LEAA to make grants to state and local agencies to strengthen and improve law enforcement, and provided for more than $100 million

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17. 31 U.S.C. §§ 5322 (willful failure to file currency transaction report), 5324 (structuring transactions to avoid currency reporting requirements); 18 U.S.C. §§ 1956-57 (money laundering).
18. The legislative history cites with approval the following statement by the President calling for enactment of legislation on this subject:
   Substantially greater resources must be devoted to improving the entire criminal justice system. The Federal Government must not and will not try to dominate the system. It could not do so if it tried. Our system of enforcement is essentially local; based upon local initiatives, generated by local energies, and controlled by local officials. But the Federal Government must help to strengthen the system, and to encourage the kind of innovation needed to respond to the problem of crime in America.

per year in funding. The act also authorized the provision of in-kind aid, particularly FBI training of state and local law enforcement personnel.

The 1980s and 1990s brought increased public concern with violent crime, and Congress responded with the enactment of a number of new federal offenses, such as carjacking and new firearms offenses, as well as legislation specifically aimed at violent career criminals. During this period Congress also created new federal crimes to deal with a variety of other social ills, such as the failure to pay child support, fraud in connection with identification documents, computer fraud, and the disruption of animal enterprises, such as laboratories and circuses.

In general, Congress simply added each new provision to those already on the books. Efforts in the 1970s and 1980s to enact comprehensive criminal code reform failed. As a result, there are now roughly 3,000 federal crimes. By the mid-1990s the accumulation of new statutes had reversed the pattern that held for the first century of the nation: the bulk of the federal criminal code now treats conduct that is also subject to regulation under the states' general police powers. It should be noted, however, that one comprehensive piece of reform legislation was passed: the Sentencing Reform Act of 1984, which created the Sentencing Commission and authorized it to promulgate sentencing guidelines; the resulting guidelines have revolutionized federal sentencing.

20. Id. § 403.
29. For one commentary on this shift, see William Van Alstyne, Dual Sovereignty, Federalism, and National Criminal Laws: Modernist Constitutional Doctrine and the Nonrole of the Supreme Court, 26 AM. CRIM. L. REV. 1740 (1989).
B. The Impact of the Expansion of Federal Criminal Jurisdiction

(1) Increases in the Criminal Caseload

One of the major themes at the Roundtable was the change in the federal courts' caseload as a result of the expansion of federal criminal jurisdiction and the commitment of greater federal resources to criminal prosecutions. In particular, attention was drawn to the very large increases in the criminal caseload that have occurred since 1980. Between 1980 and 1992, the number of criminal cases filed in the federal courts increased by 70 percent, from 27,968 to 47,472, and the number of defendants prosecuted rose 78 percent, from 38,033 to 67,632. The increase in federal drug and firearm offenses was even sharper. The number of drug cases filed in the federal courts roughly quadrupled, from 3,130 cases (6,678 defendants) to 12,833 cases (25,033 defendants). Firearms prosecutions also quadrupled, from 931 prosecutions in 1980 to 3,917 in 1992. Annual criminal case filings per sitting judge increased from 58 to 84 during the same period. Criminal filings in the appellate courts have doubled since 1980.

While the increases since 1980 have been significant, the current criminal caseload is not unprecedented. As revealed in figure 1 below, the criminal caseload has fluctuated widely since 1960, and the number of federal criminal prosecutions was approximately the same in 1972 as it is today. Indeed, because the number of federal judges has increased substantially since 1972, the rate of criminal filings per judge was significantly higher during that period than it is today. Moreover, federal criminal filings now account for a smaller percentage of the federal courts' caseload than they did in 1972. Today criminal cases account for only seventeen percent of all filings in the district courts, as compared with roughly one third of all filings in 1972.

32. Id.
33. Id.
35. Id.
36. The number of federal criminal cases reached its all-time high in 1932, as a flood of Prohibition cases swelled the total number of cases to 92,174, more than 2 1/2 times the total number of cases in 1918, the last year before Prohibition. Rubin, supra note 8.
37. Figure 1 is reprinted from the Federal Judicial Ctr., On the Federalization of the Administration of Civil and Criminal Justice 51 (1994).
Figure 1


Source: Statistics Division of the Administrative Office of the U.S. Courts.
(2) Changes in the Nature of the Criminal Caseload and in the Resources Required

While the absolute number of criminal cases in the federal courts today is not unprecedented, criminal cases are consuming an unprecedented share of federal judicial resources. Though criminal cases presently account for only seventeen percent of the federal judicial docket, they take forty-eight percent of federal judges' time.38 In many districts, the situation is considerably more extreme. In the Southern District of Florida, district judges spend eighty-four percent of their trial time on criminal cases, leaving only sixteen percent for a wide range of civil cases.39 By 1992, thirty-eight of the ninety-two federal districts devoted more than fifty percent of their trial dockets to criminal cases.40 Some district judges have been unable to try a civil case for a year or more.41

Several factors appear to account for the increased share of federal judicial resources being consumed by criminal cases. First, the cases themselves are different than in any time in the past, and they require more judicial resources. The federal caseload in 1972 included a substantial number of relatively straightforward offenses that could typically be disposed of quickly. Selective service offenses, auto theft, forgery, and counterfeiting accounted for twenty-three percent of federal defendants charged in 1972, and only four percent in 1992.42 Only eighteen percent of defendants were charged with drug offenses in 1972, as compared with forty-one percent in 1992.43 Not only have drug filings increased, but the nature of the charges in drug cases has also changed, with the percentage of drug distribution cases increasing, and the percentage of the simpler possession cases decreasing sharply.44 The effect of this change is substantial. A Federal Judicial Center (FJC) time study found that cocaine and heroin distribution cases take four times as much judicial time per defendant as cases involving possession of the same drugs.45

38. Professor Sullivan's statement, at 18.
41. Miner, supra note 28, at 686 (quoting a judge from the Eastern District of New York).
42. THE CRIMINAL CASELoad, supra note 40, at 5-6 figs. 4, 6.
43. Id.
44. Id. at 7.
45. Id. at 8 (distribution cases take an average of 6 hours compared with 1.5 hours for possession cases). Marijuana cases show a similar pattern. Id.
While the overall percentage of multiple defendant cases has remained fairly stable since the early 1970s, the number of multi-defendant cases has grown by seventy percent since 1980, and the number of multi-defendant drug cases has grown by thirty percent in just the last four years.\textsuperscript{46} The number of jury trials with more than one defendant increased by thirty-five percent in the last four years.\textsuperscript{47} Multiple defendant cases are more complex, and they consume far more judicial resources than cases involving a single defendant. A recent FJC time study found that the average judge time per defendant was 5.8 hours in multi-defendant cases, but only 3.0 hours in single defendant cases.\textsuperscript{48}

The number of federal criminal trials is at an all-time high, ten percent higher than the previous high reported in 1970.\textsuperscript{49} Perhaps even more important, federal criminal trials are increasingly lengthy. In 1970 the average length of a criminal jury trial in federal court was 2.5 days; it is now 4.4 days.\textsuperscript{50} Very long trials have now become commonplace: criminal trials in the 6 to 20-day range have increased 118 percent since 1973.\textsuperscript{51}

One district judge’s comments provide a vivid description of what these statistics can mean. He had a drug case pending with fifteen defendants; it was his third case in less than a year with more than a dozen defendants. Each case required the appointment of separate counsel for almost all defendants, and counsel for each defendant then had to separately review government documents and tape recordings, a time-consuming process. Getting these cases to the plea or trial stage, the judge summed up, “requires many motions and status conferences, and they generate unbelievable amounts of paper.” The experience of this judge was not unique; indeed he noted that each judge in his district had had at least one multiple defendant case of unusual length within the last year.

Another change in the federal system is the increased judicial time being devoted to sentencing. The Sentencing Guidelines, which went into effect in 1987, require extensive factual findings and legal conclusions in each case. Guidelines sentencing has increased significantly the time district judges spend on sentencing. Ninety percent of

\textsuperscript{46} Id. at 1.
\textsuperscript{47} Id.
\textsuperscript{48} Id.
\textsuperscript{49} Id. at 12.
\textsuperscript{50} Id. at 1.
\textsuperscript{51} Id.
federal judges surveyed by the Federal Courts Study Committee stated that sentencing had become more time consuming, with over half reporting an increase of at least twenty-five percent and a third reporting an increase of over fifty percent in the time required for sentencing.\textsuperscript{52} This estimate was confirmed by a Federal Judicial Center time study, which found that the average time for sentencing in Guidelines cases was twenty-five percent more than for non-Guidelines cases.\textsuperscript{53} Sentencing appeals have also resulted in an increased burden on the courts of appeals. The Sentencing Reform Act permits either the defendant or the government to appeal a sentence, and even a defendant who pled guilty may nonetheless file an appeal to contest his sentence. Each year from 1990 to 1993, appeals raising sentencing issues alone accounted for at least twenty-six percent of criminal appeals in cases subject to the Guidelines.\textsuperscript{54} Prior to the reform of the sentencing process, few if any of these appeals could have been brought. The appeal of sentencing issues has also made appeals from convictions more complex and difficult to resolve, and most appeals from convictions now also raise one or more sentencing issues. In 1993, for example, only thirty percent of criminal appeals did not involve a sentencing issue, and that percentage falls to fifteen percent if the calculations are based exclusively on cases to which the Guidelines are applicable.\textsuperscript{55} These changes flowing from the reform of the sentencing process have a substantial effect on the workload of the courts of appeals since criminal appeals now account for approximately one-fourth of the appellate caseload.\textsuperscript{56}

Two other factors, which have not generally been noted, have also resulted in an increased allocation of judicial time to sentencing issues in criminal cases. First, the overall conviction rate has increased substantially since the 1970s. Two decades ago the conviction rate was approximately seventy-five percent; it has risen gradually and is now

\begin{itemize}
  \item \textsuperscript{52} Report of the Federal Courts Study Committee 137 (Apr. 1990).
  \item \textsuperscript{53} Letter from John Shapard, Research Division, Federal Judicial Center, to Sara Sun Beale, Duke University School of Law (Mar. 29, 1995) (on file with author) (average judge time 76 minutes in Guidelines cases, 61 minutes in non-Guidelines cases).
  \item \textsuperscript{54} These calculations were based exclusively on classified cases to which the Guidelines were applicable, excluding a small number of cases (612 in 1993) in which the type of appeal was not classified. Although the Guidelines became effective November 1, 1987, there are still some non-Guidelines appeals (1,870 in 1993).
  \item \textsuperscript{55} These calculations are based exclusively on classified cases, excluding the few cases (612 in 1993) that were not classified.
\end{itemize}
holding steady at roughly eighty-five percent.\textsuperscript{57} Though the number of prosecutions was nearly the same in 1972 as in 1992, there were 37,220 convictions in 1972 and 50,260 in 1992.\textsuperscript{58} This larger number of defendants must, as noted above, be sentenced in accordance with more time-consuming procedures.

The Sentencing Reform Act also gave the federal courts new responsibility for supervision of defendants following conviction. The Sentencing Reform Act requires that most defendants be sentenced to a term of supervised release and provides that the federal courts, rather than the parole board, monitor supervised release. The impact of monitoring supervised release is just beginning to be felt, as defendants sentenced under the Guidelines are beginning to complete their sentences in large numbers. In just two years, from 1990 to 1992, the number of persons serving supervised release roughly quadrupled, growing from 5,011 to 19,362.\textsuperscript{59} While the impact of this new responsibility has been modest to date, it is likely to add significantly to the federal courts' workload as the number of persons on supervised release grows.

(3) Corresponding Decline in the Civil Trial Docket

The increased criminal caseload has an inevitable impact on the remainder of the federal courts' docket. Criminal cases receive top priority because of the mandates of the Speedy Trial Act, which requires dismissal of charges that are not brought within the time periods specified by the Act.\textsuperscript{60} While the speedy trial clock is tolled during certain pretrial proceedings,\textsuperscript{61} the total time allotted—70 days—\textsuperscript{62}—is so short that the Act places significant pressure on prosecutors and court personnel. It seems relatively clear that the federal courts have responded to the increased pressure from the criminal caseload by reducing the resources available for civil cases, and particularly for the trial of civil cases.

The total number of trials in the federal system held relatively constant from 1980-1992, at approximately 20,000,\textsuperscript{63} but criminal trials

\textsuperscript{57} The Criminal Caseload, supra note 40, at 10.
\textsuperscript{59} The Criminal Caseload, supra note 40, at 10.
\textsuperscript{60} 18 U.S.C. § 3162(c).
\textsuperscript{61} See 18 U.S.C. § 3161(h).
\textsuperscript{63} There were 19,825 trials in 1980 and 19,992 in 1992. Statistical Abstract of the United States 1993, at 206 tbl. 332.
increased while civil trials decreased during this period. Given the priority accorded to criminal trials, the dramatic expansion of the criminal trial docket, the greater percentage of complex cases, and the increased call on judicial resources for sentencing and monitoring of supervised release, it is not surprising that the resources available for civil trials has been substantially reduced. Between 1980 and 1993, the number of civil trials declined by twenty percent, from 13,191 to 10,527.\(^6\) During the same period, criminal trials increased by forty-three percent, from 6,634 to 9,465.\(^6\) During this period, while the percentage of civil jury trials decreased slightly, the percentage of criminal jury trials increased from fifty-two percent to sixty percent.\(^6\)

It should be noted, moreover, that the decline in the number of civil trials has occurred despite the fact that the civil docket has continued to grow, and indeed has grown far more rapidly than the criminal docket. Civil filings rose from approximately 125,000 in 1975 to approximately 227,000 in 1992. This represents a slight decrease from the high of 275,000 cases filed in 1985 before the statutory increase in the required amount in controversy. Thus, criminal trials appear to be displacing civil trials despite the fact that criminal cases now account for only a small fraction—about seventeen percent—of total filings. One way of expressing the availability of trial resources is to calculate the number of trials per 100 cases filed. Between 1980 and 1992, the number of civil trials per 100 case filings fell dramatically, from 7.8 to 4.6. In contrast, the trial resources devoted to criminal cases have remained far greater, though they too declined somewhat between 1980 and 1992, falling from 23.7 to 19.9 trials per 100 case filings. It should be noted that these figures, which are based upon national averages, underrepresent the changes experienced in districts where the criminal caseload has exploded.

\(4\) Impact on the Bureau of Prisons

The increase in the number of federal convictions and changes in the federal sentencing laws have had a particularly significant impact on the Bureau of Prisons. Between 1980 and 1993, the number of federal inmates grew by 263 percent, from 19,025 to 69,143.\(^6\) In 1993

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\(^6\) See id.

\(^6\) Id.

\(^6\) Id. The percentage of jury trials in civil cases fell from 43% in 1980 to 41% in 1992. Id.

\(^6\) Statistics provided by Bureau of Justice Statistics, based upon Historic Statistics on Prisoners in State and Federal Institutions, Yearend, 1925-86 and Correctional Populations
the total number of persons under the jurisdiction of federal correctional officials, which includes persons on supervised release and parole as well as persons who served terms of less than one year, was 89,586.68 The federal prison system, which did not exist sixty-four years ago, is now the second largest prison system in the United States, and it is growing more rapidly than all but a few state systems.69 The operating budget for the Bureau of Prisons rose from $314 million in 1980 to $1.8 billion in 1993.70 The federal prison system is now at 136 percent of capacity.71 A federal correctional official observed that there is now less difference between the inmates in federal prisons and those in state institutions; the prison populations reflect the degree to which federal offenses and enforcement priorities overlap with those of the states.

One factor driving the census in the federal prisons is obviously the number of federal prosecutions, and more particularly the number of federal convictions. As noted above, both prosecutions and convictions are at or near historic highs. It would, however, be a mistake to assume that these are the only factors responsible for the dramatic increase in the number of federal inmates.

Another significant factor in the increase in federal inmates is the increasing length of federal prison terms.72 Between 1982 and 1992, the mean length of all federal sentences increased from 47.8 months to 62.2 months.73 The increased prison terms result in part from the changes in the caseload mix discussed above (e.g., a higher percentage of drug cases), and in part from the adoption of the Sentencing Guidelines and the enactment of many statutes requiring defendants to serve mandatory minimum sentences. In particular, drug and weapon sentences increased dramatically at the very time the number of those

in the United States, 1990-92. These figures include only prisoners with a maximum sentence.

69. Between 1992 and 1993, the number of inmates in the federal system grew by 13.2%; during the same period only 5 states and the District of Columbia experienced increases of 10% or more. Bureau of Justice Statistics, Prisoners in 1993, at 1 & 3 tbl. 3.
70. These figures do not include the capital budget, i.e., the cost of new buildings.
72. The Sentencing Reform Act of 1984 also eliminated parole for offenses that occurred after the effective date of the Sentencing Guidelines in 1987. That change, along with the increased length of sentence, is increasing the average time served by federal prisoners. During this period, the average time served before first release for all offenses increased from 14.9 months in 1982 to 23.6 months in 1992. Bureau of Justice Statistics, Federal Case Processing 1982-91 tbl. 18 (1993).
73. Id. at 17 tbl.17.
prosecutions increased as well. The mean sentences in drug cases increased from 54.6 months to 82.2 months during this period, and mean weapons sentences increased from 34.3 months to 76.9 months.\textsuperscript{74}

A 1994 Department of Justice study highlighted the extent to which the expanding federal prison population is the product of sentencing policy in drug cases. The study found that 16,316 federal inmates were "low level" drug violators, defined as offenders with no current or prior violence on their records, no involvement in sophisticated criminal activity, and no prior commitment.\textsuperscript{75} This accounted for 21.2 percent of the total federal prison population.\textsuperscript{76} Two thirds of these low level drug offenders had received mandatory minimum sentences.\textsuperscript{77} Among low level drug offenders, the Department concluded, sentences had increased 150 percent over what they were prior to the enactment of the Sentencing Guidelines and mandatory minimum sentencing legislation.\textsuperscript{78}

\textbf{(5) Impact on the Federal Budget and the Budget of the Department of Justice}

A federal budget official informed the participants in the Roundtable that the budget for the Department of Justice has been growing twice as fast as that for the rest of the federal budget. He argued that the federalization of crimes traditionally prosecuted by the states and resulting budget increases could be seen as a form of in-kind fiscal relief for state and local government, which do not have to pay for the investigative, prosecutorial, judicial, and correctional resources that are now devoted to these cases. He suggested that this support be reassessed in light of the federal budget deficit and the budgets of the states, some of which are running surpluses or cutting taxes. A state official responded that the situation varies from state to state. Some states are in a far less favorable budgetary situation than the federal government. Moreover, the large federal tax burden places practical limitations on the resources that can be raised by the states. If federal taxes were reduced, states could increase their own taxes and correspondingly increase their expenditures for law enforcement.

\textsuperscript{74} Id.
\textsuperscript{75} U.S. DEP'T OF JUSTICE, AN ANALYSIS OF NON-VIOLENT DRUG OFFENDERS WITH MINIMAL CRIMINAL HISTORIES (Feb. 1994), reprinted in 7 FED. SENT. REP. 7 (July/Aug 1994).
\textsuperscript{76} Id.
\textsuperscript{77} Id.
\textsuperscript{78} Id.
A Bureau of Justice statistics study of the changes in federal and state and local expenditures for justice activities reveals some support for the thesis that federal expenditures have grown more rapidly than state and local expenditures, though the pattern is more complex if one separates state and local expenditures. Employing a standard of constant 1990 dollars per capita, the study concluded that between 1971 and 1990 federal government spending for all justice activities—including police, courts, prosecutors, public defense, and corrections—rose 129.7 percent, more than double the rate of increase for combined state and local spending.\(^7\) Similarly, in actual dollars, federal expenditures increased from 1971-1990 by 668 percent, more than the combined increase of 597 percent for all state and local governments.\(^8\) But both state government expenditures (which increased 848 percent) and county expenditures (which increased by 711 percent) outpaced the federal increases during this period.\(^9\) Municipal expenditures, on the other hand, increased at a much lower rate than either state or federal expenses.\(^10\) Moreover, the situation clearly varies from state to state. Per capita state and local government spending on justice activities ranged from a high of more than $400 per person in two states (New York and Alaska) to a low of $97 per person in West Virginia.\(^11\) Per capita justice expenditures also varied by region, being highest in the Northeast ($335) and West ($322), and lowest in the South ($220) and Midwest ($202).\(^12\)

Federal expenditures for prosecutorial resources have significantly outstripped those provided for the courts during this period. While Congress has increased the appropriations for the federal courts dramatically, doubling them over a six-year period, the number of prosecutors has risen much more quickly than the number of federal judges. Indeed, the number of prosecutors per federal judicial officer has doubled in the last ten years.\(^13\) The key investigative agencies of the Department of Justice also received substantial increases between 1975 and 1993, which translates into the resources for an increasing number of investigations.\(^14\)

\(^8\) Id.
\(^9\) Id. at 4-5 & tbl. 4.
\(^10\) Id. (increase of 393.5%).
\(^11\) Id. at 7 tbl. 9.
\(^12\) Id. at 7.
\(^13\) THE CRIMINAL CASELoad, supra note 40, at 1, 15-19.
\(^14\) Id. at 16-19.
(6) **Reasons for the Accelerated Growth in Federal Jurisdiction and Caseload**

Participants identified a number of factors responsible for the increased federalization of criminal law. Some of the changes were legislative, particularly the enactment of new offenses and the enactment of new sentencing measures (both the Guidelines and mandatory minimum sentencing laws) that guarantee the imposition of tougher sentences on cases brought in federal court than would be available if the cases were brought in state court. There was a general recognition that the state prosecutors and state courts were straining under record caseloads and that cases are often shifted to the federal system because greater resources are available there. The resource issue comes into play at every stage. There are greater federal resources available to federal investigators and prosecutors, and cases come to trial more quickly in the federal courts. Finally, although federal prisons are over capacity, they are generally less crowded than state institutions. Many state prisons are so overcrowded that offenders serve only a small portion of their sentences before they must be released to comply with federally mandated caps on inmate capacity.

Some participants argued that there has been a change in crime itself, with more and different forms of crime, especially more violent crime, which required the federal government to respond. Others suggested that the principal change had been in the public's perception of an increase in crime, and the resulting political pressure for crime prevention and control measures, fanned by a media preoccupation with crime and violence. This latter view finds support in the statistics compiled by the Department of Justice, which concluded in a 1994 study that the rate of violent crime fell nine percent from 1981 to 1992.87

There was general agreement that most citizens want action and that jurisdictional issues mean little to the general public. As one participant noted, people are frightened, they want action, and they don't care whether it's state or federal. Another participant suggested that the pressure for federal action reflects the fact that the public has come to rely increasingly on the federal government to provide solutions to any important national problem, including crime.

87. U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, VIOLENT CRIME 1 (1994). In 1992 the percentage of households in which a member had been the victim of violence other than homicide was the lowest since 1975, when the data was first compiled. Id. On the other hand, in 1992 violent crime against blacks was the highest ever recorded. Id.
II. A Reevaluation of the Principles that Should Govern the Federalization of Criminal Law

Participants in the Roundtable agreed on a key point: the states should and must continue to play the dominant role in criminal law enforcement, and the federal government's role should remain far more limited than that played by the states. Though Congress might, in theory, employ the commerce power to preempt most of the states' traditional jurisdiction over crime, no support was voiced for ousting state and local authority.

Discussion focused on a variety of advantages to the traditional allocation of authority to the states. State and local prosecutors (and some judges) are elected, and they are responsible to and in touch with their varied constituencies. State prosecutors and state courts are geographically closer to—and hence more convenient for—victims and witnesses. States have developed local social services and outreach programs that the federal government cannot match. Federal authorities are necessarily farther removed from the grass roots.88

State corrections programs also have built-in advantages. Since state corrections institutions are located closer to offenders' home communities, they facilitate contact with family and reintegration into the community. Federal institutions, in contrast, draw their inmate populations from a nationwide base, and inmates may be housed hundreds or even thousands of miles from their friends and families. Sustaining family contacts and reintegrating the inmate into his home community are inherently more difficult in the federal system. It was also noted that large bureaucratic national institutions are better suited to responding to individual offenders after the fact. Such institutions are less effective than local programs that seek to change offenders' relationships with the individuals and groups to which they will eventually return.

One statistic was cited repeatedly: state prosecutors and state courts now handle roughly ninety-five percent of all criminal prosecutions, while federal courts and federal prosecutors process the remaining five percent. The disproportionate share of the cases now handled in the state system, the magnitude of the caseload, and the small size of the federal judiciary make it virtually impossible for the federal

88. One state official also argued that the smaller size of state systems is also an inherent advantage because it permits better coordination among the various branches of government. The degree of advantage no doubt varies from state to state, depending on size. It may have little effect in populous states such as New York and California.
government to take over the lion’s share of criminal enforcement responsibility. In 1992 there were 1,188,569 criminal felony cases filed in the 35 states that provided data to the National Center for State Courts, and more than 12 million criminal cases filed in the 47 states that reported combined felony and misdemeanor filings. Obviously no more than a small fraction of these cases can be heard by the 649 federal judges on the federal district courts. Even a significant increase in the size of the federal judiciary would still leave the vast bulk of criminal cases in the state courts.

Finally, the variety inherent in the federal system permits desirable experimentation. Many of the most promising trends in criminal law enforcement began at the state and local level, including specialized drug courts, community policing, boot camps, and sentencing guidelines. A number of state participants in the Roundtable noted that there is, as yet, no evidence that federal approaches are superior to those adopted by various states on matters such as sentencing policy.

Participants also noted that there are costs to the increasing overlap between the state and federal criminal laws. Some resources are being duplicated, and other resources are being allocated to efforts to coordinate the efforts of state, local, and federal officials at the investigative and prosecutorial stages. The overlap also increases the potential for both duplicative prosecutions and for disparate results among similarly situated offenders, depending on whether a state or federal prosecution is brought.

A. The Sullivan and Marcus Proposals

Much of the discussion at the Roundtable was based upon statements by Professor Kathleen Sullivan and Judge Stanley Marcus, each

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90. This number was calculated from the state filings reported in id. at 31 fig. 1.48.
91. It should be noted, however, that state court judges currently have far heavier caseloads than do federal judges. In 1992 there were 75 criminal cases and 355 civil cases filed per judge in the federal system; in the state courts of general jurisdiction there were 417 criminal cases and 995 civil cases per judge. Id. at 44 fig. 1.61.
92. For example, some states might decide to act upon the basis of social science research concluding that longer prison sentences and mandatory sentencing schemes, such as the “three strikes and you’re out” legislation, do not reduce crime. See, e.g., Michael Tonry, Racial Politics, Racial Disparities, and the War on Crime, 40 Crime & Delinq. 475 (1994); Center for the Study of Law & Society, Pa. State Univ., Incarceration and Crime: Facing Fiscal Realities in Pennsylvania.
of whom proposed a list of criteria for the federalization of criminal law.

Professor Sullivan proposed that there are four bases on which the federal government has a comparative advantage over state government in the prosecution of crime (as well as in civil adjudication):

1) Where the federal sovereign is directly involved, i.e., an offense against the sovereign itself (treason), or against its treasury or its officers, or a crime committed on federal property;

2) Where efficiency-based considerations favor federal prosecution because of the interstate or international character of the offense, or economies of scale, or where the conduct threatens to overwhelm the local authorities (e.g., the activities of the Klu Klux Klan immediately after the Civil War);

3) Where uniformity is important, as in the context of antitrust and securities regulation and the criminal enforcement authority that underlies these regulatory schemes;

4) Where the states are unable or unwilling to face the problem, as in the case of the enforcement of the civil rights statutes.

Later in the day, participants pondered what ought to count as a comparative advantage in the context of criminal enforcement. For example, is it proper at the legislative level to extend federal jurisdiction over intrastate crime that has traditionally been the province of the state system because federal sentences are longer, or federal procedural rules of various types are more favorable to the prosecution? In the context of individual cases, prosecutors often bring cases into the federal system for just such reasons. Later discussion considered some of the problems raised when prosecutors select a few cases—or “cherry pick”—to get the advantages of favorable federal laws.

Judge Marcus suggested a list of similar criteria for federal criminal jurisdiction:

1) Crimes against the United States itself, i.e., against its treasury or its officers, or on its property;

2) Criminal enterprises that by virtue of their scope and magnitude spill across interstate and/or international boundaries, e.g., international narcotics cartels;

3) Crime that is essentially intrastate, where the scope is so great that there is a need for federal resources and concurrent jurisdiction is justified, e.g., large bank fraud cases;

4) Enforcement of the rights of insular minorities, e.g., civil rights cases;

5) Systematic and pervasive corruption of the local system, e.g., Operation Greylord, the investigation of corruption of the Cook County court system.
Judge Marcus observed that the two most difficult and controversial questions today involve the role the federal government should play regarding violent crime, which has traditionally been the province of state and local enforcement, and narcotic enforcement. Judge Marcus's third criterion, the extension of federal jurisdiction over intrastate crime in order to provide federal resources, was the focus of a great deal of discussion throughout the day.

How much difference is there between these two proposals? Both agree on the first criterion, a direct injury to the federal government. Professor Sullivan's second criterion, efficiency-based considerations, seems to collapse two of Judge Marcus's criteria, criminal enterprises that spill over interstate or international boundaries, and intrastate crime of such magnitude that there is a need for federal resources. The differences in wording may be significant. Professor Sullivan explicitly approves of federalization for reasons of economy of scale or because illegal conduct "threatens to overwhelm local authorities." This last phrase may have tremendous expansive potential; if they are inadequately financed, state authorities may be overwhelmed by even garden variety crime. This presents quite a different issue than large scale bank fraud cases, which may be quite different in kind from other offenses prosecuted by the states, and present a self-limiting category.

Professor Sullivan's third and fourth criteria have no counterparts in Judge Marcus's scheme. She posits that the need for uniformity may justify federalization, as in the context of antitrust and securities legislation and the criminal enforcement that underlies this enforcement scheme. It should be noted that similar regulatory schemes backed by criminal sanctions are common, including the regulations involving occupational health and safety, pure food and drugs, national labor relations, coal mine safety, and air and water quality. Finally, she suggests that the federal government has a comparative advantage in prosecuting "when states are unable or unwilling to face up to a problem, as in the case of the enforcement of the civil rights statutes." This category poses real difficulties. Though Judge Marcus agrees that federal enforcement of the civil rights laws is appropriate, he does so on a different and far more limited ground. Read literally, Professor Sullivan's final criterion would support federal intervention whenever there is a federal judgment that the states have failed adequately to "face up to"—or perhaps to solve—some facet of crime. Yet failure to act may reflect a deliberate state policy. Nonenforcement may reflect the state authorities' view that prosecuting the con-
duct in question is comparatively unimportant, or indeed the policy that prosecuting such conduct would be undesirable. Should it be the federal government’s role to force the states to face up to crime across the board, or should such intervention be limited to situations in which there is some special federal interest in the subject matter?

Judge Marcus’s last two criteria identify more specialized federal interests that would justify federal enforcement when state officials are unable or unwilling to act: the federal interest in the enforcement of the rights of “insular minorities,” and the federal interest in the prosecution of “systematic and pervasive corruption of the local system.” In the presence of discrimination or pervasive corruption, federal officials may no longer defer to state and local authorities, and political checks on the behavior of local officials are of doubtful value. Hence the justification for federal enforcement is greater than it would be in other situations when state officials are unable or unwilling to act. Further, in the case of discrete minorities, the federal government has special enforcement responsibilities under the Civil War Amendments.93

B. A Presumption Against the Federalization of New Offenses

Written materials presented to the participants suggested that there be a presumption against the creation of new federal offenses,94 and considerable support for such a presumption was voiced. Those speaking in favor of such a presumption agreed that it could be overcome if three criteria were met. There was general agreement on the formulation of the first two criteria: in order to overcome the presumption there must be a substantial federal interest, and the states must be unable to accomplish this interest.95 The third criterion was formulated differently by various speakers. Some referred to a requirement of a showing that federal enforcement would be more effective. This would require a determination of what it means to be “effective.” Is federal enforcement more effective if the federal government has greater financial resources? If so, that will nearly always

93. It has also been suggested that there is also a special federal responsibility to prosecute state and local corruption under the Guarantee Clause. See Adam Kurland, The Guarantee Clause of the Constitution as a Basis for Federal Prosecutions of State and Local Officials, 62 S. CAL. L. REV. 367 (1989).


95. Since the application of this standard requires a determination whether a federal interest is present, it requires agreement on what constitutes a federal interest. This issue is discussed supra.
be the case. On the other hand, effectiveness could be defined much more narrowly, meaning that enforcement called upon some innate feature of the federal system, such as its ability to handle interstate and international activity. Another speaker focused on whether federal enforcement would be consistent with the expertise of the federal system and personnel; this would be similar to a test of effectiveness that focused on the unique features of the federal system.

A federal judge, in comments provided after the Roundtable, supported a presumption against the enactment of new federal crimes and sought to refine the criteria. The key, in his view, should be the question whether a federal criminal statute would enlarge federal jurisdiction so much that it would interfere with the federal courts' core functions. If so, federalization in areas of concurrent jurisdiction should be resisted. This view would require not only an analysis of the federal interest supporting a proposal, but its potential impact on the other business of the federal courts. The application of this standard poses two difficulties. First, agreement must be reached on what constitutes the "core functions" of the federal courts. Second, it would be more difficult than it might appear at first blush to identify the impact on the courts. The impact criminal legislation has on the courts is a function not merely of the crimes on the books, but more importantly of the funds appropriated by Congress for enforcement and the policies of the Department of Justice and the various United States Attorneys' offices. By itself, the enactment of a new criminal statute does not increase the number of prosecutions in the federal courts, nor does it necessarily mean that federal prosecutors will bring cases under the new statute rather than cases under older statutes.

C. A Presumption in Favor of Employing Federal Resources in Support of State and Local Enforcement, Rather than to Bring Federal Prosecutions in Areas of Concurrent Jurisdiction

Much of the Roundtable discussion centered on the desirability of providing federal resources to the states rather than enacting new federal offenses or appropriating additional funds for more federal enforcement. Once a federal interest is recognized, Congress can employ a variety of means. In areas of traditional state enforcement, there might be a presumption in favor of providing federal support for additional state prosecutions, rather than authorizing or funding additional federal prosecutions.

Several speakers expressed strong opposition to creating new federal crimes as a means of providing financial resources to aid either
(1) the wholesale prosecution of new classes of intrastate crime or (2) the selective federal prosecution of just a few cases of intrastate activity. Several federal participants argued in favor of providing financial support and other federal resources to assist the states rather than creating new federal crimes or prosecuting more cases under the present federal statutes. For example, the new Crime Bill will provide federal grants to hire local police and set up local drug courts. One congressional participant spoke in favor of using federal resources to provide seed money to encourage states to adopt approaches that are working elsewhere. In general, state participants seemed to support the idea of federal support of the state and local criminal justice system. Another participant spoke in favor of federal technical and financial aid to state enforcement, particularly state juvenile courts, drug courts, and unified family courts.

There are a variety of advantages to funding state and local enforcement rather than adding a new layer of federal enforcement. First, the creation of new federal crimes, unlike the provision of support for state and local prosecutions, requires the reallocation of scarce federal judicial resources when the state courts, if adequately funded, are fully adequate. Second, unless massive resources are provided, new federal crimes are unlikely to be enforced in more than a token number of cases. Bringing a small number of prosecutions in federal courts inevitably creates a disparity in the way similarly situated offenders are treated, particularly regarding their sentences. The vast majority of such offenders are prosecuted in the state system, and only a few are prosecuted in the federal courts, where sentences are often far heavier. What justifies the disparity in these sentences? Congress and federal prosecutors generally cite the need for a deterrent effect, arguing that the possibility of prosecution under the harsher federal laws will deter future violations. If that is the case, would it be acceptable to randomly select one of every 200 federal offenders and double or triple his sentence in order to deter future violations? This would fly in the face of the Sentencing Guidelines, though it has the same practical effect as bringing only a handful of federal prosecutions when the remainder of similarly situated cases are prosecuted under more lenient state law.

One state participant noted that federal participants seem to be assuming that more incarceration will provide more deterrence, when in fact that may not be the case. A recent study of state data found that increasing incarceration levels did not reduce the rate of violent crime, and accordingly "at both the national and state levels, incapac-
tation as a crime control strategy need not be directed as broadly as it is." The study concluded that "[u]sing incarceration as the primary sanction for the bulk of offenders does not appear to be justified given what we do know."  

One key question to be explored is whether it is possible to provide federal leadership—including not only model programs and technical assistance, but also continuing financial support for state justice—without unduly trenching on state autonomy and losing the benefits of state experimentation.

Some state participants voiced strong opposition to the idea of the federal government providing funds to support the state criminal justice system, and particularly the state courts, on the ground that this inevitably makes them "federal dominions." While other state participants supported the provision of state funds to support state and local enforcement, they generally opposed the imposition of federal standards as a condition of federal funding, arguing that no one has shown that the federal procedures are better than the state procedures and that experimentation with a variety of standards is beneficial. Federal standards are too far removed from the grass roots, where there is the most expertise about particular problems. One state participant argued in favor of a clear division of authority; it is better for the federal government to take over a function entirely than to impose onerous federal regulations as a condition of federal support of functions for which the states remain responsible. Another state participant particularly objected to federal efforts to impose conditions without providing financial support.

On the other hand, some comments by state participants suggested that internal deficiencies in the state systems sometimes lead state actors to prefer the federal system. For example, state prosecutors spoke of the need to take cases to federal court to gain the advantage of federal laws authorizing wiretaps, limiting discovery, permitting the joinder of multiple defendants to enhance efficiency, and authorizing and enforcing long sentences for extremely dangerous offenders. Some might argue that state officials who believe the federal standards in question are beneficial should see the strings attached to federal resources as the carrots that could lead states to adopt laws to improve the functioning of the state and local criminal


97. Id.
justice systems across the board, rather than providing an ad hoc fix in a few cases. Indeed, it could be argued that it is both inefficient and unfair to require federal subsidies for states that have failed to adopt beneficial laws to aid law enforcement, such as laws authorizing wire taps, or joinder, discovery, and sentencing provisions. It was also noted that it is difficult to justify the fairness of the significant differences between the sentences of those prosecuted in the federal system and those prosecuted for the same conduct in the state system, particularly when the issue of reducing sentencing disparity was one of the primary justifications for the adoption of the Sentencing Guidelines.

Participating constitutional scholars pointed out that Congress has a variety of alternatives if it wishes to see various federal procedural rules and sentencing laws apply to cases that have traditionally been prosecuted by the states. So long as Congress has constitutional authority over the conduct in question (under the Commerce Clause, for example), it may create federal offenses and require them to be tried in state courts following federal law.98 Or Congress could simply enact a law requiring that the desired federal procedures be adopted in any case meeting certain criteria (such as an impact on interstate commerce), including state offenses prosecuted in state courts. No support for such an approach was voiced.

There was also a recognition that federal monies are not likely to last forever. Congressional participants warned that Congress could not and would not permanently federalize the funding of local law enforcement with no strings attached; ultimately local jurisdictions will have to decide whether to pick up the costs. If the money is not permanent, there will be trouble down the line. One state participant likened the situation to giving an addict one heroin fix: what happens when you get over that high?

Other problems with federal funding of state and local enforcement were raised. Federal funding for one part of the system increases pressures on other parts of the system. For example, federal funding of more police is fine, but how will the states pay for the other costs of the cases these police will generate in the courts and corrections system? Other participants expressed concern that federal resources may not be well spent. LEAA resources were often not used wisely. Indeed, state officials have sometimes taken federal monies intended for new initiatives and used them instead to pay current expenses. Concerns about how effectively federal resources will be

98. But see supra notes 2-4 and accompanying text.
spent may lead to the imposition of controls which states find burdensome or believe are substantively unjustified.

D. Judicial Impact Statement

One participant advocated the idea of a requirement that new federal criminal legislation be accompanied by a new kind of impact statement that would identify the cost and benefits of the initiative in question and then compare the costs and benefits of alternative measures. This would allow a comparison of alternatives, such as federal prosecution of a large number of new cases, federal prosecution of a few selected, and federal financial and technical support for state and local prosecutions. Such a procedural requirement would spotlight alternative federal responses to crime and force consideration and public debate regarding the relative costs and benefits.

E. Shifting the Focus: Federalization Occurs as Prosecutorial Discretion

The criteria identified by Professor Sullivan and Judge Marcus and the presumptions discussed above provide guidance on the legislative issue of when to create new federal offenses. While recognizing the importance of limiting the federalization of crime, several participants suggested that the breadth of the federal criminal legislation on the books was far less important than the question of the actual discretionary enforcement. Under this view, the most important question is when federal prosecutors should exercise their discretion, not whether Congress should enact new federal offenses. It was pointed out that federal prosecutors do not currently prosecute all of the conduct that falls under the existing 3,000 federal offenses. In some districts, the federal courts are not currently overburdened because the federal prosecutor brings only cases of serious federal interest; this demonstrates that prosecutorial discretion can handle many of the problems of any possible legislative over-federalization. Another participant observed that the breadth of federal criminal statutes is less important than the amount of money that is provided for enforcement.

While there was certainly general support for the sound exercise of federal prosecutorial discretion in consultation with state and local officials, various concerns were raised about extending the current pattern of the discretionary selection of a limited number of prosecutions under extremely broad federal statutes that overlap with state and local laws.
Federal prosecutors identified several problems with expanding the number of federal crimes. First, when the legislature makes everything a priority, nothing is a priority. In other words, an overbroad legislative mandate provides no guidance to prosecutors. Second, the more federal crimes Congress authorizes, the more time federal prosecutors must spend working out their cooperation with state and local officials. One federal prosecutor observed that cherry picking a few cases may enhance the safety of the community and set a high-profile example for state officials, but it also takes the pressure off state officials to reform their own laws and procedures.

Other participants expressed concern that the creation of new federal offenses that will be enforced in only a few symbolic prosecutions raises unrealistic expectations, which may ultimately leave the public very disillusioned and may also delay more far-reaching solutions.

The federal prosecutors agreed that they often cherry pick a small number of cases where federal law is advantageous on procedural matters or sentencing; this can send a deterrent signal or take a particularly dangerous offender off the streets for a longer time. The state prosecutors agreed that they often ask their federal counterparts to take such cases. In these cases, to use Professor Sullivan’s terminology, the federal prosecutors have a comparative advantage. One participant asked whether the state participants were being consistent when they objected to the imposition of federal procedures and standards, yet frequently sought to move cases to the federal system in order to have the benefit of the application of these very federal standards.

Prosecutorial discretion to select out a few cases (cherry picking) inevitably produces disparity in the treatment of these offenders in comparison with others who are prosecuted in the state system. It is difficult to square this disparity with the efforts under the Sentencing Guidelines to ensure that persons who have engaged in the same conduct receive the same sentence. Within the federal system we would never countenance the selection of one offender out of one hundred to receive a far harsher sentence in order to deter others, but this is exactly what we do when we pull one out of one hundred cases into the federal system to send a deterrent message.