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Debunking Claims of Over-Federalization of Criminal Law

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DEBUNKING CLAIMS OF OVER-FEDERALIZATION OF CRIMINAL LAW

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[*] Alice McKean Young Regents Chair in Law, University of Texas School of Law. Many thanks to my research assistant Eric Werlinger. This paper was first presented at a conference hosted by the Southeastern Association of Law Schools, and I appreciate the insightful discussion from the other commentators and participants on my panel, especially Brandon Garrett and Ellen Podgor. I appreciate as well the comments I received from my colleagues at UT when I presented this at our drawing board lunch, especially the written comments provided by Jordan Steiker and Jennifer Laurin, and the oral comments from Michael Churgin, Mitch Berman, and Ronen Avraham. I benefited greatly from discussions on the topic with Anthony Brown, Chief Assistant for the Austin Office of the U.S. Attorney's Office for the Western District of Texas. Finally, special thanks go to Daniel C. Richman, Stephanos Bibas, Robert Weisman, Sam Buell, and Stephen Smith for the extensive and insightful written comments on an earlier draft.

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INTRODUCTION

Virtually all criminal law scholars bemoan the over-federalization of criminal law.[1] They are joined by judges,[2] bar review associations,[3] and special interest groups.[4] Conventional wisdom has it that our federal congressmen and senators curry favor with their constituents by making a federal case out of any

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[1] *See* scholars listed *infra* notes 5–9; *see also* Kathleen F. Brickey, *Criminal Mischief: The Federalization of American Criminal Law*, 46 HASTINGS L.J. 1135 (1995); J. Richard Broughton, *Congressional Inquiry and the Federal Criminal Law*, 46 U. RICH. L. REV. 457 (2012) (criticizing the over-federalization of criminal law and suggesting the use of congressional inquiry powers as one solution); Rory K. Little, *Myths and Principles of Federalization*, 46 HASTINGS L.J. 1029, 1061–62 (1995) (arguing that the Constitution authorizes the federal government to address only a limited range of criminal acts and that it should do so only when it has a definite national interest and clear textual authority); Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703 (2005) (offering libertarianism as the solution to the problem of over-criminalization at both the federal and state levels); Ellen S. Podgor, Foreword, *Overcriminalization: The Politics of Crime*, 54 AM. U. L. REV. 541 (2005); John A. Humbach, *Returning Prosecutions to the States: A Proposal for a Criminal Justice Restoration Act* (Pace Univ. School of Law, Working Paper No. 746, 2010), *available at* http://ssrn.com/abstract=1690267 (arguing that the federal justice bureaucracy has run amok and can be reduced to a fraction of its size by returning authority over criminal prosecutions to the states). *But see* Tom Stacy & Kim Dayton, *The Underfederalization of Crime*, 6 CORNELL J.L. & PUB. POL'Y 247, 268 (1997) (suggesting that the federal government should become more involved in combating ordinary street crime).

[2] Sykes v. United States, 131 S. Ct. 2267, 2288 (2011) (Scalia, J., dissenting) ("Fuzzy, leave-the-details-to-be-sorted-out-by-the-courts legislation is attractive to the Congressman who wants credit for addressing a national problem but does not have the time (or perhaps the votes) to grapple with the nitty-gritty."); FED. COURTS STUDY COMM., REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 4–10, 35–38 (1990) (reporting that the federal courts are nearing caseload crises, stemming in part from the unprecedented number of narcotics prosecutions); JUDICIAL CONFERENCE OF THE U.S., LONG RANGE PLAN FOR THE FEDERAL COURTS 21–28 (1995) (identifying for federal involvement only those offenses that involve unique national concerns, such as offenses against the federal government itself, corruption cases involving state actors, operations by sophisticated criminal enterprises, and criminal activity with international dimensions); William H. Pryor Jr., Commentary, *Federalism and Sentencing Reform in the Post*-Blakely/Booker *Era*, 8 OHIO ST. J. CRIM. L. 515, 517 (2011) ("To restore respect for federalism, we must reverse the federalization of crime.").

[3] *See, e.g.*, Task Force on the Federalization of Criminal Law, *The Federalization of Criminal Law*, 1998 A.B.A. CRIM. JUST. SEC. 1, 5–14 [hereinafter A.B.A. REPORT] ("Congressional activity making essentially local conduct a federal crime has accelerated greatly . . . . contribut[ing] to a patchwork of federal crimes often lacking a principled basis."). Edwin Meese III, who served as Attorney General of the United States under President Ronald W. Reagan, was the Chair of this task force. He also authored *Big Brother on the Beat: The Expanding Federalization of Crime*, 1 TEX. REV. L. & POL. 1, 6 (1997), which suggested that the "more crime is federalized, the more the potential exists for an oppressive and burdensome federal police state."

[4] *See, e.g.*, JOHN S. BAKER, JR. & DALE E. BENNETT, FEDERALIST SOC'Y FOR LAW & PUB. POLICY STUDIES, MEASURING THE EXPLOSIVE GROWTH OF FEDERAL CRIME LEGISLATION (2004) [hereinafter FEDERALIST SOCIETY REPORT]; BRIAN W. WALSH & TIFFANY M. JOSLYN, HERITAGE FOUND., WITHOUT INTENT: HOW CONGRESS IS ERODING THE CRIMINAL INTENT REQUIREMENT IN FEDERAL LAW 6 (2010) [hereinafter HERITAGE FOUNDATION REPORT].

conceivable bad behavior.[5] On the other hand, a lawmaker who votes to repeal a criminal law may be faced with accusations that she is soft on crime. Thus, politics (rather than reasoned judgment) has led to the passage of upwards of approximately 4,500 federal criminal prohibitions, as many as half of these passed since 1970.[6]

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

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[5] There is general agreement that the cause of the growth is political—no one will vote against crime control legislation because no one who wishes to be reelected can appear soft on crime. *See* Sara Sun Beale, Essay, *The Many Faces of Overcriminalization: From Morals and Mattress Tags to Overfederalization*, 54 AM. U. L. REV. 747, 755 (2005) [hereinafter Beale, *The Many Faces of Overcriminalization*] (noting that the present federal criminal code contains "legislation drafted in response to whatever crime is the focal point in the media—even if that offense is already defined and punished harshly and effectively under state law"); Donald A. Dripps, Essay, *Criminal Procedure, Footnote Four, and the Theory of Public Choice; or, Why Don't Legislatures Give a Damn About the Rights of the Accused?*, 44 SYRACUSE L. REV. 1079 (1993); Julie R. O'Sullivan, *The Federal Criminal "Code" is a Disgrace: Obstruction Statutes as Case Study*, 96 J. CRIM. L. & CRIMINOLOGY 643, 654 (2006) (arguing that redundancies in the federal code "can be traced largely to the political desire to react to a given scandal . . . by enacting a 'new' section that simply repeats existing prohibitions (*and* by jacking up statutory maximum penalties to underscore congressional resolve)"); Stephen F. Smith, *Proportionality and Federalization*, 91 VA. L. REV. 879, 881 (2005) ("[T]he expansion of the criminal code has seemed to be driven by politics rather than by a demonstrated need for expanded coverage.").

[6] One witness stated before a House Subcommittee in 2009 that there are now more than 300,000 regulations within the federal code that could possibly trigger criminal sanctions. *Over-Criminalization of Conduct/Over-Federalization of Criminal Law: Hearing Before the Subcomm. on Crime, Terrorism, & Homeland Sec. of the H. Comm. on the Judiciary*, 111th Cong. 7 (2009) [hereinafter *House Hearings*] (testimony of Richard Thornburgh, former Att'y Gen. of the United States). The last official government count of federal criminal laws took place in the early 1980s when the government reported identifying 3,000 federal criminal laws. *See* Roger J. Miner, *Crime and Punishment in the Federal Courts*, 43 SYRACUSE L. REV. 681, 681 (1992) (identifying 3,000 federal criminal laws as of 1992); *see also* FEDERALIST SOCIETY REPORT, *supra* note 4, at 5, 7–10 (estimating 4,000 federal offenses carrying criminal punishments in 2004 and detailing the difficulties in obtaining an accurate count of federal criminal laws due to dispersion throughout the federal code and multiple crimes embedded in single statutes); HERITAGE FOUNDATION REPORT, *supra* note 4, at 6 (noting that the number of offenses in the U.S. Code was at least 4,450 by 2008).The ABA observed that "more than a quarter of the federal criminal provisions enacted since the Civil War [through 1996] have been enacted within a sixteen year period since 1980." A.B.A. REPORT, *supra* note 3, at 7 n.9.

[7] Sara Sun Beale, *Federalizing Crime: Assessing the Impact on the Federal Courts*, 543 ANNALS AM. ACAD. POL. & SOC. SCI. 39 (1996) [hereinafter Beale, *Federalizing Crime*] (arguing that criminal cases take up a disproportionate share of judicial resources because of the complexity of the cases, the more onerous sentencing structure required by the Sentencing Reform Act of 1984, and the timing requirements of the Speedy Trial Act); Beale, *The Many Faces of Overcriminalization*, *supra* note 5 (noting the many inane

federal criminal code gives federal law enforcement agents and prosecutors unhealthy amounts of discretion to charge just about anyone, and he suggested that the Supreme Court impose substantive limits on the definitions of crimes.[8] Steven Clymer and Stephen F. Smith independently insist that the expansion of the federal criminal code gives federal prosecutors an opportunity to unfairly charge select defendants with controlled substance violations (according to Professor Clymer) and sex crimes, bribery, RICO, and mail fraud (according to Professor Smith) in a forum characterized by government-friendly procedural rules and draconian sentences.[9] The American Bar Association reported that overgrowth of the federal criminal code now threatens both the efficacy of our federal court system and the continued viability of local law enforcement.[10]

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activities prohibited by federal criminal law); Sara Sun Beale, *Too Many and Yet Too Few: New Principles to Define the Proper Limits for Federal Criminal Jurisdiction*, 46 HASTINGS L.J. 979 (1995) [hereinafter Beale, *Too Many and Yet Too Few*].

[8] William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505 (2001) [hereinafter Stuntz, *Pathological Politics*] (arguing that the broad federal laws enacted give prosecutors discretion to target a large pool of actors); *see also* O'Sullivan, *supra* note 5, at 673 (noting that "the overbreadth, vagueness, and redundancy of the code give prosecutors power that they are not supposed to have in a decently-functioning system of justice"); Ellen S. Podgor, *The Tainted Federal Prosecutor in an Overcriminalized Justice System*, 67 WASH. & LEE L. REV. 1569, 1578 (2010) ("In addition to the constantly increasing number of applicable statutes, the breadth of many federal criminal statutes and the lack of *mens rea* or reduced *mens rea* in some of these statutes afford prosecutors significant power in their prosecution role."). *But see* Samuel W. Buell, *The Upside of Overbreadth*, 83 N.Y.U. L. REV. 1491 (2008) (suggesting that a certain amount of overbreadth in liability rules, especially in federal criminal law, is desirable). More recently, Professor Stuntz suggested that we solve this problem by applying federal sentences only if federal criminal law is exclusive. William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 780, 843–45 (2006); *see also* Daniel C. Richman & William J. Stuntz, Essay, *Al Capone's Revenge: An Essay on the Political Economy of Pretextual Prosecution*, 105 COLUM. L. REV. 583 (2005).

[9] Steven D. Clymer, *Unequal Justice: The Federalization of Criminal Law*, 70 S. CAL. L. REV. 643 (1997) (noting that many federal laws, particularly those involving drug trafficking and weapons offenses, require long mandatory minimum sentences that are longer than the statutory maximum sentences at the state level, and suggesting judges rely on the Equal Protection Clause when prosecutors fail to resolve the problem by internal control); Smith, *supra* note 5 (arguing that over-federalization leads to draconian sentences compared to similar state crimes, but that federal judges could solve this by narrowly interpreting federal crimes to ensure proportionality in punishment); *see also* Rachel E. Barkow, *Federalism and Criminal Law: What the Feds Can Learn From the States*, 109 MICH. L. REV. 519, 579 (2011) (suggesting that "disagreement over sentencing policy goes a long way toward explaining why the federal government has intervened in a host of areas of traditional local control"); Rachel E. Barkow, *Federalism and the Politics of Sentencing*, 105 COLUM. L. REV. 1276, 1299–1312 (2005) (arguing that the political process in the states is more likely to produce sound sentencing outcomes than the federal political process).

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

For the ABA, the solution is a combination of congressional restraint and Supreme Court enforcement of federalism principles.[11]

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

In the following pages, we will demonstrate through empirical data that in spite of the large increase in the number of federal criminal statutes, this growth itself has caused almost no impact on federal resources, nor has it destabilized the traditional balance of power between state and federal courts.[12] The percentage of criminal justice matters heard in federal court, when viewed as a fraction of all criminal matters prosecuted at both the state and federal level, has remained relatively constant from year to year, in spite of numerous new criminal enactments at the federal level. Moreover, the types of cases that make up the bulk of the federal caseload are generally appropriate for federal intervention, as they reflect a careful consideration of federal interests. Finally, the federal law enforcement system continues to defer to states in areas of strictly local concern, such as violent crime and property crime.

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

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[11] *Id.* at 51–56; *see also* Brickey, *supra* note 1, at 1166 ("If the federal justice system is to function effectively and continue to dispense justice, the legislative and executive branches of government must exercise restraint.").

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

the likeness of Smokey Bear)[13] or federalism concerns (such as the federal carjacking statute)[14] are rarely, if ever, used.

In Part I, we will explore the makeup of federal criminal caseloads in the United States since 1940.[15] These statistics demonstrate that the bulk (approximately 80%) of federal criminal prosecutions today pertain to one of four offense categories: controlled substances, immigration, fraud, and weapons offenses.[16] In fact, the majority of federal criminal defendants today (around 59%) fall into one of just two offense categories: in 2011, 30% of all federal criminal defendants were charged with drug offenses, while an additional 29% were charged with immigration offenses.[17] Similarly, controlled substances, immigration, and weapons offenders comprise more than three-quarters of the federal prison population.[18] Aside from prosecutions of drug and immigration violators, which have increased significantly in recent years, the rate of prosecution for most other federal offenses remains low and surprisingly static from year to year.[19] Some prominent offense categories have actually decreased as an overall percentage of the federal criminal caseload, owing primarily to the astronomical rise in the number of prosecutions for drug and immigration offenses, which now dwarf all other offense categories.[20]

What has remained relatively static in recent decades is the percentage of felony matters pursued federally rather than at the state or local level. This is

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[13] 18 U.S.C. § 711 (2006). Though this statute is trotted out by many of the commentators criticizing the over-federalization of criminal law, we could find no prosecution or investigation pursuant to it.

[14] 18 U.S.C. § 2119 (2006) is another favorite of those arguing against over-federalization. *See, e.g.*, Beale, *The Many Faces of Overcriminalization*, *supra* note 5, at 755–56 ("[Federal criminal law] contains what some have called the *crime du jour*—legislation drafted in response to whatever crime is the focal point in the media—even if that offense is already defined and punished harshly and effectively under state law. For example, a high profile carjacking in a suburb near Washington, D.C., led to the rapid enactment of a federal carjacking statute." (footnote omitted)). There were 131 defendants prosecuted for carjacking under this statute in 2011, comprising 0.1% of the federal caseload. *See* STATISTICS DIV., ADMIN. OFFICE OF THE U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS app. at 84 tbl.D-2 (March 31, 2011) [hereinafter Table D-2, 2011].

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

[16] *See infra* Table 6B for a pie chart of federal criminal defendants by offense category for 2011. Drug offenses account for 30% of federal criminal defendants, immigration 29%, weapons offenses 8%, and fraud 13%. *See infra* Table 6A for the similar 2010 figures.

[17] *See* Table D-2, 2011, *supra* note 14, at 84–86; *see also infra* Table 6B.

[18] These three offense categories comprise 76% of current federal prisoners (drugs 48%, immigration 12%, and weapons 16%). *See infra* Table 12.

[19] *See infra* Tables 7, 8.

[20] See *infra* Tables 2–6, which illustrate the growth of immigration and drug prosecutions compared to other offense categories since 1980.

so in spite of the increasingly complex interstate and global nature of business and crime organizations. Crime remains as much a local matter today as it did 100 years ago. Overall, federal felony convictions have comprised around 5% of all felony convictions (state and federal combined) since at least 1992.[21] The action in criminal law has always been, and continues to be, at the state and local levels. Unless we experience an extreme resource and cultural refocus, federal criminal law will remain a minor player outside the enclaves of direct federal interests (for example, bribery of federal officials and other administration of federal justice offenses, immigration, terrorism, tax offenses, and protection of federal programs and property) where it reigns supreme.[22]

In the remainder of Part I, we will explain why the explosion in federal criminal law (at least in terms of the sheer number of federal criminal proscriptions) is largely irrelevant to charging decisions made by federal prosecutors. Many of these new federal crimes are virtually ignored or overlooked by prosecutors. Immigration and drug prosecutions,[23] the most frequently charged offenses in the federal criminal code, are brought primarily under statutes enacted decades ago,[24] and few scholars, judges, practitioners, or citizens would suggest, at least in the case of immigration enforcement, that such enforcement is inappropriate for federal pursuit.[25] While a plausible argument has been made that some, if not all, of those controlled substances banned federally (and at the state level) should be decriminalized,[26] once the

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[21] *See infra* Tables 9, 10.

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

[23] In 1980, just 7% of all federal criminal defendants were charged with immigration offenses, but this number rose to 29% in 2011. Defendants prosecuted for controlled substance offenses constituted 19% of all federal criminal defendants in 1980, but this rose to 30% in 2011. *See infra* Tables 2, 6-B.

[24] *See* Act of June 27, 1952, ch. 477, 66 Stat. 228 (codified as amended at 8 U.S.C. § 1324 (2006)); Controlled Substances Act, Pub. L. No. 91-513, 84 Stat. 1242 (1970) (codified as amended at 21 U.S.C. § 801 *et seq*. (2006)); *see also infra* Chart of Commonly Used Federal Criminal Statutes.

[25] *See infra* notes 75, 86–89, 96–101; *see also* Arizona v. United States,132 S. Ct. 2492, 2502 (2012) (acknowledging that "[f]ederal law makes a single sovereign responsible for maintaining a comprehensive and unified system to keep track of aliens within the Nation's borders").

[26] For example, the Global Commission on Drug Policy—a nineteen-member group that includes a former U.N. Secretary General and past presidents of Mexico, Brazil, and Colombia—reported in June 2012 that the global war on drugs has failed and recommended that governments explore legalizing, regulating, and taxing marijuana and other controlled substances. GLOBAL COMM'N ON DRUG POLICY, THE WAR ON DRUGS

policy choice is made to engage in a war on drugs, few would agree that such a fight can be won without federal involvement, at least in the key areas of importation and drug trafficking. Ultimately, the compelling arguments in favor of defederalizing the war on drugs are actually arguments against the propriety of using a crime control model, rather than a medical model, to curb the demand for drugs. Such arguments, therefore, go not to the heart of the over-federalization debate, but rather aim for a different target: the criminal regulation of controlled substances.

This is not to deny that there are some glaring problems with the federal criminal justice system,[27] but the worst of these do not stem from the enactment of too many (and sometimes just plain silly) federal criminal proscriptions. In Parts II and III, we take on not only the more shallow critique regarding the excessive number of federal criminal prohibitions, but also the more serious and nuanced scholarly critiques regarding deeper issues, such as overbroad federal jurisdiction, federal crimes that do not require bad intent, and disproportionately severe federal sentences. Many of the problems that scholars and judges most frequently blame on over-federalization are either not

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AND HIV/AIDS: HOW THE CRIMINALIZATION OF DRUG USE FUELS THE GLOBAL PANDEMIC 21 (2012); *see also* NORMAN ABRAMS, SARA SUN BEALE & SUSAN RIVA KLEIN, FEDERAL CRIMINAL LAW AND ITS ENFORCEMENT 319–23 (5th ed. 2010) (collecting arguments on alternate approaches to the issue of controlled substances).

[27] We believe that the worst injustices in the administration of criminal justice today occur at the state and local (and not the federal) level. As Professor Klein argued over a decade ago, the most pressing problem for criminal defendants in this country is lack of adequate representation, a non-federal phenomenon. This, in turn, can lead to conviction of the innocent. *See* Susan R. Klein, Review Essay, *Enduring Principles and Current Crises in Constitutional Criminal Procedure*, 24 LAW & SOC. INQUIRY 533 (1999). We now note that none of the 225 defendants exonerated by DNA evidence by 2009 was convicted of a federal offense. *See* Nancy Ritter, *Postconviction DNA Testing Is at Core of Major NIJ Initiatives*, NAT'L INST JUST. J, Mar. 2009, at 18, 18–25. While two of the exonerated individuals were originally prosecuted by the federal government (one for rape and murder, the other for assault with intent to rape) both were actually prosecuted in the D.C. Superior Court under District of Columbia law, and not under the U.S. Code. *See Know the Cases: Edward Green*, INNOCENCE PROJECT, http://www.innocenceproject.org/Content/Edward_Green.php (last visited Aug. 31, 2012); Maurice Possley, *Know the Cases: Donald Eugene Gates*, INNOCENCE PROJECT, http://www.innocenceproject.org/Content/Donald_Eugene_Gates.php (last visited Aug. 31, 2012); *see also* Jerry Markon, *Justice Dept. to Reverse Bush-era Policy on DNA Tests*, WASH. POST, Nov. 18, 2010, at A4 (reporting that Attorney General Holder decided to overturn the federal practice of seeking "DNA waivers" in plea agreements after Gates was exonerated). In the federal system, the most pressing problems in our opinion stem from unequal bargaining power at plea negotiations, draconian and mandatory minimum sentences, and lack of adequate and timely discovery for criminal defendants—problems wholly unrelated to the burgeoning number of federal criminal proscriptions. *See* Susan R. Klein, *Enhancing the Judicial Role in Criminal Plea and Sentence Bargaining*, 84 TEX. L. REV. 2023, 2027, 2042–52 (2006) (suggesting that changes to Federal Rules of Criminal Procedure 11 and 16 could improve many of these issues); Susan R. Klein & Jordan M. Steiker, *The Search for Equality in Criminal Sentencing*, 2002 SUP. CT. REV. 223 (2002) (arguing that unfairness in federal sentencing in non-capital cases is not due to mandatory sentencing guidelines, but rather to mandatory minimum penalties and other limits on judicial discretion).

problems at all, or are attributable to independent causes, such as legitimate concurrent federal and state jurisdiction (as in the drug trafficking context) or vague and overbroad federal criminal proscriptions (such as obstruction and mail fraud). As one of us has argued elsewhere, concurrent federal and state jurisdiction over the same misconduct is relatively benign. Those who commit fraud or drug offenses and receive harsher federal, rather than state, sentences have little cause for complaint.[28] First, each independent sovereign has its own independent interest in convicting and punishing misbehavior within its borders or by its citizens.[29] Second, the evidence we do have suggests that federal prosecutors rationally select cases for federal prosecution in areas of concurrent jurisdiction based upon such neutral reasons as value of loss (in fraud and property crime cases), quantity (in drug cases), recidivism, sophistication of means, number of jurisdictions involved, availability and allocation of government resources, and value of information defendants may possess to substantially assist the prosecution with other important cases.[30] We should be concerned with concurrent jurisdiction only when the federal government criminalizes behavior that some states regard as morally neutral or beneficial.[31] The problem of federal regulation of such activity, such as the use of medicinal marijuana by patients in many states, is a real but not intractable one.

The injustices associated with federal strict liability regulatory offenses, as well as the worst excesses regarding overbroad and vague criminal statutes, have actually been curbed rather well, particularly in the last few decades, by the United States Supreme Court. The absolute number of prosecutions for regulatory violations initiated by the Department of Justice has steadily decreased over the last few decades, and defendants charged with federal regulatory offenses now make up just 2% of all federal criminal defendants, down from 7% in 1980.[32] Moreover, the Court has implied a *mens rea* in many

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[28] See *infra* Part II. There were slightly more than 27,000 federal drug convictions in 2006 compared with almost 380,000 state drug convictions that year. Similarly, there were fewer than 10,000 federal fraud, embezzlement, and forgery convictions in 2006 compared with around 96,000 convictions at the state level. *See infra* Table 11.

[29] Heath v. Alabama, 474 U.S. 82, 93–94 (1985); Bartkus v. Illinois, 359 U.S. 121, 157 (1959) (Black, J., dissenting); *see infra* notes 162, 171.

[30] Richard S. Frase, *The Decision to File Federal Criminal Charges: A Quantitative Study of Prosecutorial Discretion*, 47 U. CHI. L. REV. 246, 263 (1980).

[31] Susan R. Klein, *Independent-Norm Federalism in Criminal Law*, 90 CALIF. L. REV. 1541, 1556 (2002) [hereinafter Klein, *Independent-Norm Federalism*].

[32] *See infra* Tables 2–6.

federal offenses that might otherwise appear to be strict liability offenses.[33] Vague and sweeping federal offenses, such as obstruction of justice and mail fraud, have likewise been trimmed significantly by the Court's narrow statutory interpretation to apply to clear instances of what we would all recognize as criminal misbehavior.[34] An astonishing 97.4% of federal criminal convictions in 2010 were by guilty plea[35] not because of over-federalization, but instead because the federal criminal justice system incentivizes prosecutors to charge only rock-solid cases (as they can decline most cases safely in the knowledge that state and local actors must pursue them),[36] and because the federal sentencing system generously rewards guilty pleas and cooperation agreements.[37]

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[33] *See infra* Part III. A few of those Supreme Court cases were subsequently overridden by Congress. *See* William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 450–55 (1991). Since Professor Eskridge's article, however, many more federal criminal statutes have been narrowed by the Court, and many of the congressional overrides have been themselves subsequently overridden. The battle over the mail fraud statute serves as a good example.

[34] *See, e.g.*, Skilling v. United States, 130 S. Ct. 2896 (2010) (discussing mail fraud); Cuellar v. United States, 553 U.S. 550 (2008) (discussing money laundering); Arthur Andersen LLP v. United States, 544 U.S. 696 (2005) (discussing obstruction of justice); United States v. Aguilar, 515 U.S. 593 (1995) (discussing obstruction of justice); Liparota v. United States, 471 U.S. 419, 426 (1985) (discussing fraud); Williams v. United States, 458 U.S. 279 (1982) (discussing false statement), *superseded by statute*, Act of Oct. 12, 1984, Pub. L. No. 98-473, 98 Stat. 2147 (codified as amended at 18 U.S.C. § 1344 (2006)); Bronston v. United States, 409 U.S. 352 (1973) (discussing perjury). These cases are discussed further in Part III.

[35] *See* Missouri v. Frye, 132 S. Ct. 1399, 1407 (2012). As the Court noted in *Frye*, of those convicted in district court in 2010, 97.4% were by guilty plea, with the remaining 2.6% choosing trials. *Id.* However, if we consider all federal defendants in 2010, including dismissals and acquittals, the guilty plea rate drops to 89%. That is, of all federal defendants disposed of in 2010, 89% pleaded guilty, 8.7 % were either dismissed or acquitted, and the remainder were convicted by trial. *See* SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS: ONLINE, tbl. 5.22.2010, *available at* http://www.albany.edu/sourcebook/pdf/t5222010.pdf (last visited Aug. 31, 2012).

[36] Richman & Stuntz, *supra* note 8, at 600–05 (noting that state and local prosecutors must pursue every violent crime, serious theft, and hard drug distribution offense committed in their jurisdiction if they desire reelection, whereas federal prosecutors have vast jurisdiction but little responsibility).

[37] ABRAMS, BEALE & KLEIN, *supra* note 26, at 911–60; Susan R. Klein & Sandra Guerra Thompson, *DOJ's Attack on Federal Judicial "Leniency," the Supreme Court's Response, and the Future of Criminal Sentencing*, 44 TULSA L. REV. 519 (2009).

I. THE NUMBERS: AN EXPLORATION OF THE FEDERAL CRIMINAL CODE AND ANNUAL CASELOADS

A. Enactment of Federal Criminal Statutes, 1790–Present

Federal criminal jurisdiction has, as Professor Beale noted, "expanded dramatically in the 200 years since the drafting of the Constitution."[38] The First Congress in 1790 enacted twenty-two federal felony offenses, covering such direct federal interests as treason; bribery of federal officials; perjury in federal court; theft of government property; crimes on the high seas, forts, and other places of sole and exclusive federal jurisdiction; and revenue fraud.[39] Other early federal criminal enactments covered areas of interest committed to the national government via the Constitution, such as immigration, counterfeiting, and bankruptcy.[40] In 1872, Congress enacted the Mail Fraud Statute in response to multi-state fraudulent schemes targeting large numbers of victims.[41] This might be viewed as the first federal criminal statute protecting individual victims,[42] rather than protecting the interests of the federal government.[43] After the Civil War, Congress enacted a series of statutes in response to the growth in interstate transportation and commerce, such as the Sherman Antitrust Act (1890); the Federal Food, Drug, and Cosmetic Act

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[38] Beale, *Federalizing Crime*, *supra* note 7, at 40. See *id.* at 40–47 and ABRAMS, BEALE & KLEIN, *supra* note 26, at 18–75 for an excellent summary of federal criminal jurisdiction from 1903–1995.

[39] Act of Apr. 30, 1790, ch. 9, 1 Stat. 112 (establishing federal crimes for treason; murder, maiming, larceny, or robbery within a fort or any other place under the sole and exclusive jurisdiction of the United States; piracy or mutiny on the high seas; stealing, perjury, or falsifying a record in any court of the United States; bribery of a judge of the United States (fine and imprisonment at discretion of court); obstruction of an officer of the United States; and violence against a foreign ambassador).

[40] Offenses concerning immigration include: passport fraud (enacted 1902), impersonating a citizen (1940), false citizenship or nationalization paperwork (1948), and alien smuggling and re-entry after deportation (1952). 8 U.S.C. §§ 1253–1428 (2006). Congressional authority to regulate naturalization is contained in Article I, section 8, clause 4 of the U.S. Constitution. U.S. CONST. art. I, § 8, cl. 4. The first counterfeiting offenses were enacted prior to 1909, 18 U.S.C. §§ 470–514 (2006), pursuant to Article I, section 8, clause 6 of the U.S. Constitution. U.S. CONST. art. I, § 8, cl. 6. Bankruptcy-related offenses were also enacted quite early, 18 U.S.C. §§ 152–58 (1898) (concerning concealed assets), pursuant to Article I, section 8, clause 4 of the U.S. Constitution. U.S. CONST. art. I, § 8, cl. 4. Federal tax fraud offenses included misdemeanor failure to pay federal income tax, Revenue Act of 1918, ch. 18, 40 Stat. 1085, federal tax felonies formerly contained in 26 U.S.C. §§ 1260–72 (1924), and our present 26 U.S.C. §§ 7201–17 (2006) (responding to the Sixteenth Amendment authorizing a federal income tax in 1913). Those statutes also clearly fall into the category of offenses that are clearly the exclusive province of the federal government.

[41] *See* CONG. GLOBE, 41st Cong., 3d Sess. 35 (1870) (statement of Rep. Farnsworth).

[42] This could be so viewed only if we exclude garden-variety criminal statutes that Congress enacted for those areas where federal jurisdiction was exclusive, such as the District of Columbia and federal territories.

[43] Beale, *Federalizing Crime*, *supra* note 7. However, one could argue that the Mail Fraud Statute was designed to protect the integrity of the Postal Service.

(1906, first criminal proscription 1907); and the Mann Act (transportation for illegal sexual activities, 1910). Congress also enacted statutes banning interstate transport of lottery tickets (1902) and theft in interstate shipments (1913). This marked the point in time at which the bulk of the federal criminal code began to concern conduct also subject to similar regulation under the states' general police powers. The federal jurisdictional hook in such statutes is interstate transport. Starting with the New Deal Era, when the role of the federal government expanded in all matters, Congress enacted federal criminal legislation concerning kidnapping (1932); securities and exchange fraud (1933 and 1934); interstate transportation of stolen property (1934); bank robbery (1934); Social Security fraud (1935); interference with commerce by threats, violence, or extortion (1946); the first federal firearms prohibitions (1938, 1954, 1968); and restrictions on labor unions (1947).[44]

The so-called explosion of federal criminal offenses that started in the 1960s and peaked throughout the 1970s and 1980s brought us legislation against credit card fraud (1964); explosives and arson (1970); the Medicare-Medicaid Anti-Kickback Act (1972); the Controlled Substances Act (1970, 1986); hazardous waste treatment, disposal and storage offenses (1972); the Racketeered Influenced and Corrupt Organizations Act (1970); game and conservation prohibitions (1970s–1990s, though an early statute was enacted in 1934); the Bank Secrecy Act (currency reporting requirements, 1970); money laundering and structuring prohibitions (1986); identification document fraud (1982); and Violent Crime in Aid of Racketeering (1984). The late 1980s through the first decade of the new century brought most of the federal anti-terrorism legislation (1986 and 1994), a federal carjacking statute (1992), interstate domestic violence prohibitions (1994), health care fraud legislation (1996), Freedom of Access to Clinic Entrances Act (1994), Violence Against Women Act (1994), special provisions against church arson (1996), additional legislation against child pornography (especially combined with use of the Internet, 1996), the Sarbanes-Oxley Act (2002), and sex offender registration laws (2006).[45] While many of the bad acts prohibited in these federal statutes are prohibited at the local level as well, the federal statutes generally contain an additional requirement of movement across state lines, use of the Internet,

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[44] *See generally* ABRAMS, BEALE & KLEIN, *supra* note 26 (discussing statutes); *infra* Chart of Commonly Used Federal Criminal Statutes (listing statutes).

[45] *See generally* ABRAMS, BEALE & KLEIN, *supra* note 26 (discussing statutes); *infra* Chart of Commonly Used Federal Criminal Statutes (listing statutes).

or a congressional finding that, in the aggregate, the local conduct substantially affects interstate commerce.[46]

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

The ABA Report is now more than ten years old, the Federalist Society Report, five. As part of our preliminary inquiry into the over-federalization debate, we compiled our own list of commonly used federal statutes[49] in response to the ABA and Federalist Society reports. Rather than compile a complete laundry list of all federal criminal statutes (an impossible task), we created a list of statutes both familiar to and frequently used by federal prosecutors in real (as opposed to hypothetical) prosecutions.[50] What we

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[46] Though the Court in *Perez v. United States* approved of the "class of activities" approach to federal jurisdiction (permitting regulation of purely local conduct if, in the aggregate, the class of activities substantially affected interstate commerce), 402 U.S. 146, 154–56 (1971), that approach is rarely used. *See* ABRAMS, BEALE & KLEIN, *supra* note 26, at 27.

[47] *See, e.g.*, A.B.A. REPORT, *supra* note 3, at 10 ("[T]he amount of individual citizen behavior now potentially subject to federal criminal control has increased in astonishing proportions in the last few decades."); FEDERALIST SOCIETY REPORT, *supra* note 4, at 9 (arguing persuasively that "[i]ncreasing the number and variety of charges tends to dissuade defendants from fighting the charges, because (s)he usually can be 'clipped' for something").

[48] A.B.A. REPORT, *supra* note 3, at 130, 153. For example, animal enterprise terrorism and misuse of the Smokey Bear likeness were both included in the ABA Report as examples of over-federalization gone too far; they are codified at 18 U.S.C. § 43 (2006) and 18 U.S.C. § 711 (2006), respectively.

[49] *See infra* Chart of Commonly Used Federal Criminal Statutes. This chart also includes the dates of enactment and the percentages of federal criminal defendants sentenced under each code provision in 2010.

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

immediately noticed was that many of the statutes present on our list were enacted decades ago, and, furthermore, that the rate of enactment for these frequently used statutes is relatively stable throughout each decade:

- Approximately 170 major statutes were initially enacted prior to 1909;
- Approximately 40 major statutes were enacted from 1910-1919;
- Approximately 20 major statutes were enacted from 1920-29;
- Approximately 70 major statutes were enacted from 1930-39;
- Approximately 50 major statutes were enacted from 1940-49;
- Approximately 60 major statutes were enacted from 1950-59;
- Approximately 47 major statutes were enacted from 1960-69;
- Approximately 76 major statutes were enacted from 1970-79;
- Approximately 80 major statutes were enacted from 1980-89;
- Approximately 80 major statutes were enacted from 1990-99;
- Fewer than 50 major statutes were enacted from 2000-2010.[51]

Starting after the New Deal, there is a more-or-less regular rate of enactment for criminal statutes, and few of these statutes were widely used by prosecutors to charge suspected criminals. This suggests that, in spite of many new criminal proscriptions being enacted, federal prosecutors generally adopt a select few of these laws into their arsenals, and they do so at a more-or-less stable rate from year to year. If we look at the statutes that prosecutors are actually utilizing on a day-to-day basis, there is little evidence of the so-called avalanche of new federal criminal enactments in the past forty years. Sifting through this list of fewer than 750 statutes, we can find no statutes representing more than, say, 1% of the federal criminal caseload that should arguably be prosecuted solely at the state, as opposed to federal level, due to either prudential or federalism concerns.

Similar conclusions can be drawn with respect to claims that federal criminal statutes enacted since 1970 account for the bulk of the federal criminal caseload. As noted in the Introduction (and further explained in Part I.B below), the vast majority of federal criminal charges today are brought

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[51] These bullets reflect the authors' informal estimate of the number of statutes enacted in each decade, based on the following: (1) an examination of major caseload categories reported by the federal district courts, *see* Table D-2, 2011, *supra* note 14; (2) an examination of the U.S. Code and the U.S. Attorneys Manual to identify all relevant federal criminal statutes; (3) assigning statutes to the appropriate caseload category, which is reflected *infra* by our Chart of Commonly Used Federal Criminal Statutes; (4) identifying the date of enactment for each statute; and (5) calculating how many of these statutes were enacted in a given decade.

Thus, a "major" statute is one that we were able to assign to any caseload category. Other statutes that were not assigned were excluded because they were not accounted for in the caseload statistics.

under the Immigration and Nationality Act (1952), the Controlled Substances Act (1970), various fraud statutes (for example, Mail Fraud, 1876), or the Gun Control Act (enacted 1968, and preceded by the Federal Firearms Act of 1938).[52]

These findings are eminently plausible given everything we know about the individual and institutional structures and incentives that underlie federal prosecutors' work. The criminal code might be potentially infinite, but a prosecutor's time and resources are both finite. In fact, prosecutorial resources are increasingly scarce, and Department of Justice budgets have not kept pace with rising costs associated with prosecuting and investigating crime and the increasing rate of criminal prosecutions.[53] Current federal criminal law is set forth in forty-eight titles of the United States Code, encompassing roughly 27,000 pages of printed text, as interpreted in judicial opinions found in over 2,800 volumes, containing approximately 4,000,000 printed pages.[54] No busy professional can afford to take time away from her important work to study complex new laws, especially when the old statutes do the trick quite well. This is particularly true where the Department of Justice fails to require (or offer) continuing education courses or monographs in these areas.[55] Most federal prosecutors do not want to be the official who tests a new law, especially on pain of losing a conviction under a reliable statute.[56] Just because

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[52] 8 U.S.C. § 1101 *et seq.* (2006); 18 U.S.C.§ 921 *et seq.* (2006); 18 U.S.C. § 1341 (2006).

[53] *See Challenges Facing Today's Federal Prosecutors: Hearing Before the Subcomm. on Crime & Drugs of the S. Comm. on the Judiciary*, 109th Cong. (2006) (noting that DOJ funding has not kept pace with rising costs of prosecution and increased support for local law enforcement). Note too that, in 1985, there were around 35,000 federal prisoners—by 2010, that number had risen to almost 200,000. *See* SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS: ONLINE, tbl. 6.13.2010, *available at* http://www.albany.edu/sourcebook/pdf/t6132010.pdf (last visited Aug. 31, 2012); *see also* Justice Mgmt. Div. Budget Staff, *Budget Trend Data from 1975 Through the President's 2003 Request to the Congress*, JUSTICE.GOV 14–17 (Spring 2002), http://www.justice.gov/archive/jmd/1975_2002/2002/html/page14-17.htm.

[54] *See* FEDERALIST SOCIETY REPORT, *supra* note 4, at 13 n.7 (citing Ronald L. Gainer, *Federal Criminal Code Reform: Past and Future*, 2 BUFF. CRIM. L. REV. 45, 54 (1998)). Mr. Gainer oversaw the comprehensive effort by the Office of Legal Policy in the U.S. Department of Justice to count the number of federal crimes.

[55] When Professor Klein served in the Department, new trial attorneys were required to take courses in trial advocacy and the federal sentencing guidelines. At our leisure, we could read the monograms published by about half of the sixteen (at that time) criminal sections at the Department. These monograms focused on two or three statutes commonly used by prosecutors in that section.

[56] Of course there are exceptions to this, as when a prosecutor wants to make a name for herself, or wants to use a statute in a novel way to avoid problems she might otherwise encounter. The former is less likely to occur at the federal level, where line-prosecutors are appointed based upon merit, rather than elected based upon their win-loss records. The latter scenario is exactly what spawned the "honest services" theory in mail fraud. Though it took thirty years and two Supreme Court slapdowns, that theory was eventually narrowed, and many convictions are now at peril. This may be enough to make future prosecutors think twice. On the other hand, we see a handful of securities fraud prosecutions under 18 U.S.C. § 1348 (2006) , and we cannot

Congress wants to score whatever political points it believes obtainable with the next federal criminal enactment, there is absolutely no reason to believe that these political priorities will be shared by the President, Main Justice, or any of the United States Attorneys.[57] Congress may be passing too many federal criminal laws, but because enforcement can only be accomplished by the Executive, the Department can ignore ill-advised and symbolic laws with impunity.

B. Comparison of Federal and State Court Caseloads

There have been large fluctuations concerning the number of federal criminal filings per year.[58] For example, there were 92,174 federal criminal cases filed in 1932 at the height of Prohibition, 2.5 times the total number of federal criminal cases filed in 1918.[59] Federal criminal filings were down to about 30,000 in 1964, peaked to over 48,000 in 1972, and then returned to under 30,000 in 1980.[60] The number did not reach 1972 levels again until the late 1980s.[61] The number of federal criminal prosecutions has grown steadily, with little fluctuation, since 1980, at a rate of about 1,500 additional cases per year.[62] The most recent official count shows that in 2011 federal prosecutors filed charges in slightly more than 79,000 cases against slightly more than

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think of any reason for the use of this unnecessary Sarbanes-Oxley Act provision. Perhaps there is some need felt at DOJ to use some of the new criminal statutes.

[57] A nice example of this is explored in Lucian E. Dervan, New Crimes and Punishments: A Case Study Regarding the Impact of Over-Criminalization on White Collar Criminal Cases (June 24, 2011) (unpublished manuscript), *available at* http://ssrn.com/abstract=1872004. Professor Dervan examined the effect of two new obstruction of justice statutes enacted by Congress as part of the Sarbanes-Oxley Act of 2002, and determined that federal prosecutors did not increase (and in fact decreased) administration of justice prosecutions as a total percentage of the criminal caseload in response. *Id.*

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

[59] Edward Rubin, *A Statistical Study of Federal Criminal Prosecutions*, 1 LAW & CONTEMP. PROBS. 494, 497 tbl.1 (1934). In 1932 there were 65,960 Prohibition-related criminal cases in the federal courts. *Id.* at 497. Prohibition was repealed in 1933. U.S. CONST. amend. XXI.

[60] Beale, *Federalizing Crime*, *supra* note 7, at 39, 46. We recorded similar but not identical figures in Table 1-B, also compiled from data from the Federal Judicial Caseload Statistics compiled by the Administrative Office of the United States Courts.

[61] *See infra* Table 1-B.

[62] *See infra* Table 1-B. The Supreme Court noted in its 2000 year-end report that the 5% rise in felony criminal filings in 2000 was the sixth straight year to see an increase. CHIEF JUSTICE WILLIAM REHNQUIST, SUPREME COURT OF THE U.S., 2000 YEAR-END REPORT ON THE FEDERAL JUDICIARY (2000). The 2005 report noted that criminal case filings declined 2% that year. CHIEF JUSTICE JOHN ROBERTS, SUPREME COURT OF THE U.S., 2005 YEAR-END REPORT ON THE FEDERAL JUDICIARY 9 n.4 (2005).

103,000 defendants.[63] A good chunk of the steady increase in the federal criminal caseload since 1980 is certainly attributable to population growth,[64] and a significant part can be traced to the growing number of controlled substance prosecutions and stepped-up enforcement against immigration law violators. Since violent and property crime peaked in the 1990s but have decreased on average 5% a year over the last two years,[65] perhaps we will see another fluctuation downward in the number of federal criminal charges. That will depend in large measure not on the number of new federal criminal enactments, but rather on the future of federal immigration policy, as immigration cases now represent the fastest growing segment of federal criminal law enforcement since 1980.[66]

What appears relatively clear is that there is no causal connection (or even a correlation) between the number of federal criminal statutes and the annual number of federal criminal prosecutions. This is best established by comparing federal caseloads with state and local data. As is evident from Tables 9 and 10, the number of federal felony convictions relative to the number of state felony convictions has been static for many decades.[67] State courts, like federal courts, have experienced significant criminal caseload increases since the late 1980s.[68] The fact that both federal and state court criminal dockets are expanding at a steady rate suggests that some factor other than too many federal offenses is driving higher caseloads across the board, not just in the federal system.

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[63] *See infra* Table 1-A.

[64] The U.S. population in 1980 was estimated at 226.5 million, BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, 1980 CENSUS OF POPULATION 1-16 (1981), while the latest U.S. Census estimates the current population to be 308.7 million. PAUL MACKUN & STEVEN WILSON, U.S. CENSUS BUREAU, POPULATION DISTRIBUTION AND CHANGE: 2000 TO 2010, at 2 tbl.1 (2011). While this 37% population increase does not account for the entirety of the increase in federal criminal caseloads, it does help to explain away part of the growth.

[65] *See* CRIMINAL JUSTICE INFO. SERVS. DIV., FED. BUREAU OF INVESTIGATION, FBI ANNUAL CRIME REPORT tbl. 1 (2010), *available at* http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2010/crime-in-the-u.s.-2010/tables/10tbl01.xls (noting that violent crime peaked nationally in 1991); CRIMINAL JUSTICE INFO. SERVS. DIV., FED. BUREAU OF INVESTIGATION, FBI ANNUAL CRIME REPORT tbl. 3 (2011), *available at* http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2011/preliminary-annual-ucr-jan-dec-2011/data-tables/table-3 (noting that violent crime decreased 4.4% in 2009 and 6% in 2010); *see also id.* (showing property offenses fell nationally by 2.7% in 2010 and 6.1% in 2009).

[66] *See infra* Tables 2–6.

[67] *See infra* Tables 9, 10.

[68] From 1987 to 2004, non-traffic criminal filings in state court rose nearly 45%, from 31.3 million to 45.2 million. LYNN LANGTON & THOMAS H. COHEN, U.S. DEP'T OF JUSTICE, STATE COURT ORGANIZATION, 1987–2004, at 1 (2007). In general jurisdiction trial courts, criminal case filings increased 67% during the same period. *Id.* at 2.

Perhaps more persuasively, throughout the 1990s and first decade of the new millennium, federal court felony convictions have tracked increases in state court felony convictions proportionately. That is, from 1994–2006, federal court felony convictions consistently comprised 5% to 6% of all felony convictions in the country annually (state and federal combined).[69] If over-federalization were actually occurring at an alarming rate, one would reasonably expect to observe either an increase in the federal caseload without corresponding increases in state court caseloads, or at least a significant rise in the proportion of federal to state felony convictions each year. No such trends are reflected in the data.

An examination of recent state and federal felony caseloads (as opposed to the annual felony *conviction* figures discussed above) compels a similar conclusion. As Table 9-B reveals, in 2000, felony charges were commenced in state courts in approximately 2.2 million cases, while felony charges were commenced in federal court in just over 48,000 cases (representing 2% of all felony cases nationally).[70] This trend held steady in 2009, when state court felony caseloads reached approximately 2.5 million, while federal court felony caseloads reached around 63,600 (2.5% of the total).[71]

Finally, a careful examination of the types of cases pursued in state courts when compared to those pursued federally makes clear that the division of labor between the two systems is alive and well. The data in Table 11 strikingly illustrates that state courts continue to dominate federal courts in those offense categories reflecting conduct that is generally considered to be local in nature. For example, in 2006:

- State courts convicted 8,670 individuals of murder; federal courts convicted just 146 murderers (or 1%).
- There were 33,566 felony sexual assault convictions in the United States; just 366 (or 1%) were prosecuted at the federal level.
- 165,534 individuals were convicted of felony drug possession in the United States; of those, just 174 (or 0.1%) were convicted in federal court.[72]

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[69] *See infra* Table 10. Note also that these numbers do not include juvenile or misdemeanor prosecutions, which, if included, would skew the data even further toward the states.

[70] *See infra* Table 9-B.

[71] *See infra* Table 9-B.

[72] *See infra* Table 11.

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

- 100% of the 44 felony convictions for international (non-domestic) terrorism took place at the federal level;[73]
- 18.9% of 46,841 felony convictions for weapons offenses took place at the federal level;
- 11.3% of approximately 240,000 felony convictions for drug trafficking took place at the federal level;
- 9.3% of 106,000 felony convictions for fraud, forgery, and embezzlement took place at the federal level.[74]

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

A more detailed review of federal court caseload statistics from 1980 onward reveals several trends that weaken claims of over-federalization. By examining caseload data from 1980 onward, it is clear that annual growth in the federal criminal caseload is being propelled not by an across-the-board

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[73] *See* NAT'L SEC. DIV., DEP'T OF JUSTICE, STATISTICS ON UNSEALED INTERNATIONAL TERRORISM AND TERRORISM-RELATED CONVICTIONS (2010) [hereinafter NSD REPORT]. Note that the NSD definition of terrorism is broader than that of the Administrative Office of U.S. Courts, and thus the reported number of terrorism convictions varies depending on which source is consulted. The NSD tracks those convictions with some nexus to international terrorism, including such non-terrorism specific offenses as money laundering or false statements, whereas the Federal Judicial Caseload Statistics only includes convictions pursuant to violations of 18 U.S.C. §§ 1038, 1993, and 2332–2339. *See* STATISTICS DIV., ADMIN. OFFICE OF THE U.S. COURTS, 2006 JUDICIAL BUSINESS OF THE UNITED STATES COURTS 233 tbl.D-2 (2006). We could, of course, find no state cases where international terrorism was charged.

[74] *See infra* Table 11.

increase in federal criminal law enforcement, but almost exclusively by increased enforcement in just two offense categories: drug trafficking and immigration. Most other offense categories have experienced declining or stable rates of prosecution since the 1980s, in spite of the fact that numerous new and novel statutes have been enacted during that time period. In those few offense categories that display increased levels of prosecution (immigration; drugs; weapons that traveled in interstate commerce or were used in federal offenses; and child pornography transmitted over the Internet), some quintessentially federal interest is at stake.

In fiscal year 2011, of nearly 80,000 criminal cases commenced in federal court, 56% were either drug or immigration cases involving more than 60,000 defendants.[75] Put another way, of the approximately 103,000 defendants charged in federal court in 2011, more than 60,000 of them (59%) were charged with immigration or drug offenses.[76] If we look more closely within those offense categories, we find that 48% of cases commenced against federal criminal defendants in 2011 were charged under just two federal criminal statutes.[77] These numbers reflect a vast increase in the investment of federal prosecutorial resources in drug and immigration prosecutions, indicating that resources previously devoted to prosecuting other types of offenses have been reallocated to support this growth.[78]

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[75] Drug cases represented 20.3% of the caseload, while immigration cases represented 35.9% of the caseload. Table D-2, 2011, *supra* note 14, at 84–86. There were more drug *defendants* in federal court in 2010 than there were immigration defendants, owing to prosecutors' preference for trying multi-defendant drug cases. Note that drug prosecutions averaged 1.9 defendants per case.

[76] There were 30,795 drug and 29,530 immigration defendants commenced in federal court in 2011, equaling a total of 103,274 defendants. *Id.* Thus, as noted in the Introduction and in Table 6-B, 59% of federal defendants were charged with drug (30%) or immigration (29%) offenses.

[77] Table D-2, 2011, *supra* note 14, at 84–86, indicates that of approximately 103,000 defendants commenced in federal court in 2011, 25,616 of them were prosecuted for selling, distributing, or dispensing drugs, covered by 21 U.S.C. § 841 (2006), while 23,927 defendants were prosecuted for "improper reentry by alien," covered by 8 U.S.C. § 1326 (2006). Thus, 25% of all federal criminal defendants in 2011 were prosecuted under 21 U.S.C. § 841 (2006), and 23.1% of all federal criminal defendants in 2011 were prosecuted under 8 U.S.C. § 1326 (2006), for a total of 48% for the two statutes combined.

[78] *See* Julia Preston, *States Resisting Program Central to Obama's Immigration Strategy*, N.Y. TIMES, May 6, 2011, at A18 (detailing the Obama Administration's Secure Communities Program, which mandates that participating local governments fingerprint all those booked into local jails for immigration violations). The Secure Communities Program has led to a record number of immigration prosecutions and deportations, nearly 800,000, in the past two years. *Id.*; *see also* OFFICE OF NAT'L DRUG CONTROL POLICY, EXEC. OFFICE OF THE PRESIDENT OF THE U.S., NATIONAL DRUG CONTROL STRATEGY 25–27 (2012), *available at* http://www.whitehouse.gov/sites/default/files/ondcp/2012_ndcs.pdf (stating that the administration will maximize availability of federal resources to combat drug trafficking and flow of weapons across the southern U.S.–Mexico border).

In 1980, immigration and drug defendants constituted just 7% and 19%, respectively, of all criminal defendants in federal court (of around 40,000 federal court defendants in 1980, 2,873 were immigration defendants, while 7,645 were drug defendants).[79] Since 1980, prosecutions against immigration offenders have increased tenfold to more than 29,000 defendants in 2011, while prosecutions against drug offenders have increased by a factor of four to more than 30,000.[80] A few key points on this significant rise:

- If we compare the number of federal criminal prosecutions in 1980 (approximately 40,000) to the number in 2011 (just over 100,000), this yields an increase of around 60,000 prosecutions, or 150% over the 1980 caseload. Increases in immigration and drug prosecutions can account for nearly 50,000 cases, or 83% of the increase.[81]
- The drug and immigration offense categories now dwarf all others; the next largest offense category behind drugs (30%) and immigration (29%) is fraud, a distant third, at just 13% of the caseload, followed by firearms and explosives, fourth, at 8% of the caseload.[82]
- The category of fraud offenses has decreased from 15% of criminal cases commenced against federal defendants in 1980 down to 13% in 2011.[83]
- Drug and immigration cases now so overwhelmingly dominate the federal criminal caseload that no major offense category—aside from drugs, immigration, fraud, and firearms—constituted more than 5% of the criminal caseload in 2011.[84] This includes such high-profile offense categories as regulatory offenses (2%); violent offenses, including murder (0.1%), assault (1%), kidnapping (0.1%), robbery (1%), carjacking (0.1%), and terrorism (0%); money laundering (1%);

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[79] See *infra* Tables 2–6 where the enormous rise in drug and immigration offenses is represented graphically.

[80] Twenty-nine thousand five hundred thirty individuals were charged with immigration offenses in 2011; 30,795 individuals were charged with drug offenses during the same period. *See infra* Table 6-B.

[81] To arrive at this number, we compared the annual number of drug and immigration prosecutions in 1980 (around 10,400) to the number of combined drug and immigration prosecutions in 2011 (around 60,000). This represents an increase of around 50,000 cases annually over the 1980 drug and immigration caseload. *Compare* Table D-2, 2011, *supra* note 14, at 84, *with* STATISTICS DIV., ADMIN. OFFICE OF THE U.S. COURTS, DEFENDANTS COMMENCED IN FEDERAL COURT (1980) [hereinafter Table D-2, 1980].

[82] *See infra* Table 6-B.

[83] *See infra* Tables 2, 6. While the raw number of annual fraud prosecutions commenced has risen slightly between 1980 and 2011, fraud as a percentage of the federal criminal caseload has declined. *See infra* Table 7.

[84] *See* Table D-2, 2011, *supra* note 14, at 84–87.

securities fraud (0.1%); mail and wire fraud (1% combined); and RICO (0.1%).[85]

Where approximately 60% of the criminal defendants haled into federal court last year were charged under just a handful of federal drug and immigration statutes, it is difficult to accept the proposition that the sprawling size of the Code is to blame for the growing federal criminal docket. One may surely criticize the enactment of overly broad criminal proscriptions, draconian federal sentences, or unbridled discretion of federal prosecutors, but these criticisms have little to do with over-federalization itself. When one considers that for every 100 criminal defendants in federal court today, approximately 50 are being prosecuted pursuant to one of two federal criminal statutes,[86] it becomes clear that it is the overwhelming number of drug and immigration prosecutions, and not the size of the Code, that is the strongest driver of caseload increases in the federal courts.

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

The spike in the illegal immigrant population from 1980 onward is an issue that can only be fully addressed at the federal level.[87] Much has been written of late regarding state- and local-level involvement in immigration policy and

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[85] *Id.* See also *infra* Tables 6-A and 6-B for recent caseload distributions for other offense categories.

[86] *See supra* note 75 and accompanying text.

[87] Most statisticians agree that approximately three million illegal immigrants were present in the United States in the late 1970s, whereas there are now thought to be ten to eleven million. *See* MICHAEL HOEFER ET AL., U.S. DEP'T OF HOMELAND SEC., ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES: JANUARY 2008 (2009); Robert Warren & Jeffrey S. Passel, Research Note, *A Count of the Uncountable: Estimates of Undocumented Aliens Counted in the 1980 United States Census*, 24 DEMOGRAPHY 375 (1987). This 300% increase in the population of illegal immigrants during the thirty-year period between 1980 and 2010 explains some, but not all, of the 1000% increase in immigration prosecutions during that same period. In 2010, 47.5% of those sentenced in federal court were non-citizens, up from 27.3% in 1996. Nearly 27,000 of the 38,619 non-citizens sentenced in federal court in 2010 were convicted of immigration offenses. U.S. SENTENCING COMM'N, 1996 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 14 tbl.9 (1996) [hereinafter SOURCEBOOK 1996]; U.S. SENTENCING COMM'N, 2010 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.9 (2010) [hereinafter SOURCEBOOK 2010].

enforcement.[88] There is little consensus on whether federal immigration prosecutions are handled in an appropriate manner, with particular criticism of the removal of aliens based on what is now an extremely broad array of state and federal crimes, including some that can be characterized as non-violent and fairly minor.[89] These criminal conviction-based removal decisions later form the basis for criminal reentry prosecutions. This is in itself an interesting federalism story. The federal convictions and deportations for alien reentry are generally a collateral consequence of state criminal convictions (though the underlying crime can be a federal one, in most cases it is not). Moreover, the scholarly critiques of our immigration policy are directed at whether the civil and criminal prohibitions are sensible ones.[90] No scholars suggest that, whatever policy we select, the federal government should not be the primary player. Federal authority to regulate immigration and expulsion from the United States is not only included in Congress's power to regulate foreign commerce, provide for naturalization, and make treaties with foreign states, but is also inherent in sovereignty itself.[91] Since immigration authority is one of the enumerated powers of the federal government, federal immigration proscriptions preempt state criminal regulation in this area.[92] The sphere of

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[88] *See, e.g.*, M. Isabel Medina, *Symposium on Federalism at Work: State Criminal Law, Noncitizens and Immigration Related Activity—An Introduction*, 12 LOY. J. PUB. INT. L. 265 (2011).

[89] *See, e.g.*, Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469 (2007); Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 376 (2006).

[90] *See, e.g.*, Anil Kalhan, *Rethinking Immigration Detention*, 110 COLUM. L. REV. SIDEBAR 42 (2010). Under intense pressure to revise federal immigration policy, the Obama Administration recently announced that it would temporarily cease initiation of deportation proceedings against immigrants who came to the United States as children. *See* Julia Preston & John H. Cushman Jr., *Obama to Permit Young Migrants To Remain in U.S.*, N.Y. TIMES, June 16, 2012, at A1.

[91] U.S. CONST. art. I, § 8, cl. 4 ("The Congress shall have Power . . . [t]o establish a uniform Rule of Naturalization . . . ."); Chae Chan Ping v. United States (The Chinese Exclusion Case), 130 U.S. 581, 604–05 (1889). The Supreme Court has confirmed on numerous occasions since *Chae Chan Ping* that immigration is a matter for federal enforcement, both as a matter of constitutional text and preemption law. De Canas v. Bica, 424 U.S. 351, 354 (1976) (holding that the power to regulate immigration is unquestionably an exclusive federal power). Federal civil enforcement is also an appropriate response, of course, but it is not realistic to ignore a federal criminal law response when pursuing illegal aliens who have already been deported once because they violated the criminal laws of the United States during their visit.

[92] *See* Arizona v. United States, 132 S. Ct. 2492 (2012) (holding that three of four state-law immigration provisions were preempted by federal law, including a prohibition on unlawful presence in the country, a ban on work by illegal aliens, and the power to arrest without warrant those individuals believed to have committed a deportable crime); *see also* Chamber of Commerce v. Whiting, 131 S. Ct. 1968 (2011) (holding that the Immigration Reform and Control Act preempts state criminal and civil sanctions for employing unauthorized aliens but expressly preserves state authority to impose sanctions through licensing). Several other southern states, including Alabama and Georgia, recently passed immigration enforcement legislation that continues to move through the lower federal courts. *See* Laurence Viele Davidson, *Alabama, Georgia*

federal immigration enforcement is distinct from federal criminal proscriptions over controlled substances and white-collar frauds. In the latter instances, the state has general police power and related federal criminal statutes do not preempt state law in the field.[93] State actors, such as Arizona state lawmakers, believe that the federal government is failing to adequately enforce federal immigration law and wish to enact state laws that might assist federal regulators, not supplant their role. Similarly, those on the other side of the immigration issue pushing for amnesty for current illegal aliens, a wider door for future immigrants, and a shorter list of what criminal convictions make a person ineligible to enter the United States must seek federal legislation to accomplish their goals.

Unlike immigration laws, we could theoretically leave all drug trafficking enforcement to the states.[94] On the other hand, having a federal presence does not interfere with state drug-control enforcement because the federal Controlled Substances Act does not displace the state law enforcement regime, but rather supplements it with concurrent jurisdiction over similar misconduct. The valid constitutional basis for the Controlled Substances Act has been confirmed by the Supreme Court on several occasions as a legitimate exercise of Congress's Commerce Clause power to regulate local activities that are part of an economic "class of activities" having a substantial effect on interstate commerce.[95] The practical problem with removing federal jurisdiction over all controlled substance violations is that large-scale drug trafficking into and within the United States is more than a local problem. It frequently involves interstate and international elements that cannot successfully be prosecuted by states on the same scale as at the federal level. Federal criminal enforcement of drug laws focuses almost exclusively on trafficking, importation, and

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Fight to Salvage Immigration Laws in U.S. Appeals Court, BLOOMBERG (Mar. 1, 2012, 2:23 PM), http://www.bloomberg.com/news/2012-03-01/two-states-fight-to-save-immigration-laws-in-u-s-appeals-court.html.

93 *See* NORMAN ABRAMS & SARA SUN BEALE, FEDERAL CRIMINAL LAW AND ITS ENFORCEMENT 681 (3d ed. 2000) [hereinafter ABRAMS & BEALE, FEDERAL CRIMINAL LAW] ("In the criminal context there is a clear understanding that Congress ordinarily intends to supplement state law, rather than to regulate comprehensively and occupy the field.").

94 David W. Rasmussen & Bruce L. Benson, *Rationalizing Drug Policy Under Federalism*, 30 FLA. ST. U. L. REV. 679 (2003) (advocating the decentralization of drug policy to the state and local governments).

95 *See, e.g.*, Gonzales v. Raich, 545 U.S. 1, 22 (2005) ("[W]e have no difficulty concluding that Congress had a rational basis for believing that failure to regulate the intrastate manufacture and possession of marijuana would leave a gaping hole in the CSA. . . . [Therefore], Congress was acting well within its authority to 'make all Laws which shall be necessary and proper' to 'regulate Commerce . . . among the several States.'" (quoting U.S. CONST. art. 1, § 8)).

manufacturing; drug possession prosecutions represent less than one percent of the current federal caseload.[96] Interdiction efforts often require federal executive branch involvement, through use of the United States military, in policing both land borders and the high seas, as well as the pursuit of diplomatic relationships with source countries.[97]

While drug enforcement laws have often been the focus of harsh criticism, most of this criticism has been directed at the severity of sentencing schemes, the disproportionate cost borne by racial minorities and the poor, the privacy invasions inherent in fighting the war on drugs, and a general lack of rehabilitative options.[98] These criticisms are not directly relevant to the over-federalization debate; rather, they are criticisms that apply to state and federal drug enforcement schemes alike.

The relevant drug and immigration statutes under discussion here are not new, novel, or truly controversial from a federalism standpoint—both have been on the books for more than forty years and have sustained multiple constitutional challenges.[99] The ubiquity of drug and immigration prosecutions in the federal system weakens the familiar argument that federal prosecutors are utilizing a slew of new and controversial statutes to encroach on subjects traditionally reserved to state control. Indeed, even those who complain of over-federalization do not frequently criticize federal exercise of jurisdiction over drug trafficking and immigration prosecutions (though they may have valid complaints regarding the way in which this jurisdiction is exercised).

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[96] *See* Table D-2, 2011, *supra* note 14, at 84–87.

[97] It would be difficult to imagine trying General Manuel Antonio Noriega in a state court, especially because he was charged under one of the many drug offenses that explicitly provide for extraterritorial jurisdiction. *See* United States v. Noriega, 746 F. Supp. 1506, 1541 (S.D. Fla. 1990) (upholding conviction, under 21 U.S.C § 959 (2006), for participation in an international conspiracy to import cocaine into and out of the United States), *aff'd*, 117 F.3d 1206 (11th Cir. 1997). The USA Patriot Improvement and Reauthorization Act of 2005 expanded extraterritorial jurisdiction to reach acts of "narco-terrorism." Pub. L. No. 109–177, § 122, 120 Stat. 192, 225 (2006). Moreover, only the federal government can make arrest requests pursuant to extradition treaties with foreign nations, though violation of such treaties does not deprive courts of jurisdiction to hear the criminal case. United States v. Alvarez-Machain, 504 U.S. 655 (1992).

[98] DOUGLAS N. HUSAK, LEGALIZE THIS! THE CASE FOR DECRIMINALIZING DRUGS (Colin McGinn ed., 2002) (suggesting that the current drug policy is not only ineffective but unjust); Frank O. Bowman, III & Michael Heise, *Quiet Rebellion? Explaining Nearly a Decade of Declining Federal Drug Sentences*, 86 IOWA L. REV. 1043 (2001) (establishing that federal prosecutors are gaming the system to decrease drug sentences); Clymer, *supra* note 9; Smith, *supra* note 5; William J. Stuntz, *Unequal Justice*, 121 HARV. L. REV. 1969 (2008) (arguing that the drug war unfairly incarcerates Latino and black males).

[99] *See* Immigration and Nationality Act, ch. 477, 66 Stat. 163 (codified as amended at 8 U.S.C. § 1324 (2006)); Arizona v. United States, 132 S. Ct. 2492 (2012); *see also* Controlled Substances Act, Pub. L. No. 91-513, 84 Stat. 1242 (1970) (codified as amended at 21 U.S.C. § 841 (2006)); *Gonzales*, 545 U.S. 1.

This suggests then that the bulk of the current federal criminal caseload, nearly 60%, consists of drug trafficking and immigration prosecutions for which there is little debate as to the legitimacy or desirability of federal enforcement.

C. Beyond Drugs and Immigration: What Cases Are Prosecutors Bringing?

Immigration and drug prosecutions have increased both in terms of raw numbers and as a percentage of federal criminal caseloads to such a degree that they obscure what is happening in other offense categories. Because of the dominance of drug and immigration prosecutions, most other offense categories have now been reduced to less than 3% of the federal criminal caseload.[100]

It is instructive to examine increases and decreases in the raw number of prosecutions for various offense types on an annual basis, as we do in Tables 7 and 8. Overall, caseload indicators demonstrate that, despite an increase in the number of available statutory grounds for charging defendants, the number of prosecutions has remained stable, declined, or increased very slightly in most major offense categories. Aside from drug trafficking and immigration, the only categories to increase as a percentage of the federal criminal caseload were firearms and sex offenses, and the only categories to increase in absolute numbers were fraud (slightly), firearms, sex offenses, and terrorism offenses.[101] This indicates that prosecutors are, by and large, uninterested in the latest and greatest anti-crime legislation as a means of reaching new forms of conduct.

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

- Homicide: In 1980, federal prosecutors commenced homicide cases against 180 defendants; in 2011, federal prosecutors commenced

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[100] For example, violent offenses represent 3% of the caseload, including robbery, assault, homicide, kidnapping, racketeering, carjacking, and terrorism; larceny and theft comprise 3%; and regulatory offenses comprise 2%. *See* Table D-2, 2011, *supra* note 14, at 84; *infra* Table 6-B.

[101] See *infra* Tables 7 and 8 for graphical representations of those major offenses for which the raw number of prosecutions has increased (Table 7) and decreased (Table 8). For terrorism prosecution data, compare STATISTICS DIV., ADMIN. OFFICE OF THE U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS app. at 79 tbl.D-2 (March 31, 2005) [hereinafter Table D-2, 2005], with Table D-2, 2011, *supra* note 14, at 84–87. Note that these raw numbers do not reflect whether prosecutions for a particular offense type increased or decreased as a percentage of the federal caseload. For that information, see *infra* Tables 2 to 6.

homicide charges against just 130 defendants.[102] Note that there was a decrease in the number of prosecutions in spite of the fact that Congress enacted at least five new homicide statutes since 1980.[103]

- Bribery: In 1980, 225 defendants were charged in federal court with bribery; in 2011, there were 165 federal bribery defendants.[104] This decline occurred in spite of the fact that Congress enacted at least six new bribery statutes during that period.[105]

These are just two examples of a trend that can be traced throughout most offense categories within the caseload data. In reality, most major offense categories have actually decreased, both in terms of raw numbers and as a percentage of the caseload since 1980, in spite of a vast increase in the number of available statutory grounds for bringing prosecutions. When considered in conjunction with population growth, this translates into an actual declining rate of prosecution for these offense categories. The following additional examples[106] illustrate this point:

- Larceny and theft offenses now account for less than 3% of the federal criminal caseload. In 2011, 2,819 prosecutions were commenced, down from approximately 4,000 in 1980. This major offense category represented nearly 10% of the caseload in 1980. At first glance, larceny and theft appear to be the types of conduct typically regulated by states, but note that in 2011, 1,979 of these prosecutions in federal court were for theft of U.S. property, an undeniably federal interest, while another 298 prosecutions were for postal theft, another offense implicating federal interests.

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[102] Table D-2, 2011, *supra* note 14, at 84–87; Table D-2, 1980, *supra* note 81.

[103] *See infra* Chart of Commonly Used Federal Criminal Statutes. Congress enacted at least five new homicide statutes in 1994. *E.g.*, Act of Sept. 13, 1994, Pub. L. 103-322, § 60005(a), 108 Stat. 1970 (codified at 18 U.S.C. § 1118 (2006)); *id.* § 60009(a), 108 Stat. 1972 (codified at 18 U.S.C. § 1119 (2006)); *id.* § 60012(a), 108 Stat. 1973 (codified as amended at 18 U.S.C. § 1120 (2006)); *id.* § 60015(a), 108 Stat. 1974 (codified as amended at 18 U.S.C. § 1121 (2006)); Act of Sept. 30, 1994, Pub. L. 103-333, § 514, 108 Stat. 2574 (codified as amended at 18 U.S.C. § 1122 (2006)).

[104] Table D-2, 2011, *supra* note 14, at 84–87; Table D-2, 1980, *supra* note 81.

[105] *See infra* Chart of Commonly Used Federal Criminal Statutes. Post-1980, Congress enacted six additional bribery statutes. Act of Dec. 19, 2003, Pub. L. 108-198, § 2(a), 117 Stat. 2899, 2899–90 (codified at 18 U.S.C. §§ 212, 213 (2006)); Act of Nov. 29, 1990, Pub. L. 101-647, § 2510(a), 104 Stat. 4863 (codified at 18 U.S.C. § 225 (2006)); Act of Mar. 9, 2006, Pub. L. 109-177, § 309(a), 120 Stat. 241 (codified at 18 U.S.C. § 226 (2006)); Act of Sept. 14, 2007, Pub. L. 110-81, § 102(a), 121 Stat. 739 (codified as amended at 18 U.S.C. § 227 (2006)); Act of Oct. 12, 1984, Pub. L. 98-473, § 1104(a), 98 Stat. 2143 (codified as amended at 18 U.S.C. § 666 (2006)).

[106] Table D-2, 2011, *supra* note 14, at 84–87; Table D-2, 1980, *supra* note 81. The statistics for the larceny, forgery, and regulatory offense examples discussed below come from this source.

- Forgery and counterfeiting have declined as a percentage of the caseload: In 1980, there were nearly 2,500 prosecutions; in 2011, there were only 1,091. Forgery and counterfeiting now account for around 1% of the caseload, whereas in 1980 these offenses accounted for 6% of the federal criminal caseload.
- Regulatory offense prosecutions now account for a mere 2% of the federal criminal caseload, down from 7% in 1980. During this period, there has been a significant decline in the annual number of regulatory crime prosecutions—down to 2,171 in 2011 from 2,925 in 1980. An enormous number of new regulatory crimes were enacted in the period 1980–2011, so many that we were unable to count even a fraction of them; yet this increase appears to have had virtually no impact on the annual number of regulatory prosecutions. If we look at specific laws within the regulatory offense category, there is a more-or-less even distribution of prosecutions throughout different sub-categories in the 2011 caseload, with the most frequent types of prosecutions being brought for game and conservation violations (227 prosecutions, down from 459 in 1990); reporting of monetary transactions (368 prosecutions, level since 2001); violations of postal service regulations (125 prosecutions, down from 242 in 1990); customs (196 prosecutions, level since 1990); and national parks regulations (160 prosecutions, down from 194 in 2001). On the low end, just forty-nine defendants were prosecuted for Food, Drug, and Cosmetic Act violations in 2011, while sixty-one were prosecuted for copyright infringement and fifty-four were prosecuted for antitrust violations (level since 1990).[107] Thus, most types of regulatory laws are being criminally enforced at an equal or less frequent rate than in decades past. This is in spite of enactment of many new regulations.

[107] The "Regulatory Offenses" category includes a wide array of regulations including those pertaining to aircraft, copyright, the postal service, hazardous waste, migratory birds, reporting of monetary transactions, antitrust, labor, and national defense, to name a few. Table D-2, 2011, *supra* note 14, at 87. See *infra* Chart of Commonly Used Federal Criminal Statutes for particular laws included in various regulatory subcategories. What evidence we could find does not support the thesis that the number of regulatory charges is artificially low due to the new practice of non-prosecution agreements ("NPA") and deferred prosecution agreements ("DPA") in the corporate crime situation. There were only 140 such agreements between 1993 and 2009. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-636T, CORPORATE CRIME: PRELIMINARY OBSERVATIONS ON DOJ'S USE AND OVERSIGHT OF DEFERRED PROSECUTION AND NON-PROSECUTION AGREEMENTS 2 (2009) (reviewing fifty-seven of the 140 identified NPA and DPA negotiated between 1993 and 2009).

A few other offenses[108] of particular notoriety that have experienced flat or declining rates of prosecution in recent years include:

- Racketeer Influenced and Corrupt Organizations Act (RICO): 114 prosecutions in 2001, as compared to 189 in 2011 (representing 0.1% of the caseload).
- Carjacking: 131 prosecutions in 2011, down from 161 in 2001 (representing 0.1% of the caseload).
- Mail and wire fraud: 1,408 prosecutions in 2011, down from 1,457 in 2001 (representing 1% of the caseload). We can expect that number to continue to decrease after the 2010 term's *Skilling v. United States*,[109] in which the Supreme Court limited honest services mail and wire fraud to instances involving kickbacks and bribery.
- Financial institutions fraud: 751 prosecutions in 2011, down from 1,633 in 2001 (representing less than 1% of the caseload).

The offense categories identified below represent those few areas (other than drugs and immigration) that have experienced increased levels of prosecution in the past thirty years. While we do not wish to overlook the significance of these areas of growth, we would note three things: (1) the increases are relatively modest, especially when considered in light of population growth; (2) their significance to the over-federalization debate is outweighed by declining prosecutions in all other major offense categories in spite of many new laws being enacted; and (3) the increases in these few categories arguably reflect a valid investment of resources to protect federal interests and to prosecute developing forms of interstate criminal conduct. For example[110]:

- The sex offense category has experienced a significant increase in number of prosecutions since 1980, when there were just 172 prosecutions compared to 3,237 prosecutions in 2011.[111] At first glance, this increase may be attacked by critics of federalization as an encroachment upon states' traditional regulation of sex crimes. But a closer examination reveals that almost the entirety of the increase in sex

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[108] Table D-2, 2005, *supra* note 101, at 79; Table D-2, 2011, *supra* note 14, at 84–87. The data in these tables provides the statistics for the below RICO, carjacking, mail and wire fraud, and financial institution examples.

[109] 130 S. Ct. 2896 (2010).

[110] *See* Table D-2, 2011, *supra* note 14, at 84–87. The statistics for the below sex offense, firearm, and fraud examples come from this source.

[111] *See infra* Tables 2, 6-B.

offense prosecutions at the federal level consists of interstate child pornography offenses, sexual abuse of minors offenses in geographic regions of exclusive federal jurisdiction, and offenses related to failure to complete National Sex Offender Registry requirements.[112] The strong interstate and international components involved in trafficking of child pornography, particularly via the Internet, indicate that it is a legitimate subject for federal enforcement. Likewise, the federal government's ability to prosecute offenses for sexual abuse of a minor (unconnected to interstate or foreign commerce) is triggered only when the relevant conduct occurs within United States territorial, maritime, or federal prison jurisdiction, and thus in such cases there exists no concurrent state jurisdiction in which to bring charges. Finally, a national registry of sex offenders can only be accomplished at the federal level.[113]

- Firearms offenses have experienced a significant increase in the number of prosecutions since 1980 when there were around 1,500 prosecutions (4% of the caseload). By 2011, 8,531 defendants were prosecuted for firearms and explosives offenses in federal court (8% of the caseload). Most prosecutions within this category are for weapons possession by prohibited persons (e.g., convicted felons), with 4,786 prosecutions, and for use of a firearm in furtherance of violent or drug trafficking crimes (1,994 prosecutions). Many are brought by Operation Triggerlock, consisting of task forces comprised of federal, state, and

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[112] Prosecutions for sexually explicit material offenses comprised 1,779 of federal prosecutions in 2011, sexual abuse of minors added another 657 prosecutions, and sex offender registry violations nearly rounded out the category with another 466 prosecutions. *See* Table D-2, 2011, *supra* note 14, at 84–87.

[113] 18 U.S.C. § 2243(a) (2006), enacted in 1986, criminalizes sexual abuse of a minor or ward and includes an express jurisdictional element that indicates that the act applies only to those who engage in acts of sexual abuse against a minor while in special maritime and territorial jurisdiction, a federal prison, or an institution under contract with the federal government. *See* Act of Nov. 10, 1986, Pub. L. 99-646, § 87(b), 100 Stat. 3621 (codified as amended at 18 U.S.C. § 2243 (2006 & Supp. II 2008)). The provisions in 18 U.S.C. §§ 2251, 2252, and 2252A—the most commonly used subsections of Chapter 110, Sexual Exploitation and other Abuse of Children—require either a connection to interstate or international commerce, or occurrence in the special maritime and territorial jurisdiction of the United States. A substantial chunk of the sexual assault cases that find their way into federal court come from Indian reservations and federal land (parks and bases). The incidence of sex crimes on American Indian reservations is higher than the national average, and numbers continue to rise. *See* Timothy Williams, *High Crime but Fewer Prosecutions on Indian Land*, N.Y. TIMES, Feb. 21, 2012, at A14. We express no opinion here as to the value of the Sex Offender Registration and Notification Act (SORNA); we merely note that no state or even combination of states could create or maintain a national registry.

local officials.[114] This is an area where national sentiment, under both Democratic and Republican administrations, has called for the stricter enforcement of federal laws. Like alien reentry cases, most federal weapons prosecutions are triggered by an underlying prior state felony conviction. States themselves can remove some of these federal consequences by restoring their citizens' civil rights.[115]

- In 2011, there were around 13,000 federal prosecutions for all types of fraud, constituting 12% of all federal prosecutions. Compare this to 1980, when fraud prosecutions numbered approximately 6,000, or 15% of the caseload. The fraud offense category has experienced a 100% increase in the raw number of prosecutions since 1980, yet it has declined slightly as a percentage of the overall caseload. Within the fraud category, the most frequently used statutes in 2011 were those reflecting undeniably strong federal interests: identification document and information fraud (approximately 2,800 prosecutions), conspiracy and attempt to defraud (2,280 prosecutions), conspiracy to defraud the United States (approximately 1,100 prosecutions), and passport fraud (855 prosecutions). Also strongly represented are tax fraud, health care fraud, and Social Security fraud, all of which are protective of federal interests or target interstate criminal activity.
- Within the violent offense category, only violent racketeering and terrorism prosecutions have experienced significant growth in the past decade. But note that the violent offense category overall is shrinking as a percentage of the caseload, down from 7.2% in 1980 to 2% in 2011.[116] Moreover, the increase in violent racketeering and terrorism prosecutions is small—violent racketeering rose from 268 prosecutions in 2001 to 467 prosecutions in 2011; terrorism prosecutions rose from 25 in 2001 to 65 in 2011.[117] Both offenses combined represent less than 1% of the 2011 federal caseload.[118] Obviously terrorism offenses are of

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[114] Operation Triggerlock was established in 1991 by Republican Attorney General Richard Thornburg. *See Project Triggerlock*, 40 U.S. ATT'YS BULL. 248 (1992); *see also* ABRAMS & BEALE, FEDERAL CRIMINAL LAW, *supra* note 93, at 109–11.

[115] *See* 18 U.S.C. § 921(a)(20) (2006) (providing that a conviction for which a person's civil rights have been restored shall not serve as a predicate offense for a federal firearms charge).

[116] *Compare* Table D-2, 1980, *supra* note 81, *with* Table D-2, 2011, *supra* note 14, at 84–87.

[117] Table D-2, 2005, *supra* note 101; Table D-2, 2011, *supra* note 14, at 84–87; *see also* NSD REPORT, *supra* note 73. According to the National Security Division, the federal government has prosecuted 403 terrorism cases since 2001. Unlike the statistics from the Administrative Office of the U.S. Courts, these statistics also include non-terrorist offenses (such as passport fraud and perjury) so long as the case is *related to* international terrorism. *See id.* at 1.

[118] *See infra* Table 6-A.

> critical national concern, and violent racketeering offenses generally involve multi-state or international organizations of a sophisticated nature, making federal involvement imperative.

We pause here to note that the absolute number of terrorism prosecutions annually, which continues to be quite low, certainly does not reflect its importance in the federal criminal justice system. In fact, the federal focus on anti-terrorism enforcement is much greater than the small number of cases reflects. Post-9/11, anti-terrorism enforcement was elevated to top priority at the FBI. After a 2005 report of the Special Presidential Intelligence Commission highly critical of the FBI, organizational changes have shifted nearly half of the FBI's 1,200 agents to terrorism and intelligence work.[119] The goal, of course, is to identify risks and prevent terrorist attacks, and there is no way to quantify how many attacks were thwarted and cases not filed due to the diligence of our federal agents.

The foregoing data illustrates that, beyond immigration and drug trafficking, few offenses are experiencing increased rates of prosecution at the federal level. Those that are (such as fraud, firearms, sex offenses, and terrorism) represent and protect federal interests. Furthermore, 80% of growth to the federal criminal caseload since 1980 is attributable to increased enforcement of our nation's drug and immigration laws.[120] To a much lesser degree, caseload increases are being driven by increased prosecutions of fraud involving the federal government, weapons offenses, trafficking in child pornography, and other offenses devoted to defending national interests and resources. In spite of the expanding number of federal criminal statutes in many major offense categories (most notably, regulatory offenses), other major offense categories have actually experienced notable declines in both the rate and raw number of annual prosecutions.

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[119] ABRAMS, BEALE & KLEIN, *supra* note 26, at 709–12.

[120] In 1980, there were around 10,000 drug and immigration defendants prosecuted in federal court; in 2011, there were more than 60,000, out of 100,000-plus inmates total. Table D-2, 1980, *supra* note 81; Table D-2, 2011, *supra* note 14, at 84–87; *see also infra* Tables 2, 6-B.

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

Federalization of criminal law is often cited as an unnecessary drain on federal judicial, prosecutorial, and prison resources.[121] It is true that federal courts are busier than ever with criminal matters, and federal prison populations are at peak capacity, with more than 210,000 inmates.[122] Critics of federalization may evoke sympathetic images of unwitting offenders rotting in federal prisons, having been unlucky enough to violate some obscure federal regulation. Are we really spilling our coffers to jail nonviolent regulatory and white collar offenders? The answer, again, is a resounding no. Sentencing data and prison population data reveal that our limited federal resources are being expended primarily to prosecute and imprison those who have offended federal interests, and not to punish those who have committed trivial offenses, or who have engaged in conduct traditionally regulated by states.

In fiscal year 2010, the United States Sentencing Commission reported that 83,919 individuals were sentenced in federal court.[123] In the following offense categories,[124] offenders received a median prison sentence of less than 12 months:

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

The above-referenced offense categories, and specifically the number of statutes criminalizing regulatory infractions, are often cited by critics of over-federalization as proof that Congress and federal prosecutors have gone too

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121 *See, e.g.*, U.S. SENTENCING COMM'N, REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 63–84 (2011) (citing the federalization of criminal law as a major driving factor behind prison overcrowding).

122 *See infra* Table 12.

123 SOURCEBOOK 2010, *supra* note 87, at tbl.13. For a summary of this data, see *infra* Table 13, which shows average sentences in federal court by offense type.

124 SOURCEBOOK 2010, *supra* note 87, at tbl.13.

far.[125] However, it is apparent from the statistics above that these prosecutions are not actually a significant drain on federal resources. Regulatory prosecutions, specifically, are relatively few in number;[126] prison sentences are short (or nonexistent in many cases); and trial costs are frequently avoided through plea bargains.[127]

Commentators who attempt to connect the dots between over-federalization and prison overcrowding would perhaps be surprised to learn that many federal offenders convicted of regulatory offenses, and even some white collar offenses, frequently receive probation and criminal fines instead of prison time. For example, offenders in the following offense categories[128] were given probation-only sentences more than 40% of the time:

- Miscellaneous regulatory offenses (48.7%);
- Food & Drug offenses (57.5%);
- Environmental/Wildlife offenses (60.1%);
- Gambling/Lottery offenses (43.4%);
- Embezzlement (42.8%);
- Larceny (44.4%).

Likewise, many costs of prosecution may be offset by imposition at the sentencing stage of fines (payable to the government) and restitution (payable to victims). In 2010, federal judges ordered all offenders, for example, to pay a total sum of $8,206,913,773 in fines and restitution.[129] Fraud offenders alone were ordered to pay more than $6 billion in fines and restitution, but they served median sentences of just ten months in federal prison.[130] Forfeitures and seizures also help pay for law enforcement efforts.[131]

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125 *See, e.g.*, Susan A. Ehrlich, *The Increasing Federalization of Crime*, 32 ARIZ. ST. L.J. 825, 838 (2000); Joseph E. Kennedy, *Making the Crime Fit the Punishment*, 51 EMORY L.J. 753, 825 (2002) ("[R]elatively 'innocent' transactions violating various federal regulatory laws can easily result in mandatory prison sentences, often as a function of the amounts of money involved.").

126 *See infra* Table 6-B.

127 An average of 96.8% of those convicted in federal court entered guilty pleas in 2010. For example, of sixteen antitrust defendants sentenced in 2010, fifteen entered guilty pleas; of eighty-four food and drug offenders sentenced, eighty pled guilty. SOURCEBOOK 2010, *supra* note 87, at tbl.11.

128 *Id.* at tbl.12.

129 *Id.* at tbl.15. We were unable to find statistics on the percentage of these court-ordered fines and restitution that was actually paid.

130 *Id.* at tbl.13.

131 *See* U.S. DEP'T OF JUSTICE, FY 2011 SEIZED PROPERTY INVENTORY VALUED OVER ONE MILLION DOLLARS AS OF SEPTEMBER 30, 2011 (2011) (providing the total amount of property seized in fiscal year 2011).

Federal prison resources are being consumed primarily by drug, immigration, and firearms offenders. Consider the following data from Tables 12 and 13:

- In 2010, nearly 29,000 immigration offenders were sentenced to an average of 16.8 months in jail,[132] and immigration law violators now constitute 12% of the federal prison population.[133] Whereas immigration sentences are relatively low, a few other major offenses carry very heavy average sentences, including drug trafficking (74.9 months), child pornography (118 months), and firearms (85 months).[134] This emphasis on harshly protecting federal interests at the sentencing stage is also reflected in the makeup of the federal prison population, where 48% of the current inmates are drug offenders and 16% are weapons, explosives, and firearms offenders.[135] Regulatory offenders, in contrast, make up less than 1% of the federal prison population, while certain white collar offenders (banking and insurance, counterfeiting, and embezzlement) make up just 0.4%.[136]

Increases in the federal prison population are undoubtedly striking and alarming. The federal system currently imprisons around 216,000 individuals, up 363% from 1992, when just 59,516 were incarcerated.[137] In light of the caseload increases described previously, it is not hard to see why federal prisons are now crowded with drug, firearms, and immigration offenders. Additionally, the imposition in 1987 of the now-advisory Sentencing Guidelines, and the trend during that same period toward statutory mandatory minimum sentences, has resulted in harsher sentences for many classes of offenders.[138]

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132 *See infra* Table 13.

133 *See infra* Table 12.

134 *See infra* Table 13.

135 *See infra* Table 12.

136 *See infra* Table 12.

137 *See infra* Table 12; *see also* U.S. DEP'T OF JUSTICE, Report No. I-2003-002, THE FEDERAL BUREAU OF PRISONS' DRUG INTERDICTION ACTIVITIES 1 (2003) (noting that, from fiscal year 1992 through 2001, the number of sentenced inmates in Bureau of Prisons (BOP) institutions increased by 103% from 59,516 to 120,827).

138 *See* Sentencing Reform Act of 1984, Pub. L. No. 98-473, ch. 2, 98 Stat. 1987; United States v. Booker, 543 U.S. 220 (2005) (striking down mandatory provisions of the Federal Sentencing Guidelines); Erik Luna & Paul G. Cassell, *Mandatory Minimalism*, 32 CARDOZO L. REV. 1, 27 (2010) (noting that harsh mandatory minimum sentences have the effect of encouraging defendants "to cooperate with the prosecution by providing information, entering into plea agreements, and waiving their constitutional rights"); *see also* Anthony M. Kennedy, Assoc. Justice, Supreme Court of the U.S., Speech at the American Bar Association Annual Meeting

In light of the fact that most federal prison resources are consumed by just a few types of offenders, the criticism of over-federalization and the growth of the federal criminal code as a driver of booming prison populations loses much of its steam. Just as any debate about caseload increases must begin with a discussion of drug and immigration prosecutions, so too must discussions of prison overcrowding focus on mandatory sentencing provisions for the largest and most harshly punished groups of offenders—drug, immigration, and firearms offenders—who now jointly constitute 76% of the federal prison population.[139]

II. CONCURRENT FEDERAL AND STATE CRIMINAL JURISDICTION

In Part I, we established that the growth of the federal criminal justice system is being driven primarily by increased prosecutions of immigration and controlled substance offenders (and, to a much lesser extent, weapons and fraud offenders). A substantial percentage of federal law enforcement resources are now devoted to counterintelligence and otherwise preventing terrorism offenses, though this allocation is not reflected in the number of terrorism cases or defendants. The plethora of federal criminal statutes on the books is largely irrelevant to federal law enforcement activities, prosecutorial charging decisions, and the constituency of the federal prison population. The argument from the ABA, the Federalist Society, and others that the federal criminal law enforcement system is encroaching on state systems and endangering the balance between state and federal law enforcement is clearly mistaken.

Perhaps most tellingly, the national proportion of criminal cases brought federally has remained constant since at least 1980, and has averaged between 2% to 5% of the total national criminal felony caseload for the last century,[140] leaving the bulk of criminal cases filed at the state and local level. In fact, the proportion of federal criminal prosecutions, as a percentage of all criminal prosecutions in this country annually, has been more-or-less stable since 1918, with a brief spike in the number of federal prosecutions during the Prohibition

(Aug. 9, 2003) (transcript available at http://www.abanow.org/2003/08/speech-by-justice-anthony-kennedy-at-aba-annual-meeting/) (expressing that he can "accept neither the necessity nor the wisdom of federal mandatory minimum sentences").

139 *See infra* Table 12.

140 We have documented the stability of federal court caseloads since the 1980s. *See infra* Tables 1-A, 1-B; *see also* Beale, *Federalizing Crime*, *supra* note 7, at 46. For more recent data, see also *infra* Tables 9-A and 9-B.

Era.[141] This pattern holds true even in those areas where jurisdiction is concurrent, such as possession of controlled substances, fraud, and weapons offenses. The federal law enforcement apparatus remains limited, both in size and scope, relative to its state law enforcement counterpart. States can thus continue to fruitfully experiment with different substantive criminal laws, procedures, and penalty schemes.[142]

A. Disparate Sentences and Procedures

A more nuanced over-federalization critique advanced by serious scholars, and one that therefore deserves a more thoughtful response, is that concurrent federal and state criminal jurisdiction results in unfairness to those defendants unlucky enough to be chosen for federal criminal prosecution—an unfairness that may rise to constitutional dimensions. This is not truly an over-federalization critique at all. The inequity attacked here is not that there are too many federal criminal laws, but rather that a particular federal law may overlap with an almost identical state law barring the same misbehavior. A close reading of this literature reveals that the critique is directed not so much at the vast size of the federal criminal code, but rather at the harsher procedure and penalties imposed in the federal system in instances of concurrent jurisdiction and the alleged arbitrariness of the selection between fora.

The argument is directed particularly toward cases involving drug trafficking, weapons offenses, and fraud. Several well-known and well-respected scholars claim that federal prosecutors, using a plethora of federal criminal statutes that duplicate and overlap similar state criminal statutes, routinely bring criminal charges in federal district court that could and perhaps should have been brought in state court.[143] Such concurrent jurisdiction, combined with the relatively low rate of federal prosecution and open-ended charging policies that hinge on prosecutorial discretion, form "a kind of cruel lottery" for criminal defendants.[144] While federal prosecution affects only a small fraction of criminal defendants,[145] federal prosecutors enjoy a variety of procedural and evidentiary advantages, including the long duration and national subpoena power of the federal grand jury; limited, rather than blanket,

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141 Beale, *Federalizing Crime*, *supra* note 7; *see also* Rubin, *supra* note 59.

142 *See infra* Part II.B.

143 Beale, *Too Many and Yet Too Few*, *supra* note 7; Clymer, *supra* note 9, at 675; Smith, *supra* note 5.

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

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

immunity for grand jury witnesses; lower standards for obtaining search warrants; the availability of preventative detention; the lower burden of proof required for electronic surveillance; a well-developed witness protection program; the ability to use uncorroborated accomplice testimony; and more favorable discovery rules.[146] The losers of this lottery thus face serious disadvantages compared to their state-charged compatriots.

These significant prosecutorial advantages, combined with sky-high conviction rates in federal court[147] and the stiffer penalties handed out by the federal system,[148] mean that a federal prosecutor's decision to bring charges may indeed have grave, life-altering ramifications for a criminal defendant.[149] Critics suggest that "the decision to bring charges in federal rather than state court is made on an ad hoc basis. The *United States Attorneys Manual* (the *Manual*) does contain some general standards for the exercise of prosecutorial discretion, but they are written so broadly that they provide little guidance."[150]

To make matters worse for the federal criminal defendant, the Supreme Court's current precedent on selective and arbitrary prosecution makes

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[146] ABRAMS, BEALE & KLEIN, *supra* note 26, at 81 (citing NAT'L INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, FIGHTING URBAN CRIME: THE EVOLUTION OF FEDERAL & LOCAL COLLABORATION 3 (2003)).

[147] For example, in 2011, federal courts disposed of around 99,000 defendants. Of those defendants who did not receive outright dismissal, 99.5% were convicted either by guilty plea (87,432) or by trial (approximately 2,400). Of those defendants who went to trial, just 428 were acquitted. *See* STATISTICS DIV., ADMIN. OFFICE OF THE U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS app. at 100 tbl.D-4 (March 31, 2004).

[148] As one example of this, consider that in 2006 felony weapons offenders at the state level received prison sentences 73% of the time, whereas federal weapons offenders received prison sentences 93% of the time. Similarly, in 2006 just 67% of drug traffickers convicted at the state level received prison time; those convicted in federal court during the same period received prison time 93% of the time. *See* SEAN ROSENMERKEL, MATTHEW DUROSE & DONALD FAROLE, JR., U.S. DEP'T OF JUSTICE, FELONY SENTENCES IN STATE COURTS, 2006 – STATISTICAL TABLES, at 9 tbl.1.6 (2009) (revised Nov. 22, 2010).

[149] *See* Clymer, *supra* note 9, at 677; *see also* Beale, *The Many Faces of Overcriminalization*, *supra* note 5, at 761–64; Smith, *supra* note 5. Professor Beale notes that defendants, while facing serious jail time under state law, face harsher penalties and loss of the possibility of parole in the federal system when prosecuted for the same conduct. *Id.* Neither Beale, nor Clymer, nor Smith examines any of the anecdotal examples of disparate federal–state sentencing that they discuss in their articles to determine why the cases that were brought federally might have been so selected. In our admittedly cursory review of those cases, we noticed plausible distinguishing features between ostensibly similar cases. For example, the federal case examples included defendants with long criminal records and those who refused to cooperate in the investigation. Finally, none of the scholars who make this criticism appear to have considered the fact that this imbalance could shift direction, and federal criminal defendants could end up the winners of this jurisdictional lottery.

[150] Beale, *Too Many and Yet Too Few*, *supra* note 7, at 997. Professor Beale is referring to a manual that guides the discretion of all trial attorneys at the Department of Justice and Assistant U.S. Attorneys at the ninety-five U.S. Attorneys' Offices. *See* DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL (1997) [hereinafter U.S.A.M.], *available at* http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/.

charging decisions essentially unreviewable.[151] Scholars such as Sara Sun Beale and Stephanos Bibas have roundly criticized this aspect of federal prosecution and have called for a reevaluation of the U.S. Attorneys' Offices' charging criteria by the legislative or executive branches.[152] Other scholars, including Professors Smith and Clymer, have demanded a judicial outlet to challenge seemingly arbitrary prosecutorial charging decisions.[153]

We are not particularly sympathetic to these complaints and see no need for a legislative or judicial fix. We offer two responses. First, we believe that even if selection for federal prosecution were completely arbitrary (as determined by the flip of a coin), such a choice between federal and state jurisdiction should not unduly concern us.[154] Certainly there is no constitutional problem with such a procedure, nor do we see an issue of equity. Second, we question whether criminal defendants are actually faced with a lottery—that is, the kind of arbitrariness that should trouble those interested in fair treatment of all individuals. Evidence suggests that cases are selected for federal prosecution based upon factors most would find rational and fair, such as the nature and extent of loss caused by a defendant's conduct, a defendant's criminal history, and whether a defendant's conduct implicated federal interests or involved interstate elements.

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[151] Courts review cases alleging selective prosecution with a very lenient rational basis test, making it essentially impossible for a defendant to win. *See* United States v. Bass, 536 U.S. 862, 862–63 (2002) (per curiam) (denying black defendant discovery regarding federal selection of death cases despite DOJ report and AG comments detailing statistical disparity based upon race); United States v. Armstrong, 517 U.S. 456, 458 (1996) (holding that black defendants alleging selective prosecution of crack cocaine cases by federal prosecutors in Los Angeles were not entitled to discovery until they showed that the government declined to prosecute similarly situated individuals of other races); Wayte v. United States, 470 U.S. 598, 604, 608 (1985) (holding that a petitioner who alleges selective prosecution of vocal opponents for failure to register for the draft must show that the enforcement system the government used had a discriminatory effect and that it was motivated by a discriminatory purpose).

[152] *See* Beale, *Too Many and Yet Too Few*, *supra* note 7, at 1018 (calling for the promulgation of charging criteria that narrow the class of cases eligible for federal prosecution); Stephanos Bibas, *Regulating Local Variations in Federal Sentencing*, 58 STAN. L. REV. 137, 138 (2005) (arguing for procedural oversight and substantive guidelines to limit "unjustified" regional variations in federal sentences based upon fast-track programs and cooperation agreements); *see also* Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959 (2009) (suggesting the solution to unreviewable prosecutorial discretion is reform of the internal structure and management of prosecutors' offices).

[153] Clymer, *supra* note 9, at 739 (demanding that the Court revisit precedent that virtually prohibits judicial review of charging decisions, and instead implement a more vibrant rational basis test); *see also* Smith, *supra* note 5.

[154] *See also* Vincent Chiao, Ex Ante *Fairness in Criminal Law and Procedure*, 15 NEW CRIM. L. REV. 277 (2012) (suggesting that fairness requires no more than a rough equalization of *ex ante* chances of punishment given conditions of resource scarcity, an inability to reliably rank claims by comparative desert, and a pressing need for punishment to be imposed).

First, let us assume that a particular defendant is randomly selected for prosecution by federal rather than state prosecutors. When such an individual engages in misconduct that violates both federal and state law, she has violated the law of two independent sovereigns and each has a legitimate interest in deterring such behavior in the future, expressing its moral condemnation of the behavior, and exacting punishment. She has no cognizable legal right to choose which jurisdiction will charge or punish her, so long as each decision to prosecute is not motivated by a constitutionally invidious reason such as race or gender, or is not otherwise arbitrary or capricious.[155]

In *Bartkus v. Illinois*,[156] the Court rejected the defendant's argument that the Fourteenth Amendment prevented his prosecution for armed robbery as a habitual offender in Cook County Court after an earlier acquittal in federal district court for robbery of a federally insured savings and loan association. It noted that over one hundred years earlier, in *Fox v. Ohio*,[157] it upheld an Ohio conviction for uttering counterfeit money despite the fact that Congress had also imposed federal sanctions for counterfeiting, and these duplicative statutes raised the possibility of double punishment. The federal statutes did not preempt the state sanctions under the Supremacy Clause because "both the federal and state governments retained the power to impose criminal sanctions, the United States because of its interest in protecting the purity of its currency, the States because of their interest in protecting their citizens against fraud."[158] After all, "[e]very citizen of the United States is also a citizen of a State or territory. He . . . owe[s] allegiance to two sovereigns, and may be liable to punishment for an infraction of the laws of either. The same act may be an offen[s]e or transgression of the laws of both."[159]

Bartkus and *Fox* involved situations in which only one sovereign actually punished the defendant. Perhaps one's intuitive sense of fair play is triggered more violently when federal and state sovereigns are both permitted to punish the same defendant for engaging in a single bad act. A perpetrator knows he might have to do the time, but perhaps he doesn't realize he may have to do it twice. This is the prevailing view of those scholars who have written on the

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155 *See Armstrong*, 517 U.S. 456.
156 359 U.S. 121 (1959).
157 46 U.S. (5 How.) 410 (1847).
158 *Bartkus*, 359 U.S. at 129.
159 Moore v. Illinois, 55 U.S. (14 How.) 13, 20 (1852).

subject.[160] The Supreme Court, of course, has rejected this entirely, instead employing the *Bartkus* reasoning to a situation where both sovereigns punished a defendant for misconduct that violated each sovereigns' laws.

In *Abbate v. United States*,[161] decided the same day as *Bartkus*, the Court upheld an indictment in federal court after a successful state prosecution and punishment for the same misconduct.[162] As Justice Brennan explained, "[I]f the States are free to prosecute criminal acts violating their laws, and the resultant state prosecutions bar federal prosecutions based on the same acts, federal law enforcement must necessarily be hindered."[163] This is particularly true in a case like *Abbate*, where the defendant received only a three-month prison sentence in state court for conduct that could result in a five-year federal penalty. The defendant's act in threatening interstate lines of communication "impinge[d] more seriously on a federal interest than on a state interest . . . . [and] [n]eedless to say, it would be highly impractical for the federal authorities to attempt to keep informed of all state prosecutions which might bear on federal offenses."[164]

The Court has shown no inclination to back away from the historically accurate position that the federal government and each state are sovereign in the fields of defining and punishing crimes against their peace and dignity, instead extending the dual sovereignty doctrine wherever possible. In *Heath v. Alabama*,[165] the Court found that Alabama had a legitimate interest in convicting the defendant of first-degree murder during a kidnapping and sentencing him to death, even after the defendant pled guilty to murder in Georgia and received a life sentence (with the possibility of parole after seven

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

[161] 359 U.S. 187 (1959).

[162] The state conviction was for conspiracy to injure property of the telephone company, and the federal charge was for conspiracy to injure means of communications, both involving a single conspiracy by union representatives to dynamite telephone company facilities located in Mississippi, Tennessee, and Louisiana during a labor dispute. *Id.* at 187.

[163] *Id.* at 195.

[164] *Id.*

[165] 474 U.S. 82 (1985).

years). The Court reiterated that "two identical offenses are *not* the 'same offence' within the meaning of the Double Jeopardy Clause if they are prosecuted by different sovereigns."[166] "Each State's power to prosecute [and punish] is derived from its own inherent sovereignty, not from the Federal Government. . . . [It is] preserved to them by the Tenth Amendment."[167]

If the primary criticism of this so-called lottery system is indeed that defendants are punished twice for a single offense, critics should rest assured that such successive prosecutions are quite rare. Those defendants concerned about the possibility could easily negotiate a global settlement. Their failure to do so is primarily attributable to the lack of any real risk.[168] When successive prosecutions do occur, there generally exists some unique circumstance warranting both state and federal prosecutions. In the typical case, a defendant is extremely unlikely to be charged by the federal government once he has been prosecuted by a state, regardless of whether that first prosecution resulted in an acquittal or a conviction. The defendant benefits from the Department of Justice's strong and well-enforced Petite Policy, which since 1959 has barred such successive prosecutions unless it can be demonstrated that a "substantial federal interest" was "demonstrably unvindicated" in the first prosecution and the Assistant Attorney General expressly approves the proceeding.[169] The times the Department makes an exception to the policy are rare enough to make national headlines.[170]

Likewise, those defendants prosecuted first by one state need not be overly concerned about a second trial in another state because state jurisdictional

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166 *Id.* at 92 (citing United States v. Lanza, 260 U.S. 377 (1922)).

167 *Id.* at 89 (citations omitted) (internal quotation marks omitted). Likewise, the Court held that the Navajo Tribe is an independent sovereign from the federal government for purposes of the dual sovereignty doctrine. United States v. Wheeler, 435 U.S. 313, 328 (1978), *superseded by statute*, Act of Oct. 28, 1991, Pub. L. No. 102-137, 105 Stat. 646, *as recognized in* United States v. Lara, 541 U.S. 193 (2004).

168 *See* Daniel C. Richman, *Bargaining About Future Jeopardy*, 49 VAND. L. REV. 1181, 1192, 1206–07 (1996).

169 *See* U.S.A.M., *supra* note 150, at tit. 9-2.031 (1997) (revised July 2009) (describing the Dual and Successive Prosecution Policy, also known as the Petite Policy).

170 The Rodney King case is the rare example of a case fitting into an exception to the Petite Policy for a prosecution at the state level where the result in the prior prosecution was "manifestly inadequate in light of the federal interest involved." *See id.* tit. 9-2.031(D); *see also* FREDERICK M. LAWRENCE, PUNISHING HATE: BIAS CRIMES UNDER AMERICAN LAW 159 (1999) (describing the King case as the "exceptional case that proves the rule"); Susan Warren, *2nd King Trial Raises Double Jeopardy Flag*, CHI. TRIB., May 15, 1992, at A23.

authority is tied to a territoriality principle.[171] Finally, the converse of the Petite Policy situation—where a defendant is tried first in federal court and second in state court—is also highly improbable. A number of states have statutes that bar a second prosecution if the defendant has been tried by another government (federal or state) for a similar offense.[172] Thus, in practice the vast majority of defendants can expect to be prosecuted one time, or more likely not at all.[173]

Thus, the Court has opined, and we agree, that there is no constitutional issue under the Double Jeopardy and Due Process Clauses with successive prosecutions or multiple punishments by federal and state jurisdictions. If we assume that the selection of jurisdiction for criminal defendants is truly random, and therefore once caught, two similarly situated suspects have an equal chance of being charged federally, we see no constitutional violation of any kind, or any intuitive sense of unfairness about this lottery. There is no legally cognizable harm or deprivation of rights when one is ultimately prosecuted by the jurisdiction that gives a higher, rather than a lower, penalty so long as the defendant is found guilty beyond a reasonable doubt by a jury of her peers; the substantive offense is one we can agree should be criminalized; the punishment in each jurisdiction is proportional within the meaning of the Eighth Amendment's Cruel and Unusual Punishment Clause; the investigation and prosecution comport with the Fourth, Fifth, and Sixth Amendment guarantees; and the procedures used are fundamentally fair within the meaning of the Due Process Clauses of the Fifth and Fourteenth Amendment. Every crook is aware of the aphorism "don't do the crime if you can't do the time."

Several of our colleagues suggested to us that being given a longer or shorter sentence based upon the fortuity of being haled into federal or state court is unfair in the same manner that it is unfair for federal criminal

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171 The bizarre factual scenario in *Heath* was a kidnapping that started in Alabama, where the defendant lived with his wife, and ended in Georgia, where the hit man left the victim in the trunk of a car. *Heath*, 474 U.S. at 83–84.

172 The *Bartkus* majority supplied a chart as an appendix to its opinion, which detailed the number of such states in 1959. 359 U.S. 121, 140 app. (1959). According to a well-known treatise, about half of the states have, since *Bartkus*, adopted statutes prohibiting state prosecution for offenses that relate to a previous federal prosecution, though these vary considerably as to the extent of the prohibition. WAYNE R. LAFAVE, JEROLD H. ISRAEL, NANCY J. KING & ORIN S. KERR, CRIMINAL PROCEDURE 661–63 (3d ed. 2007).

173 Clearance rates for most local and state crimes are well below 50% in most jurisdictions. *See* CRIMINAL JUSTICE INFO. SERVS. DIV., FED. BUREAU OF INVESTIGATION, FBI ANNUAL CRIME REPORT tbls. 25–28 (2010), *available at* http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2010/crime-in-the-u.s.-2010/clearances (showing various clearance rates for various offense types). The crime problem for most people is that no perpetrator is ever found, not that the perpetrator might be convicted twice by separate jurisdictions.

defendants to get longer or shorter sentences depending upon which federal district judge they draw at their plea or sentencing hearing. This lack of uniformity at the sentencing stage was the primary rationale behind the once-mandatory Federal Sentencing Guidelines.[174] The argument against what they consider our cavalier attitude toward those unfortunate losers of the federal lottery is this: fairness depends upon a uniform national policy for sentencing determinations, which should not be arbitrarily based upon gender, geography, which level of law enforcement personnel caught you, or judicial temperament. Furthermore, fairness depends not only on uniform sentencing policy (that is, a uniform approach by judges making sentencing decisions), but also on uniform sentencing outcomes (resulting in more or less the same sentence for similarly situated defendants).

We find unconvincing the comparison between selection for federal prosecution on the one hand and lack of uniformity in federal sentencing on the other. While we agree that it is unfair and unwise to treat similarly situated defendants differently once they are before a single jurisdictional authority, such is simply not the case here. The very nature of federalism requires independent law enforcement systems to vindicate their own respective interests—limited only by their resources, policies, and the requirements of federal and state constitutions. Where each sovereign has its own individual set of law enforcement priorities and values, this necessarily means that prosecuting a particular defendant may be a low priority for the state, but a high priority for the federal government (and vice versa).

We have no central repository for all criminal suspects that would allow us to sort all suspects for state or federal charging and punishment and therefore to rationalize sentences nationally across all jurisdictions. Perhaps if there were such a sorting system in place, then defendants could be separated according to the presence and strength of the national interest (or lack thereof) in prosecuting a particular case, given all of the facts and attendant circumstances.[175] For several reasons, this is unworkable. It would require the sharing of mountains of information between federal, state, and local actors, thereby adding an enormous bureaucracy with its resultant inefficiencies to multiple justice systems already strained by lack of resources. Ignoring

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[174] Mistretta v. United States, 488 U.S. 361 (1989).

[175] We envision something like the Sorting Hat from Harry Potter, which would sit on the defendant's head and shout "federal" or "state" to a crowd of cheering federal and state prosecutors assembled in the Great Hall.

momentarily the practical difficulties, such a system would fly in the face of federalism by denying each sovereign the independence to make the ultimate decision to charge or not to charge. Finally, some basic sorting of suspects into federal or state law enforcement systems is already happening on an informal basis. Federal law enforcement agents are not interested in small cases—they limit themselves to investigations that bear on federal interests or carry national significance. Even after a federal agent brings a case to the prosecutor's desk, the investigating agent's decisions are reviewed by federal prosecutors, who may (and often do) choose to dismiss a case they deem too insignificant or lacking in value in light of limited federal resources. Federal agents refer cases that fail to meet monetary or other thresholds to state actors, and state actors in turn call in their federal counterparts when a case appears to have ties to organized crime or terrorism, or is otherwise too complicated or multi-jurisdictional to handle.

In reality, then, selection for federal prosecution is not truly random. Losers of the federal lottery did not have their names picked out of a hat. Though no single agency examines each suspect and labels him a federal or state subject, the funneling of defendants into state or federal court rests in largest measure on objective, neutral factors, such as which law enforcement agency catches the suspect and develops the case file. Generally, where federal law enforcement agents investigate a crime over which there is concurrent jurisdiction and apprehend suspects, those suspects frequently wind up in federal court. Where state law enforcement agents investigate an incident and turn over a case file to the local assistant district attorney, that suspect, should he become a defendant, is usually prosecuted in state court. In some instances, the identity of the investigative agency is a matter of chance—do the victims or witnesses to a fraud or drug transaction call the FBI or their local police department after they suffer or witness a crime? Is the surveillance team that observes the suspects selling drugs on a street corner made up of local officers or DEA agents? In most of the 95% of criminal cases that are filed at the state level, investigative and prosecutorial decisions are reactive, not proactive—law enforcement is responding to the dead body found on the street corner, the victim's complaint that the perpetrator attacked him, the suitcase full of drug money in the backseat of the car stopped for speeding. In those situations, there is rarely a conscious decision made regarding whether to investigate, or which jurisdiction should handle a particular matter.

At the federal level, the majority of case files also start in a reactive manner. The SEC receives a complaint, or an FBI agent gets a call from a

bank. The bank examiner making such a call selects a federal agency rather than a state one because he realizes the stakes. Other than in planned undercover operations, which are more prevalent at the federal than state level (though they still certainly comprise a minority of federal cases filed), the decision is first whether to prosecute or not, and then whether to prosecute at the state or federal level. Case files rejected by federal prosecutors may be handed off and brought instead at the state level. Some cases that start at the state level are transferred to federal law enforcement authorities for the entirely legitimate reason that the case is related to an ongoing federal investigation, or the crime committed is clearly a federal one (the van the cops stopped near the border is full of undocumented immigrants). Other times, the state officials are part of a formal or informal state–federal task force or otherwise request federal assistance. The more difficult question arises where a suspect is apprehended by state law enforcement and is later turned over to federal law enforcement for federal intervention precisely because of the increased punishment that will probably ensue. This is a rare event, though it happens when the defendant's record is such that state intervention has been clearly unsuccessful.

Case files eventually land on the desks of federal prosecutors around the country after traveling through what seems to us the entirely fair and rational process of being compiled by law enforcement agents. Again, some come directly from federal law enforcement officials, some were created by the federal prosecutors themselves overseeing federal undercover investigations, some come from formal and informal federal–state–local task forces, and some come by request from state or local law enforcement agents or assistant district attorneys. That happens if the case is too big, too complex, or appears to implicate weighty federal interests. Among these case files, some criminal defendants are in fact selected for criminal prosecution at the federal level. That is, federal prosecutors must affirmatively decide to indict and prosecute a matter, or they must instead decline to prosecute that file. Such declinations are supposed to be recorded, though this does not always occur.[176]

In 2009, federal prosecutors were presented with just over 193,000 suspects for possible prosecution by federal investigators. Federal prosecutors declined

[176] Federal prosecutors are required by internal DOJ regulations to write down the case file name of any matter on which they work for at least an hour. MARK MOTIVANS, U.S. DEP'T OF JUSTICE, FEDERAL JUSTICE STATISTICS 2006–STATISTICAL TABLES Glossary 5 (2011) [hereinafter MOTIVANS, STATISTICS 2006]. Some cases are so obviously inappropriate for federal concern that they can be disregarded within an hour.

to pursue cases against 29,780 of those individuals, or approximately 15.4%.[177] A good portion of those defendants whose cases are dismissed federally will be brought up on state or local charges instead.

The 85% of defendants initially selected by federal prosecutors for criminal prosecution are carefully chosen from the pool of case files. Available evidence suggests that federal prosecutors have legitimate criteria in mind when they select defendants for prosecution or dismissal. When federal interests were strongly represented, the declination rate was markedly lower; for example, nearly all of those matters investigated for immigration offenses (99%) were referred for prosecution.[178] Prosecutors exercise their discretion to dismiss cases most frequently in areas of concurrent jurisdiction, such as property offenses (declination rate of 37%) and violent offenses (declination rate of 34%).[179] Federal prosecutors also frequently dismiss cases when the *mens rea* required for the offense includes a specific intent (usually the intent to injure or deceive)—a very difficult element to prove.[180]

How do federal prosecutors decide which cases to pursue and which to decline? They first consult the U.S. Attorneys Manual, which provides both general and specific rules. For example, the general provision regarding when to initiate a federal case requires that a prosecutor first determine there is "a substantial Federal interest" served by the prosecution, taking into account both national investigative and prosecutorial priorities established by the Department of Justice and those priorities established by "individual United States Attorneys . . . within the national priorities."[181] A prosecutor should decline a case if the defendant is subject to effective prosecution in another

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[177] *See* MARK MOTIVANS, U.S. DEP'T OF JUSTICE, FEDERAL JUSTICE STATISTICS 2009 – STATISTICAL TABLES, at 10 tbl.2.2, 11 tbl.2.3 (2011) [hereinafter MOTIVANS, STATISTICS 2009] (revised 2012). This is a decrease from the 21% of the 141,130 matters concluded between October 1, 2005 and September 20, 2006. However, that year the percentage of cases disposed of by U.S. Magistrates was 20.1%, so the total prosecution rate of 58.9% remained stable. *See id.*

[178] *Id.* at 10 tbl.2.2. This figure is essentially unchanged from the 2005-2006 data, showing a 1.8% prosecutorial declination rate for immigration offenses. *See* MOTIVANS, STATISTICS 2006, *supra* note 176, at tbl.2.2.

[179] MOTIVANS, STATISTICS 2009, *supra* note 177, at 10 tbl.2.2. Again, these figures are relatively unchanged from the 2006 data. MOTIVANS, STATISTICS 2006, *supra* note 176, at tbl.2.2.

[180] Declination rates were very high for bribery (49%), which requires a corrupt quid pro quo; perjury, contempt, and intimidation (59%), which require intent to deceive or injure; national defense offenses (55%), which require an intent to harm; civil rights (85%), which generally require an intent to deprive the victim of her civil rights; and threats against the president (89%), which require a credible threat to injure to avoid First Amendment concerns. MOTIVANS, STATISICS 2009, *supra* note 177, at 10 tbl.2.2.

[181] *See* U.S.A.M., *supra* note 150, at tit. 9-27.230.

jurisdiction.[182] In addition to these general guidelines, there are many more specific ones pertaining to particular statutes, some requiring approval or at least consultation with Main Justice before charging.[183]

Very little empirical work exists regarding the crucial question of how prosecutors implement these guidelines.[184] Professor Richard S. Frase conducted a well-designed study of federal criminal prosecutors in the Northern District of Illinois in 1979.[185] He found that the most frequent reasons why federal prosecutors declined to bring charges, in order of how frequently each reason was selected, were by our count as follows: (1) the state-prosecution alternative; (2) insufficiency of the evidence; (3) the small amount of loss by the victim; (4) the prior record of the defendant; (5) the small amount of the contraband (drugs and weapons); (6) the availability of alternative civil or administrative remedies; (7) the isolated nature of the defendant's act or other defendant characteristics; (8) a recommendation by the investigating agency or the Department of Justice; (9) the lack of interstate impact; and (10) statutory overbreadth.[186] One experienced analyst found in a 2004 empirical study of national drug prosecutions that those cases with the lowest drug weights were more likely to be declined by federal prosecutors.[187] Likewise, the Bureau of Justice Statistics reports that the most common reasons for federal declinations nationwide in 2009 were weak evidence (23%), prosecution by other authorities (12%), and investigative agency

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182 *Id.* tit. 9-27.220.

183 *See, e.g.*, *id.* tit. 9-61.1010 (requiring that the U.S. Attorney consult with state officials before initiating a federal prosecution under the carjacking statute); *id.* tit. 9-61.610 (encouraging deferral of all bank robbery cases to state and local law enforcement); *id.* tit. 9-110.812 (providing that Violent Crimes in Aid of Racketeering prosecutions will not be approved unless the violent crimes are "substantial"); *id.* tit. 9-131 (requiring consultation with the RICO section of Main Justice before pursuing a Hobbs Act charge involving a labor dispute, and establishing that the Department's policy is to restrict a Hobbs Act robbery charge to those cases involving organized crime); *id.* tit. 9-110.101 (requiring prior approval from the Criminal Division of Main Justice before filing a RICO case).

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

185 Frase, *supra* note 30.

186 *Id.* at 263–65.

187 Michael Edmund O'Neill, *Understanding Federal Prosecutorial Declinations: An Empirical Analysis of Predictive Factors*, 41 AM. CRIM. L. REV. 1439 (2004).

request (11%).[188] The empirical data we do have demonstrates sensible reasons for declinations.

Professor Daniel C. Richman has noted that while the overlap between federal and state jurisdiction in criminal codes is substantial, there are unwritten boundaries between the two systems resulting from negotiations between state and federal prosecutors in each jurisdiction as to the kinds of cases that each should handle.[189] Professor Klein found the existence of similar general agreements during her time as a trial attorney with the U.S. Department of Justice and as a Special Assistant to the U.S. Attorney's Office for the Southern District of California, and in her role (with Chief Assistant Anthony Brown) as supervisor of a University of Texas internship program with the U.S. Attorney's Office for the Western District of Texas. Each U.S. Attorney's Office has formal or informal written or unwritten guidelines as to when a case subject to concurrent jurisdiction can go federal. This determination frequently involves an objective measure (quantity of drugs, value of property defrauded, defendant's number of prior state convictions and time incarcerated) and consultation with state officials (especially in high-profile or borderline cases). Gone is the possibility of "Federal Day," when low-level drug dealers were randomly shifted from state to federal court, intended as a sort of Russian roulette to deter street level drug dealers.[190]

About one-third of federal controlled substance offenses are investigated by regional task forces called Organized Crime Drug Enforcement Task Forces (OCDETF).[191] The first OCDETF was established in 1982, and there are now nine task forces covering most areas of the nation.[192] These task forces involve law enforcement agents from many federal agencies (such as the FBI, DEA, ATF, and ICE) along with state and local agents to target high-level figures in organized criminal drug enterprises. According to the DOJ, of the about 25,000

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188 *See* MOTIVANS, STATISTICS 2009, *supra* note 177, at 11 tbl.2.3.

189 Daniel C. Richman, *The Changing Boundaries Between Federal and Local Law Enforcement*, CRIM. JUST. 2000, July 2000, at 91, 92–96.

190 Mike McAlary, *City Forms Unit to Fight Crack*: *101 cops will concentrate on epidemic of smokable cocaine*, NEWSDAY, May 22, 1986, at A2 (noting that those arrested on Federal Day—a day in which city police work with federal agents and charge those arrested with federal crimes—face double the normal fifteen-year sentence).

191 EXEC. OFFICE FOR U.S. ATTORNEYS, U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' ANNUAL STATISTICAL REPORT 20–21 (2010).

192 The nine regional offices are located in Atlanta, Boston, El Paso, Houston, New York, San Diego, San Juan, and Tampa. *See Organized Crime Drug Enforcement Task Forces (OCDETF)*, U.S. DRUG ENFORCEMENT AGENCY, www.justice.gov/dea/programs/ocdetf.htm (last visited July 31, 2012); *see also* ABRAMS, BEALE & KLEIN, *supra* note 26, at 12.

narcotics convictions during the fiscal year 2010, approximately 8,000 of them, or 30%, were OCDETF cases.[193] These investigations target the very worst national and international traffickers, and each task force consists of state and local officials who endorse these federal prosecutions. In many cases, the state and local law enforcement agencies working alone lack the resources to efficiently prosecute interstate or international drug trafficking organizations.[194] In addition to OCDETF, the DEA has 381 state and local task force programs (targeting middle-level violators) in major cities throughout the country.[195] Such figures suggest that the selection of these narcotics defendants for federal criminal prosecution is appropriate.

B. Independent-Norm Federalism

A second scholarly critique of the federal criminal law is that concurrent federal and state jurisdiction impinges upon states' ability to foster minority norms. We offer two responses to this criticism. First, it has little to do with the problem of over-federalization. Very few of the laws promulgated by Congress since the 1970s were enacted to quell state or local experimentation with criminal justice policy, and few have that effect. Our second response is more substantive. One of us made the argument a decade ago that our federalism remains vibrant despite concurrent federal and state jurisdiction over the same conduct.[196] So long as the federal system continues to constitute a mere 5% of the total criminal justice system, and so long as federal criminal laws do not preempt state ones on a grand scale, states can continue to experiment with different solutions to a host of social ills. We continue to believe this to be true.

One of the most active areas of state law experimentation at the moment is the use of medical marijuana. Many state laws on this subject are in direct conflict with the Federal Controlled Substances Act, which provides that

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193 *Organized Crime Drug Enforcement Task Forces (OCDETF)*, *supra* note 192. In fiscal year 2008, OCDETF was the investigative muscle behind more than 8,200 drug convictions. *See* INTERAGENCY LAW ENFORCEMENT, U.S. DEP'T OF JUSTICE, FY 2010 INTERAGENCY CRIME AND DRUG ENFORCEMENT CONGRESSIONAL SUBMISSION 32 tbl. (2010).

194 *Organized Crime Drug Enforcement Task Forces (OCDETF)*, *supra* note 192.

195 *State & Local Task Forces*, U.S. DRUG ENFORCEMENT AGENCY, http://www.justice.gov/dea/programs/taskforces.htm (last visited Sept. 1, 2012).

196 Klein, *Independent-Norm Federalism*, *supra* note 31, at 1556 ("Because 90 to 95% of felony offenders are prosecuted in state rather than federal criminal-justice systems, local experimentation as to the method of achieving shared federal and state law-enforcement goals has flourished.").

marijuana has no recognized medical usage.[197] Since California led the way in 1996 with the Compassionate Use Act, at least fourteen other states and the District of Columbia have passed similar bills to allow medical marijuana use with a doctor's prescription.[198] At present, it appears to us that there is a stalemate. Federal officials realize that they are unlikely to be successful in prosecuting those who use medical marijuana, or even those who supply it, when trying to convince a jury comprised of citizens who voted to decriminalize medical marijuana use in the first place. While there have been public squabbles, to our knowledge there has been no actual federal prosecution of either a sick patient for use of medical marijuana, or of a state employee for providing the marijuana. It does not appear to be to anyone's political advantage to force a court to answer the difficult question of whether the Federal Controlled Substances Act preempts state law in the medical marijuana arena. It is likely for this reason that the DOJ has expressly fought to keep courts from resolving the issue.[199]

The Department of Justice stated in an October 2009 memorandum from then-Deputy Attorney General David W. Ogden to all United States Attorneys that prosecution of those "using" or "providing" marijuana in compliance with

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[197] *See* 21 U.S.C § 812(b)(1)(C) (2006) (amended 2012) (providing that there is no accepted use of the drugs classified under Schedule I, like marijuana, under medical supervision); 21 U.S.C. § 841(a), (b)(1)(A)(vii) (2006) (providing for a minimum penalty of ten years imprisonment and a maximum penalty of life imprisonment for possession with intent to distribute 1,000 kilograms of mixture or substance containing a detectable amount of marijuana); *see also* Gonzales v. Raich, 545 U.S. 1 (2005) (rejecting request to enjoin the federal government from enforcing federal drug laws on the grounds that criminalizing the possession of marijuana for personal use is beyond the scope of congressional authority under the Commerce Clause); United States v. Oakland Cannabis Buyers Coop., 532 U.S. 483 (2001) (rejecting the medical necessity defense to federal criminal controlled substance prohibitions where provisions of the Controlled Substances Act make clear that such a defense is unavailable).

[198] MARK EDDY, CONG. RESEARCH SERV., RL33211, MEDICAL MARIJUANA: REVIEW AND ANALYSIS OF FEDERAL AND STATE POLICIES 18 & n.71 (2010) (counting fourteen states, including Alaska, California, Colorado, Hawaii, Maine, Michigan, Montana, Nevada, New Jersey, New Mexico, Oregon, Rhode Island, Vermont, and Washington, covering 27% of the U.S. population); Defendants' Motion to Dismiss for Lack of Jurisdiction and Failure to State a Claim, with Memorandum of Points and Authorities at 1, Arizona v. United States, 703 F. Supp. 2d 980 (D. Ariz. 2010) [hereinafter U.S. Dep't of Justice Motion to Dismiss] (No. CV-11-01072-PHX-SRB) (counting sixteen states, including Arizona), *aff'd*, 641 F.3d 339 (9th Cir. 2011), *aff'd in part and rev'd in part*, 132 S. Ct. 2492 (2012). Connecticut passed a medical marijuana bill on May 5, 2012. Daniela Altimari, *Measure Passes in Middle of Night; Filibuster Ends with 21-13 Senate Vote; Medical Marijuana*, HARTFORD COURANT, May 6, 2012, at A8.

[199] We note that both *Gonzales* and *Oakland Cannabis Buyers* were brought as civil injunctive actions. The Department of Justice did not attempt to criminally prosecute sick marijuana users, probably realizing that its jury pool would be the same group of persons who voted in favor of California's Compassionate Use Act. We also note that the recent preemption case, *Arizona v. United States*, 132 S. Ct. 2492 (2012), was brought by Arizona, and the Department of Justice worked to get it dismissed rather than resolved.

state law "is unlikely to be an efficient use of limited federal resources."[200] However, this provides no guarantee that state employees and dispensaries will not be prosecuted under any circumstances. For that reason, the Arizona Department of Health Services, at the direction of Governor Jan Brewer, decided not to license any dispensaries pursuant to its medical marijuana law.[201] Arizona Attorney General Tom Horne filed a civil complaint in the U.S. District Court for the District of Arizona on behalf of the Governor and against the U.S.[202] The suit asked the federal judge to rule that compliance with the Arizona law, which decriminalizes distribution, possession, and use of medical marijuana, provides protection from federal prosecution and is not preempted by federal law. The Department of Justice moved to dismiss the complaint on the grounds that the federal court lacked jurisdiction because there was no federal question—there was no actual controversy because there was no allegation that the state statute violated federal law or any state employee was likely to be prosecuted federally; the plaintiff lacked standing because there was no actual injury; and finally the case was not ripe for review because there was no genuine threat of federal prosecution.[203]

It seems to us that if the Attorney General of the United States is willing to publicly state on the record that the Department of Justice is not going to prosecute any of the allegedly at-risk individuals in Arizona with violations of the Federal Controlled Substances Act, one can take him at his word.[204] The Department's official position in its original October 2009 memorandum is that there is a strong federal interest in prosecuting "significant marijuana traffickers" and the memorandum noted that "marijuana distribution in the

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200 *See* Memorandum from David Ogden, Deputy Attorney Gen., U.S. Dep't of Justice, to Selected United States Attorneys (Oct. 19, 2009) (providing clarification and guidance to federal prosecutors in states that have authorized the medical use of marijuana) [hereinafter Ogden Memo], *available at* http://www.justice.gov/opa/documents/medical-marijuana.pdf.

201 U.S. Dep't of Justice Motion to Dismiss, *supra* note 198.

202 Complaint for Declaratory Judgment, *Arizona*, 703 F. Supp. 2d 980 (No. CV-11-01072-PHX-SRB).

203 U.S. Dep't of Justice Motion to Dismiss, *supra* note 198.

204 On the other hand, violations of the federal drug laws may certainly lead to severe consequences, and particular U.S. Attorneys could pursue a federal case despite the directive from Main Justice to the contrary. For example, in Washington, Governor Chris Gregoire vetoed part of a new medical marijuana bill because two local United States Attorneys threatened to prosecute state workers that would be passing out the distributors' licenses if those provisions of the bill were enacted. *See* Jonathan Martin, *Gregoire Expected to Veto Medical Pot Bill on Friday*, SEATTLE TIMES, Apr. 29, 2011, at B1 (describing raids on two dispensaries and letters from Spokane U.S. Attorney Michael Ormsby and Seattle U.S. Attorney Jenny Durkan, which warned that state employees involved in the licensing scheme could face prosecution); Lucia Graves, *Chris Gregoire, Washington Governor, Vetoes Critical Parts of Medical Marijuana Bill*, HUFFINGTON POST (Apr. 29, 2011, 8:15 PM), www.huffingtonpost.com/2011/04/29/washington-marijuana-bill-veto_n_855765.html.

United States remains the single largest source of revenue for the Mexican Cartels."[205] However, federal prosecutors "should not focus federal resources . . . on individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana."[206] Such a prosecution is "unlikely to be an efficient use of limited federal resources."[207] Marijuana trafficking may be of potential federal interest, the memorandum continued, if the following characteristics are present: unlawful use of firearms, violence, sales to minors, money laundering activity, amounts of marijuana inconsistent with compliance with state or local law, illegal sale of other controlled substances, or ties to other criminal enterprises.[208] On June 29, 2011, Deputy Attorney General James M. Cole's new memorandum to United States Attorneys provided that the "Department's view of the efficient use of limited federal resources as articulated in the Ogden Memorandum has not changed."[209]

Another current area of state experimentation is assisted suicide laws. The Supreme Court has been particularly active in preserving the role of states as laboratories. Three states now make it expressly legal for a doctor to actively help a patient commit suicide: Washington, Oregon, and Montana.[210] Depending upon the method used to cause death, such laws[211] could easily violate the Federal Controlled Substances Act (CSA), which classifies drugs based on their potential for abuse or dependence, their accepted medical use, and their accepted safety for use under medical supervision. This potential clash set the stage for a showdown between federal and state power, which culminated in *Gonzales v. Oregon*.[212] The Supreme Court ruled that Oregon's Death with Dignity Act did not run afoul of a CSA federal regulation requiring that every prescription be issued for a legitimate medical purpose.[213] In

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205 Ogden Memo, *supra* note 200, at 1.

206 *Id.* at 1–2.

207 *Id.* at 2.

208 *Id.* at 2.

209 Memorandum from James M. Cole, Deputy Attorney Gen., U.S. Dep't of Justice, to United States Attorneys (June 29, 2011) (providing guidance regarding the Ogden Memo in jurisdictions seeking to authorize marijuana for medical use).

210 William Yardley, *In Washington, First Death Using Assisted-Suicide Law*, N.Y. TIMES, May 23, 2009, at A10. Note that the majority of states now expressly ban assisted suicide. For example, Michigan explicitly banned physician-assisted suicide in 1993 in direct response to Dr. Kevorkian's efforts.

211 OR. REV. STAT. § 127.800 (2011); WASH. REV. CODE ANN.§ 70.245.190 (West 2011); Baxter v. State, 224 P.3d 1211, 1222 (Mont. 2009).

212 546 U.S. 243 (2006).

213 21 C.F.R. § 1306.04(a) (2012).

rejecting the government's argument, the Court approached the issue as one of administrative overreaching. The Attorney General was "not authorized [under the CSA] to make a rule declaring illegitimate a medical standard for care and treatment of patients that is specifically authorized under state law."[214]

The *Gonzales* majority gave other not so subtle indications that it would support states' ability to experiment with solutions to the quandary of end-of-life planning. The Court noted, for example, that the "structure and operation of the CSA presume and rely upon a functioning medical profession regulated under the States' police powers."[215] This tacit encouragement of states' homegrown solutions to the problem of assisted suicide was consistent with the Court's prior rulings on right-to-die questions. In *Washington v. Glucksberg*,[216] the Court held that a Washington state law criminalizing assisting in a suicide *did not* violate the Fourteenth Amendment, and in *Vacco v. Quill*,[217] the Court upheld a New York law that permitted patients to refuse life-saving medical treatment (but simultaneously prohibited assisted suicide) against a Fourteenth Amendment challenge. While the Court declined to recognize the right to die as a fundamental federal constitutional right, several Justices suggested that end-of-life planning, including assisted suicide, was properly understood as a medical issue, and that regulation of such medical issues was properly within the legislative province of the states.[218] Furthermore, Justice Souter in *Glucksberg* opined that the individual states, as the primary regulators of matters relating to health and safety, should be free to craft medical policies and to "experiment" with laws and procedures surrounding end-of-life care.[219] In *Glucksberg*, Chief Justice Rehnquist also acknowledged that "Americans are engaged in an earnest and profound debate about the morality, legality, and

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214 *Gonzales*, 546 U.S. at 258.

215 *Id.* at 270.

216 521 U.S. 702, 723–36 (1997).

217 521 U.S. 793, 799–809 (1997).

218 *Glucksberg*, 521 U.S. at 710–11; *Vacco*, 521 U.S. at 805–06; *see also* Bryan Hilliard, *The Politics of Palliative Care and the Ethical Boundaries of Medicine:* Gonzales v. Oregon *as a Cautionary Tale*, 35 J.L. MED. & ETHICS 158, 163 (2007).

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

practicality of physician-assisted suicide [and the Court's] holding permits this debate to continue, as it should in a democratic society."[220]

Through its interpretation of the CSA and the Constitution, the Court has effectively created a safety zone where states can experiment relatively freely with medical marijuana and assisted suicide laws as they see fit. In reference to assisted suicide laws, Owen Lipsett noted that the "Court has explicitly recognized the right of states to disagree on the subject of euthanasia" and has implied a "willingness to countenance diversity in states' euthanasia regimes."[221] One of the arguments in favor of competitive federalism, Lipsett noted, is that citizens can "act as consumers of government by choosing the regime that best suits their needs and views."[222] Thus, proponents of competitive federalism might not be troubled by a situation where two adjacent states have enacted differing euthanasia policies, because such a multiplicity of perspectives is viewed as a desirable reflection of state citizens exercising their preferences. If a future administration were to take aim at state assisted suicide statutes, it seems likely that the Court would again step in to defend states' ability to experiment in this area. The Court is willing and able, in appropriate circumstances, to shelter states from aggressive federal enforcement that might otherwise threaten the vitality and diversity of state solutions to local problems. The Court's apparently active interest in fostering and preserving minority norms should comfort those who are broadly concerned about the potentially stifling effects of far-reaching federal legislation. We believe that where there are sufficient numbers of states in favor of an experiment, such as marijuana decriminalization and assisted suicide, the states will likely win any arguments with the federal government regarding federal enforcement of contrary laws.[223] After all, as Jesse Choper and others argued years ago, these states have representation in the House and Senate to protect their interests.[224] Where the state norm is a true outlier, and its position seems outrageous as a

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220 *Id.* at 735 (majority opinion).

221 Owen Lipsett, *The Failure of Federalism: Does Competitive Federalism Actually Protect Individual Rights?*, 10 U. PA. J. CONST. L. 643, 652, 654 (2008).

222 *Id.* at 655.

223 Ekow N. Yankah, *A Paradox in Overcriminalization*, 14 NEW CRIM. L. REV. 1, 4 (2011) (suggesting that marijuana decriminalization has been successful because of agreement across a broad span of philosophical frameworks).

224 *See, e.g.*, Jesse H. Choper, Commentary, *Federalism and Judicial Review: An Update*, 21 HASTINGS CONST. L.Q. 577 (1994); ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 201–68 (1962); JESSE CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 55–59 (Univ. of Chicago Press, 1983) (1980); *see also* Baker v. Carr, 369 U.S. 186, 266 (1962) (Frankfurter, J., dissenting).

matter of substantive law or penalties or procedures, it may get trampled by contrary federal law. However, this is essentially a problem of federalism itself, and not a result of the explosion of the federal criminal code or any particular federal law. For the most part, state experimentation on the best way to handle recognized social ills, including criminal misconduct, continues unabated.

III. FEDERALISM, CULPABILITY, AND VAGUENESS

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

Careful scholars complain not that too many federal crimes exist, but rather that a few well-known federal crimes are poorly conceived or poorly drafted, and that these account for a substantial number of unwarranted federal prosecutions. Strict liability statutes that criminalize morally blameless conduct are unjust; every first-year law student learns that an evil mind must accompany the evil act. The existence of such strict liability offenses allows federal prosecutors to pick and choose from any hapless, non-blameworthy person because it is difficult for most of us to avoid conduct that we do not consider morally wrong. Examples of this kind of offense are found in the criminal provisions of the Federal Food, Drug, and Cosmetics Act.[225]

[225] 21 U.S.C. §§ 331–37 (2006). More specifically, see the statute's section on Prohibited Acts, 21 U.S.C. § 331 (2006), *amended by* Act of July 9, 2012, Pub. L. No. 112-144, 126 Stat. 993, which bans activities such as introduction into interstate commerce of an adulterated or misbranded food or cosmetic product; refusal to permit inspection; or receipt or delivery of misbranded or adulterated products.

Likewise, with overbroad statutes, no one knows exactly what conduct is criminal until a federal prosecutor exercises her discretion to charge under such a law and a court opinion later upholds (or rejects) her theory. A paradigmatic example of this type of prohibition is the mail fraud statute.[226]

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

A. Mens Rea

It is difficult to briefly counter the critiques against federal strict liability crimes in part because the concept is so ill-defined. Sometimes political and special interest groups that complain of over-federalization appear to attack federal crimes with common law roots (such as fraud or obstruction) as having "relaxed" *mens rea* components.[227] At other times, these groups use the same strict liability language to attack federal regulation of business activity.[228] Our review of the historical record and examination of current judicial interpretations of such federal criminal offenses raises little cause for alarm.

In order to frame a response to the critics, we must first start with definitions and categorizations. One might label as "strict liability" those offenses under which a person could be convicted despite his claimed lack of awareness that he was engaging in wrongful conduct. A defendant may claim he did not know his conduct was wrongful either because he lacked awareness about a particular fact that made his conduct unlawful, or because he lacked awareness of the law itself. An example of the former situation, which we will

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[226] 18 U.S.C. § 1341 (2006) (prohibiting any scheme or artifice to defraud or obtain property by means of fraudulent pretenses); *see also* Skilling v. United States, 130 S. Ct. 2896 (2010); Cleveland v. United States, 531 U.S. 12 (2000); McNally v. United States, 483 U.S. 350 (1987), *superseded by statute*, Act of Nov. 18, 1988, Pub. L. 100-690, § 7603(a), 102 Stat. 4508.

[227] *See, e.g.*, HERITAGE FOUNDATION REPORT, *supra* note 4.

[228] *See, e.g.*, Gary Fields & John R. Emshwiller, *Federal Offenses: A Sewage Blunder Earns Engineer a Criminal Record*, WALL ST. J, Dec. 12, 2011, at A1 (detailing prosecution of individual for violating the Clean Water Act after he unwittingly dumped sewage into a stream; the defendant was fined and received one year of probation).

label "true strict liability," is captured in *Staples v. United States.* Mr. Staples was convicted of violating the National Firearms Act by knowingly possessing a prohibited firearm, in his case an automatic assault rifle, despite his argument that he did not realize that his AR-15 had been modified from a semi-automatic to an automatic one.[229] An example of the latter situation, which we will call "semi-strict liability," is captured in *United States v. Freed*. Mr. Freed was also convicted of violating the same provision of the National Firearms Act by knowingly possessing a prohibited firearm—in his case, a hand grenade—despite his argument that he not realize that the law forbids possession of grenades.[230]

When a defendant argues that he lacked awareness regarding the nature of his conduct, the Court frequently reads in an extra-textual *mens rea* regarding that fact. There is a limited exception here for certain public welfare offenses.[231] When the defendant claims he lacked awareness that his conduct was illegal, the Court will not import *mens rea* into the law because ignorance of the law is no excuse. There is a limited exception here for certain offenses where a defendant may not be on notice of the law that makes his conduct wrongful. We will revisit both exceptions.[232] Thus, Mr. Staples's conviction was reversed when he lacked awareness of wrongdoing because he did not know all of the facts (he thought he possessed an ordinary non-automatic weapon). But Mr. Freed's conviction was affirmed because he intentionally engaged in all the conduct the crime prohibited, though he genuinely believed that his conduct was lawful.

Our definitions and classifications are much simpler than is true in practice. The Court has been notoriously bad at distinguishing between knowledge of law and knowledge of facts. Accepting our terminology, this outcome—that true strict liability is generally prohibited but semi-strict liability is generally acceptable—can be attacked on two bases. First, one could argue that no sensible theory of punishment should allow criminal convictions where there is true strict liability—where the government fails to prove knowledge of all of

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[229] 511 U.S. 600 (1994) (reversing conviction and reading in *mens rea* requirement of knowledge of attendant circumstance that brings defendant's conduct within law).

[230] 401 U.S. 601 (1971) (upholding conviction for possession of unregistered grenade and rejecting reading in *mens rea* requirement as to law).

[231] See discussion of *United States v. Dotterweich* and *United States v. Park infra* notes 245–53 and accompanying text.

[232] See discussion of *Cheek v. United States* and *Lambert v. California infra* note 261 and accompanying text.

the facts that make the conduct unlawful. The *Staples* rule should be a hard and fast one. If a person is unaware that she is engaging in wrongful conduct, there is no point in punishing her (she cannot be deterred, and she is not a proper target of retribution). Second, one could argue that it is unjust to tolerate semi-strict liability where the federal statute prohibits conduct that is not plainly immoral on its face. The maxim that ignorance of the law is no excuse is perfectly sensible as applied to *malum in se* offenses; no one seriously contends that it should be a defense that a defendant did not know that bank robbery or murder of a federal official was an offense. However, semi-strict liability may be problematic for *malum prohibitum* crimes, where the law governs behavior outside the moral sphere and an individual may not be aware of the law.

Our answer to these attacks relies on considerations of practicality and logic. In the early to mid-1900s, culminating in the New Deal, the federal government began enacting a number of regulatory statutes to protect our air, water, stock exchange, and general physical and economic health. The Court eventually came to label these as "public welfare offenses."[233] For example, Congress enacted the Harrison Act of 1914 to regulate narcotics,[234] the National Firearms Act of 1934 to regulate dangerous weapons,[235] the Securities Act of 1933 and the Securities and Exchange Act of 1934 to regulate the

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[233] As Justice Jackson explained in *Morissette v. United States*:

> The industrial revolution multiplied the number of workmen exposed to injury from increasingly powerful and complex mechanisms, driven by freshly discovered sources of energy, requiring higher precautions by employers. . . . Congestion of cities and crowding of quarters called for health and welfare regulations undreamed of in simpler times. Wide distribution of goods became an instrument of wide distribution of harm when those who dispersed food, drink, drugs, and even securities, did not comply with reasonable standards of quality, integrity, disclosure and care. Such dangers have engendered increasingly numerous and detailed regulations which heighten the duties of those in control of particular industries, trades, properties or activities that affect public health, safety or welfare.
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> While many of these duties are sanctioned by a more strict civil liability, lawmakers, whether wisely or not, have sought to make such regulations more effective by invoking criminal sanctions . . . . for what have been aptly called "public welfare offenses." . . . [L]egislation applicable to such offenses, as a matter of policy, does not specify intent as a necessary element. The accused, if he does not will the violation, usually is in a position to prevent it with no more care than society might reasonably expect . . . .

342 U.S. 246, 253–56 (1952) (footnotes omitted).

[234] Harrison Act of 1914, Pub. L. No. 63-223, ch. 1, 38 Stat. 785 (superseded by Controlled Substances Act of 1970, 21 U.S.C. § 841 *et seq*. (2006)).

[235] The National Firearms Act of 1934, Pub. L. No. 73-474, ch. 757, 48 Stat. 1236 (codified as amended in scattered sections of 28 U.S.C.) was the first federal regulation of private firearms.

market,[236] the Federal Food, Drug, and Cosmetic Act of 1938 to regulate the transportation of food and drugs,[237] and the Hazardous Materials Transportation Act to regulate the movement of dangerous chemicals.[238] Most of these criminal provisions apply to businesses and high-level corporate officials, though a few apply directly to ordinary persons. There have since been a series of additional regulatory efforts, such as the Clean Air Amendments of 1970,[239] the Clean Water Act of 1972,[240] and the Sarbanes-Oxley Act of 2002,[241] all with accompanying criminal prohibitions.

Most of these public welfare crimes are what we call semi-strict liability offenses that lack a *mens rea* component regarding whether the conduct violated the law. A few of them are what we term true strict liability offenses that allow conviction when a defendant lacks *mens rea* regarding all facts that made the conduct criminal. The Court recently summarized the contours of public welfare offenses as follows:

> "Public welfare" offenses share certain characteristics: (1) they regulate "dangerous or deleterious devices or products or obnoxious waste materials," (2) they "heighten the duties of those in control of particular industries, trades, properties or activities that affect public health, safety or welfare," and (3) they "depend on no mental element but consist only of forbidden acts or omissions." Examples of such offenses include Congress' exertion of its power to keep dangerous narcotics, hazardous substances, and impure and adulterated foods and drugs out of the channels of commerce.[242]

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[236] Securities Act of 1933, Pub L. No. 73-22, ch. 38, 48 Stat. 74 (codified as amended at 15 U.S.C. §§ 77a–77aa (2006)); Securities Exchange Act of 1934, Pub. L. No. 73-291, ch. 404, 48 Stat. 881 (codified as amended at 15 U.S.C. § 78a–nn (2006)).

[237] Federal Food, Drug, and Cosmetic Act, Pub. L. No. 75-717, ch. 675, 52 Stat. 1040 (1938) (codified as amended at 21 U.S.C. §§ 301–99 (2006)).

[238] Hazardous Materials Transportation Act, Pub. L. No. 93-633, 88 Stat. 2156 (1975) (codified as amended in scattered sections of 49 U.S.C.).

[239] Clean Air Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676 (1970) (codified as amended at 42 U.S.C. § 7401 *et seq.* (2006)).

[240] Clean Water Act, Pub. L. No. 92-500, 86 Stat. 816 (1972) (codified as amended at 33 U.S.C. § 1251 *et seq.* (2006)).

[241] Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified in scattered sections of 15 U.S.C., 18 U.S.C., and 29 U.S.C.).

[242] *See* Staples v. United States, 511 U.S. 600, 628–29 (Stevens, J., dissenting) (footnotes omitted) (citations omitted). This quote was made in the context of a disagreement between the majority and dissent regarding whether the National Firearms Act was a public welfare statute. Justice Stevens's dissent claimed that it was, and that therefore the government need not prove that the defendant knew all of the facts surrounding his conduct (in this case, that his weapon was a semi-automatic one). The majority believed that

To that list of characteristics, we would add number four: these public welfare offenses carry penalties which are "relatively small, and conviction does no grave damage to an offender's reputation."[243]

While we find these descriptions in the two cases quoted above useful, we note again that the cases cited in *Staples* and *Morissette* failed to distinguish between knowledge of facts and knowledge of law. In a series of cases between 1922 and 1971, the Court permitted criminal prosecutions in semi-strict liability cases,[244] and even in one true strict liability case[245] against defendants in a responsible relation to the public welfare. Though the Justices did not discuss the difference between true strict liability crimes and semi-strict liability crimes, we think the Court arrived at the right results for the right reasons. True to its later description in *Staples*, the Court limited true strict liability in public welfare offenses to corporate officials in a regulated industry and the penalties were small. In *United States v. Dotterweich*, the Court affirmed a misdemeanor conviction under the Federal Food, Drug, and Cosmetic Act against the president and general manager of a company for shipping misbranded drugs in interstate commerce and for shipping adulterated drugs.[246] The defendant's company purchased drugs from outside manufacturers and shipped them, repackaged under the company's own label. The defendant was not proven to have known that the drugs he shipped and sold were adulterated or misbranded, but the Court nevertheless upheld his conviction in large measure because he was in a superior position, as compared to the public, to prevent such harms:

> Hardship there doubtless may be under a statute which thus penalizes the transaction though consciousness of wrongdoing be totally wanting. Balancing relative hardships, Congress has preferred to place it upon those who have at least the opportunity of informing themselves of the existence of conditions imposed for the protection of consumers before sharing in illicit commerce, rather than to throw the hazard on the innocent public who are totally helpless.[247]

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

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

244 *See, e.g.*, United States v. Int'l Minerals & Chem. Corp., 402 U.S. 558 (1971); United States v. Balint, 258 U.S. 250 (1922).

245 United States v. Dotterweich, 320 U.S. 277 (1943).

246 *Id.*

247 *Id.* at 284–85.

The *Dotterweich* Court relied on *United States v. Balint*,[248] a 1922 case where the Court affirmed a felony conviction (though a probationary sentence) for selling narcotics in unstamped packages in violation of the 1914 Harrison Act, despite the defendant's undisputed claim that he did not know the substances were so classified by that law. The *Balint* case involved a claim of ignorance of the law, whereas the defendant in *Dotterweich* claimed ignorance of the facts. The Court did not acknowledge in *Dotterweich* that it was relaxing the usual *mens rea* requirement regarding knowledge of the facts for a public welfare offense.

In *United States v. International Minerals & Chemical Corp.*,[249] the Court upheld a conviction of a company under the Federal Food, Drug, and Cosmetic Act for shipping sulfuric acid and hydrofluosilicic acid in interstate commerce, where the company knowingly failed to show on the shipping papers the required classification. The defendant argued *not* that it did not realize it was shipping hazardous chemicals, but rather that it did not know about the federal regulations. The Court found this to be a valid public welfare offense, and rejected the argument that the word "knowingly" should apply to knowledge of the regulation as well as knowledge of the facts surrounding the defendant's conduct. Though the defendant did not argue that it was unaware of the facts surrounding its conduct—that it was shipping dangerous chemicals—the Court nonetheless noted that the government bears the burden of proving that the defendant knew he was shipping dangerous chemicals of some kind. "A person thinking in good faith that he was shipping distilled water when in fact he was shipping some dangerous acid would not be covered."[250] This case, like *Balint* but unlike *Dotterweich*, represents an example of a semi-strict liability (as opposed to a true strict liability) offense. Ignorance of the law is no defense, but the prosecution must still prove awareness of conduct. A defendant's awareness of his conduct suggests that a defendant knew, or should have known, that he was engaging in a highly regulated activity.

Before moving on to the Court's handling of true strict liability offenses, we want to point out here that we are aware of only a single statute that fits into this category: the Federal Food, Drug, and Cosmestic Act (that statute was the basis for prosecution in *Dotterweich*, discussed above, and *Park*, discussed

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[248] 258 U.S. 250 (1922).
[249] 402 U.S. 558 (1971).
[250] *Id.* at 563–64.

below).[251] Given the outcry against such laws, you would think there were hundreds in existence. In practice, the Court accepts a true strict liability construction only in the case of statutes that target prosecution of high-level corporate officials, and even then, only when the penalty is limited to a misdemeanor conviction. The Court has been rightly unwilling to expand the category of true strict liability offenses beyond public welfare offenses since *Dotterweich* in 1943. The purpose behind a true strict liability offense is to allow the responsible corporate official to be held accountable, even when the actual conduct (in that case, shipping the adulterated food) was done by an underling. The responsible corporate official should have kept himself apprised of the facts on the ground, as well as the law on the books. Thus, in the more recent *United States v. Park*,[252] the Court affirmed the misdemeanor conviction of a CEO as the responsible corporate official for a violation of the Federal Food, Drug, and Cosmetic Act where food that had been shipped in interstate commerce was held in warehouses infested with rats. Mr. Park had no defense that he was unaware that the food he was storing for sale contained rat droppings—given the interests at stake, he *should have* been aware. The law requires that a person in his high-level position institute procedures for discovering and remedying such problems in his own warehouse before his product joins our national food supply.[253]

The remaining federal regulatory public welfare offenses enacted by Congress and upheld by the Court are semi-strict liability offenses (where ignorance of the law is no excuse), such as the Securities Exchange Act of 1934,[254] the Clean Air Act,[255] and the Clean Water Act.[256] The *Balint*,

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[251] Federal Food, Drug, and Cosmetic Act, Pub. L. No. 75-717, ch. 675, 52 Stat. 1040 (1938) (codified as amended at 21 U.S.C. §§ 301–99 (2006)). Of several prohibitions contained in the Act, only § 331(a) is a true strict liability crime. *See* 21 U.S.C. § 331(a) (2006) (amended 2012). Other provisions have a minimal requirement of knowledge as to the facts constituting the offense. *See, e.g.*, 21 U.S.C. § 333(b) (2006) (amended 2012).

[252] 421 U.S. 658, 670 (1975).

[253] *Id.* at 661 n.2.

[254] Securities Exchange Act of 1934 (SEA), Pub. L. No. 73-291, ch. 404, 48 Stat. 881 (codified as amended at 15 U.S.C. § 78a–nn (2006)). The SEA's criminal offenses all require proof of willful or knowing fraud. The SEA's insider trading statute requires proof of intent to deceive the market, *and* provides an affirmative defense that allows the defendant to escape criminal liability and any possible prison time if he can prove he was unaware of the regulations regarding insider trading.

[255] The Clean Air Amendments of 1970 (CAA), Pub. L. No. 91-604, 84 Stat. 1676 (1970) (codified as amended at 42 U.S.C. § 7401 *et seq.* (2006)), impose both criminal and civil liability. The criminal provisions impose criminal liability on any person who (1) "knowingly violates any requirement or prohibition of an applicable implementation plan" (five-year maximum penalty); (2) "knowingly" makes a false or material statement, knowingly conceals, fails to file a required report, or falsifies any required monitoring device (two-

International Minerals, and *Freed* cases discussed above fall into the category of semi-strict liability offenses. Like the true strict liability offenses, these statutes apply primarily to corporate officials who have easy access to the law, though they may infrequently apply directly to individuals, like the National Firearms Act in *Freed*.[257] Limiting liability to business executives or individuals handling highly dangerous items generally ensures that truly innocent persons are not ensnared. The attack on these laws is less convincing than the attack on true strict liability; after all, ignorance of the law is no excuse. The critics' best argument here is that there are so many modern federal public welfare offenses that it may be possible for someone perfectly willing to follow the law to violate a proscription because he is unaware of its existence. In that instance, where the government fails to prove knowledge of

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year maximum penalty); and (3) "*knowingly* releases into the ambient air any hazardous air pollutant . . . and who *knows* at the time that he thereby places another person in imminent danger of death or serious bodily injury" (punishable up to fifteen years imprisonment). 42 U.S.C. § 7413(c)(1), (2), (5A) (2006) (emphasis added).

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

[256] Clean Water Act (CWA), Pub. L. No. 92-500, 86 Stat. 816 (1972) (codified as amended at 33 U.S.C. § 1251 *et seq.* (2006)). See also 33 U.S.C. § 1319 (2006), for the Act's enforcement provisions. Negligent CWA violations are misdemeanors. *See id.* § 1319(c)(1). Section 1319(c)(2)(A) of the CWA criminalizes "knowing" CWA violations, while § 1319(c)(2)(B) criminalizes the knowing release of hazardous substances into a sewer or other protected outlet. *Id.* § 1319(c)(2). Under § 1319(c)(2)(B), a prosecutor must prove that the defendant *knew* the hazardous substance would cause injury/property damage. Under § 1319(c)(3)(A), the harshest of the CWA's criminal provisions, a prosecutor must prove both a knowing violation of the CWA's regulations, plus knowledge of a risk of danger or serious bodily injury (maximum fifteen-year penalty). In all of the CWA's criminal provisions, with the exception of the misdemeanor violation, a defendant will not be convicted unless he knew, or had reason to know, facts that would alert him to the dangerous and highly regulated nature of his activities. Therefore, we would not classify the CWA's criminal provisions as true strict liability.

Similarly, the Hazardous Materials Transportation Act (HMTA), Pub. L. No. 93-633, 88 Stat. 2156 (1975) (codified as amended in scattered sections of 49 U.S.C.), created criminal provisions. Section 5124 of the HMTA prohibits knowing violations of shipping regulations. 49 U.S.C. § 5124 (2006). An earlier version of the HMTA was considered by the Court. *See* United States v. Int'l Minerals & Chem. Corp., 402 U.S. 558 (1971). The *International Minerals* Court noted that, when dealing with a dangerous product, defendants are likely to be on notice of regulations because "the probability of regulation is so great that anyone who is aware that he is in possession of them or dealing with them must be presumed to be aware of the regulation." *Id.* at 565.

[257] National Firearms Act of 1934, Pub. L. No. 73-474, ch. 757, 48 Stat. 1236 (codified as amended in scattered sections of 28 U.S.C.); *see* United States v. Freed, 401 U.S. 601 (1971). *Freed* is the only example of this we could find.

the law, it is arguable that this can result in the conviction of someone not morally blameworthy in the conventional sense.

This is the argument that we hear frequently from the conservative press and special interest groups,[258] joined less frequently by a few scholars.[259] In response to the argument, many other scholars and jurists have plausibly argued that strict liability offenses encourage knowledge of and adherence to the law,[260] and force those in responsible positions and those who deal in potentially harmful items to act very carefully. We agree with this position and find the attack on semi-strict liability offenses ultimately unpersuasive. When the Court finds a law to be an acceptable public welfare, semi-strict liability offense, it is making a normative judgment that those subject to such laws *should* know about them. Just as we expect ordinary citizens to know about laws against assault and theft, so too do we expect corporate executives with in-house counsel to know and understand business regulations aimed at protecting public health and safety. Most of us believe that those in a position to dump chemicals into a river should know that doing so is illegal and immoral. So far, in our minds, the Court has gotten the normative judgment just about right. In those rare instances when there is no notice of the law, the defendant is not likely to have financial access to a lawyer, or the law is simply too difficult to comprehend, the Court has been willing to read knowledge of the law into the statute.[261]

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[258] *House Hearings*, *supra* note 6; *Reigning In Overcriminalization: Assessing the Problem, Proposing Solutions: Hearing Before the Subcomm. on Crime, Terrorism, & Homeland Sec. of the H. Comm. on the Judiciary*, 111th Cong. (2010).

[259] *See generally* Stuart P. Green, *Why It's A Crime to Tear the Tag off a Mattress: Overcriminalization and the Moral Content of Regulatory Offenses*, 46 EMORY L.J. 1533 (1997) (arguing that criminal sanctions are improper when used for regulatory offenses involving morally neutral conduct); Laurie L. Levenson, *Good Faith Defenses: Reshaping Strict Liability Crimes*, 78 CORNELL L. REV. 401 (1993) (arguing that strict liability offenses do not serve the purposes of criminal punishment, and suggesting a good-faith defense to such crimes where a defendant made an honest and reasonable mistake); Jeffrey A. Meyer, *Authentically Innocent: Juries and Federal Regulatory Crimes*, 59 HASTINGS L.J. 137 (2007) (arguing that blameless defendants are commonly charged in our federal courts today).

[260] Interestingly, Dan Kahan has argued that strict liability offenses may be useful because they discourage knowledge of the law's content. Such knowledge exploits its gaps in statutory coverage. Dan M. Kahan, Essay, *Ignorance of Law* Is *an Excuse—But Only for the Virtuous*, 96 MICH. L. REV. 127 (1997). We should allow judges to make moral judgments regarding when ignorance of the law should be an excuse. *Id.* at 151–52.

[261] *See, e.g.*, Cheek v. United States, 498 U.S. 192, 203–05 (1991) (holding that the government must prove knowledge of and intent to violate the law in proving criminal violations of the tax code because ordinary individuals who cannot understand the complexities of the tax code should not be branded as criminals). The Court went further in one instance, striking down a state public welfare offense that it could not reinterpret to include a requirement to prove knowledge of the regulation. Lambert v. California, 355 U.S.

Behind the claims of statutory proliferation in the area of business regulation is the critique by the business community that the criminal law ought not to be so readily deployed to shore up regulatory regimes. However, these same critics refuse to fund the civil enforcement arms of those regulatory regimes.[262] Thus, the government must continue to rely on law enforcement and its deterrent effects.[263] The bottom line is that it might be better to enforce true strict liability regulatory measures with civil liability, and retain the criminal law for clearly morally blameworthy conduct. On the other hand, only the criminal law can send the clear message to the community that violation of regulations controlling our environment, our food and health, and our economy will not be tolerated. So long as the penalties are small and the prosecutions are limited to those corporate executives who have all the legal assistance they need to comply with these regulations, we will not lose any sleep over it.

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

Now for the statistics: the proportion of regulatory defendants as a total of all federal criminal defendants annually fell from 7% of the federal criminal caseload in 1980 to 2% in 2011, with 2,171 defendants being prosecuted for regulatory offenses last year.[264] There were a grand total of 32 defendants prosecuted for hazardous waste violations in 2011, 118 civil rights defendants, 61 copyright defendants, and 348 total prosecutions in the "other regulatory

225, 226, 229–30 (1957) (reversing as a violation of due process a conviction under a statute making it unlawful for "'any convicted person' to be or remain in Los Angeles for a period of more than five days without registering" as a felon because the statute did not require proof of a defendant's "actual knowledge of the duty to register or proof of the probability of such knowledge").

262 See Gary Fields & John R. Emshwiller, *As Criminal Laws Proliferate, More Are Ensnared*, WALL ST. J., July 23, 2011, at A1 [hereinafter Fields & Emshwiller, *As Criminal Laws Proliferate*]; Daniel Richman, *Overcriminalization for Lack of Better Options: A Celebration of Bill Stuntz*, *in* THE POLITICAL HEART OF CRIMINAL PROCEDURE: ESSAYS ON THE THEMES OF WILLIAM J. STUNTZ 64 (Michael Klarman et al., eds., 2012).

263 Richman, *supra* note 262.

264 *See infra* Tables 2, 6-B.

offenses" category (which includes the Clean Air Act).[265] Even these quite modest figures are overblown, as civil rights statutes and copyright statutes are *not* strict liability crimes, nor are they semi-strict liability public welfare offenses. In fact, civil rights and copyright criminal provisions expressly require proof of *mens rea*.[266] Thus, those offenses are mistakenly included in the "regulatory offenses" category, inaccurately inflating the numbers. The "other regulatory offenses" sub-category consists largely of prosecutions under the Clean Air Act, the Resource Conservation and Recovery Act, and other regulations prosecuted by the Environmental Protection Agency's criminal enforcement arm. A review of the EPA's 2010 and 2011 cases reveals that few environmental offenders are serving any jail time, and those who did receive jail time tended to be willful violators or repeat offenders.[267]

Even when public welfare offenses are prosecuted, the sentences tend to be quite lenient. While there are a significant number of federal fraud prosecutions stemming from business schemes, and some fraud defendants receive moderately serious prison time (though relative to drug and immigrations sentences, they are still quite low), the same is not true of public welfare offenses. For example, the median sentence length for the years 2000, 2005, and 2009 shows an average of zero months for Environmental/Wildlife offenses, Food and Drug Act offenses, and for Other Miscellaneous Offenses.[268]

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[265] *See* Table D-2, 2011, *supra* note 14, at 84.

[266] The primary criminal civil rights statutes found in 18 U.S.C. §§ 241–48 do not contain strict liability offenses. They require the intent to violate civil rights. *See* Screws v. United States, 325 U.S. 91, 101–03 (1945) (noting that in the context of prosecution for willful violation of a citizen's civil rights, the Court had held that proof of a "willful" deprivation would require proof of a specific intent to deprive another of his constitutionally guaranteed rights).

Furthermore, criminal copyright violations provide that any person who willfully infringes a copyright shall be punished when the infringement was committed "(A) for purposes of commercial advantage or private financial gain;" "(B) by the reproduction or distribution . . . of 1 or more copies or phonorecords of 1 or more copyrighted works, which have a total retail value of more than $1,000;" or "(C) by the distribution of a work being prepared for commercial distribution, by making it available on a computer network accessible to members of the public, if such person knew or should have known that the work was intended for commercial distribution." 17 U.S.C. § 506(a) (2006). Thus, criminal copyright provisions are clearly not strict liability crimes where the prosecution must prove willfulness. Additional safeguards are found in § 506(a)(1)(A), which requires proof that the willful violation was made for the purposes of commercial gain, and in § 506(a)(1)(C), which requires proof that a person knew or should have known that the work was intended for commercial distribution.

[267] OFFICE OF CRIMINAL ENFORCEMENT FORENSICS & TRAINING, ENVTL. PROT. AGENCY, PUB. NO. 310-K-11-001, CRIMINAL ENFORCEMENT PROGRAM 18 (2011).

[268] *See* UNITED STATES SENTENCING COMM'N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.13 (2000); UNITED STATES SENTENCING COMM'N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.13

The number of regulatory prosecutions is so low, and such prosecutions so rarely result in prison time, that the same few and dated examples are recycled through the press year after year. For example, the *Wall Street Journal* recently published two articles (they do so every few months) complaining about "picayune" laws such as those prohibiting the unauthorized use of the Smokey Bear image or the government-owned slogan "Give a Hoot, Don't Pollute."[269] The *Journal* warned that people are "one misstep away from the nightmare of a federal indictment."[270] However, these articles provide no examples of actual prosecutions under those provisions. In fact, to be convicted under the Smokey Bear provision, a defendant must knowingly misappropriate the image for profit.[271] The first of these *Wall Street Journal* articles offers as an example Mr. Wade Martin, who in 2003 received probation for violating the Marine Mammal Protection Act (MMPA), and Mr. Robert Eskridge, Jr., who pled guilty to the same crime and received a fine.[272] The second article discusses Mr. Anderson, who in 2009 pled guilty under the Archaeological Resources Protection Act (ARPA) to taking arrowheads off federal land without a permit, a misdemeanor offense leading to a sentence of probation.[273] And finally there is Mr. Krister Evertson, who in 2006 was convicted of violating the Resource

(2005); UNITED STATES SENTENCING COMM'N, 2009 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.13 (2009).

[269] Fields & Emshwiller, *As Criminal Laws Proliferate*, *supra* note 262; *see also* Gary Fields & John R. Emshwiller, *Federal Offenses: As Federal Crime List Grows, Threshold of Guilt Declines*, WALL ST. J., Sept. 27, 2011, at A1 [hereinafter Fields & Emshwiller, *As Federal Crime List Grows*].

[270] Fields & Emshwiller, *As Criminal Laws Proliferate*, *supra* note 262 (internal quotation marks omitted).

[271] *See* 18 U.S.C. § 711 (2006). This is a misdemeanor offense, with a maximum prison sentence of six months. We would classify that as a semi-strict liability offense because ignorance of the law is no excuse. *See also* 18 U.S.C. § 711a (2006) (prohibiting knowing, unauthorized use for profit of the Woodsy Owl character or the slogan, "Give a Hoot, Don't Pollute," punishable by up to six months imprisonment or a fine). Considering the statute's relatively strong *mens rea* requirement (proof of knowledge and profit motive) and light penalties, *see id.*, this statute gives us little cause for concern.

[272] *See* Fields & Emshwiller, *As Federal Crime List Grows*, *supra* note 269. 16 U.S.C. § 1375 (2006) prohibits a knowing violation of the MMPA. This means the defendant must know he is engaging in the conduct, but the government need not prove that he knew such conduct was illegal. Thus, the statute is a semi-strict liability, public welfare offense that carries a misdemeanor penalty and low likelihood of prison time.

[273] *See* Fields & Emshwiller, *As Criminal Laws Proliferate*, *supra* note 262. 16 U.S.C. § 470ee (2006) prohibits a knowing violation of ARPA regulations, and the penalty is a misdemeanor, unless the value of the archeological find at issue is $500 or more or the defendant is a repeat offender. Under the ARPA, a prosecutor must demonstrate that a defendant knew all of the pertinent facts surrounding his criminal conduct, but need not prove that he knowingly violated the law. Again, this is a semi-strict liability, public welfare offense. An ordinary person should be on notice that digging up and taking arrowheads and the like, especially when they are valuable, is a regulated activity. It is reasonable to require that individuals check such regulations before taking these finds, especially after their first conviction.

Conservation and Recovery Act ("RCRA) and received probation.[274] What we find interesting about these cases is that no one received any jail time, and all defendants knowingly engaged in conduct that should have alerted them to the possibility of regulation. Perhaps most importantly, the journalists writing these stories only found a handful of such prosecutions nationally, despite their best efforts.

Outside of corporate officials who might violate public welfare prohibitions, ordinary citizens have little cause for concern regarding the possibility of federal criminal prosecution. The Supreme Court has gotten into the habit over the last few decades of interpreting federal criminal proscriptions narrowly, or importing extra-textual *mens rea* requirements, in order to avoid difficult constitutional questions. The few true strict liability statutes have been confined primarily to prosecutions of corporate officials who act in a responsible relation to the general public while trading it harmful items. Outside of the public welfare context, the Court has been surprisingly active in successfully moving beyond the reach of federal criminal law those classes of individual defendants who may not be morally blameworthy. This is accomplished almost exclusively through statutory interpretation by reading in a *mens rea* requirement when the statute is otherwise devoid of one.[275]

There are quite a number of examples of cases where the Court has read a *mens rea* component into a federal statute, thereby preventing federal

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[274] Fields & Emshwiller, *As Criminal Laws Proliferate*, *supra* note 262. 42 U.S.C. § 6928 (2006) criminalizes the knowing transportation, treatment, storage or disposal of hazardous waste in violation of RCRA regulations. Penalties are significantly enhanced if the prosecution can show that, at the time of the violation, the defendant knew that his conduct "place[d] another person in imminent danger of death or serious bodily injury." *See* 42 U.S.C. § 6928(e) (2006). We would therefore classify RCRA as a semi-strict liability regime because knowledge of the facts and circumstances surrounding a course of criminal conduct is required for conviction, but knowledge as to a probable result/risk is not required, except in the case of prosecutions under §6928(e), in which case a prosecutor must demonstrate knowledge of imminent danger of death or serious bodily injury.

[275] Most scholars have noticed that the Court does not generally uphold strict liability offenses—using our definition of such offenses—that do not require knowledge of any wrongdoing. *See, e.g.*, Sharon L. Davies, *The Jurisprudence of Willfulness: An Evolving Theory of Excusable Ignorance*, 48 DUKE L.J. 341 (1998); Kahan, *supra* note 260; Alan C. Michaels, *Constitutional Innocence*, 112 HARV. L. REV. 828 (1999) (arguing that a series of Supreme Court decisions represents an emerging law of "constitutional innocence"); John Shepard Wiley Jr., *Not Guilty by Reason of Blamelessness: Culpability in Federal Criminal Interpretation*, 85 VA. L. REV. 1021 (1999). *But see* Meyer, *supra* note 259 (arguing that the "apparent innocence" rule created by the Supreme Court has failed because it relies on judges rather than juries to decide what knowledge is "wrongful"). *Lambert v. California*, 355 U.S. 225 (1957), is the only case we could find in which the Court declared a strict liability conviction to be unconstitutional, largely because the state court's interpretation excluded any other method of narrowing the statute. We predict that if the Court is someday forced to declare another strict liability offense unconstitutional, it will be a state and not a federal offense.

prosecutors from charging non-blameworthy conduct (or at least preventing them from having more such authority than that possessed by state prosecutors). In some of these cases, the Court imposed a requirement of knowledge as to facts (where it is the facts that make the conduct wrongful), and in some instances the Court imposed a requirement of knowledge as to the law (where it is not otherwise obvious to most citizens that their conduct would be wrongful). A few examples include *United States v. Morissette* (holding that the government must prove that defendant knew the beams he took off government land were not abandoned),[276] *Bronston v. United States* (finding literal truth an absolute defense to perjury charge, lest witnesses who did not intend to mislead prosecutors get inadvertently convicted),[277] *United States v. United States Gypsum Co.* (reading knowledge of anticompetitive effect of conduct into Sherman Act violation to avoid exposure to criminal punishment for a good-faith error of judgment),[278] *Williams v. United States* (holding that writing a bad check does not constitute a false statement to a bank, as defendant may intend to deposit sufficient funds before the check clears),[279] *Liparota v. United States* (holding that government must prove defendant knew that selling food stamps below face value was illegal, to avoid "criminaliz[ing] a broad range of apparently innocent conduct"),[280] *Cheek v. United States* (noting that defendant must be permitted to claim good faith mistake of law in a tax prosecution or else the complicated tax code could become a trap for the average citizen),[281] *Ratzlaf v. United States* (holding that government must prove that the defendant knew that structuring was illegal, as such conduct is not "inevitably nefarious"),[282] *United States v. Sun-Diamond Growers of California* (holding that government must prove public official's intent to take a thing of value in exchange for a particular official act even in a gratuity case, lest we criminalize the President accepting a jersey from a sport team),[283] *McCormick v. United States* (holding that conviction under the Hobbs Act under color of official right requires proof of quid pro quo where an official receives a campaign donation because otherwise the statute may criminalize

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[276] 342 U.S. 246 (1952).

[277] 409 U.S. 352 (1973).

[278] 438 U.S. 422 (1978).

[279] 458 U.S. 279 (1982), *superseded by statute*, Act of Oct. 12, 1984, Pub. L. No. 98-473, 98 Stat. 2147 (codified as amended at 18 U.S.C. § 1344 (2006)).

[280] 471 U.S. 419, 426 (1985).

[281] 498 U.S. 192 (1991).

[282] 510 U.S. 135, 144 (1994), *superseded by statute*, Riegle Community Development and Regulation Improvement Act of 1994, Pub. L. No. 103-325, § 411, 108 Stat. 2253.

[283] 526 U.S. 398 (1999).

ordinary political behavior),[284] *United States v. X-Citement Video, Inc.* (holding that prosecutors must prove that defendant had knowledge of age of minor starring in pornography video),[285] *Posters 'N' Things, Ltd. v. United States* (reading in scienter as to the nature of drug paraphernalia and thereby requiring prosecution to prove the defendant's knowledge that the items at issue were likely to be used with illegal drugs),[286] and *Staples v. United States* (interpreting Firearms Act to require proof that defendant knew that his weapon was a semi-automatic, as gun ownership is an otherwise innocent activity).[287]

Though every one of these cases was resolved by narrow statutory interpretation rather than constitutional interpretation, we found only one case where Congress responded by reinstating the previous interpretation through statutory amendment.[288] The cases cited above illustrate that, particularly in the area of business regulation, the Court has been active in construing statutes so as to protect unwitting offenders from what would otherwise be strict or semi-strict liability offenses.

B. Vague Federal Laws

The claim that vague federal criminal proscriptions provide undue discretion to prosecutors is debatable. One can posit numerous legitimate reasons why Congress would construct certain federal criminal laws in an open-ended fashion: it prevents clever defendants from loop-holing and allows law enforcement to keep pace with creative new methods of committing crimes without having to perpetually rewrite statutes.[289] Professor Sam Buell recently argued quite convincingly that overbreadth in federal criminal liability rules is sometimes necessary to catch individuals who strategically alter their conduct

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284 500 U.S. 257 (1991).

285 513 U.S. 64 (1994).

286 511 U.S. 513 (1994).

287 511 U.S. 600 (1994).

288 Congress re-instated pre-*Ratzlaff* law in 1994 by adding a penalty provision to the structuring law itself, 31 U.S.C. § 5324 (2006), rather than referring back to the chapter's original 1986 penalty provision, 31 U.S.C. § 5322 (2006), which included the word "willfully."

289 *See, e.g.*, Buell, *supra* note 8, at 1501 (citing the *ex ante* limits of a lawmaker's foresight and linguistic tools as reasons for drafting broad criminal provisions); Dan M. Kahan, *Is* Chevron *Relevant to Federal Criminal Law*, 110 HARV. L. REV. 469, 481–82 (1996) (positing that open-ended criminal statutes and the discretion inherent in them lower the costs of updating laws to keep pace with new forms of criminality); Stuntz, *Pathological Politics*, *supra* note 8, at 545–57 (arguing that the alignment of respective costs and benefits for legislators and prosecutors encourages Congress to craft broad statutes that give prosecutors a great deal of discretion).

to avoid punishment. This overbreadth, he said, can be resolved not by reducing the scope of conduct rules, but by greater reliance on *mens rea* doctrines, control over prosecutorial decision making, and modified sentencing practices.[290]

On the other hand, we acknowledge that there is some good-faith aspect to the well-versed Chamber of Commerce complaints. When a high-level executive tells corporate counsel that she wishes to maximize revenue by undertaking a certain course of conduct but definitely does not want to violate federal law and risk jail time along the way, she understandably expects a definitive answer. Instead, she might get the following response: Your proposed conduct is not health care fraud or a false statement to a federal official or obstruction of justice under 18 U.S.C. § 1512. However, there is this brand new statute, destruction of documents in violation of 18 U.S.C. § 1519, which arguably covers what you would like to do, but there is no case law interpreting that statute.

What is an entrepreneurial business executive to do under such circumstances? One might respond: (1) an appropriate *mens rea* requirement will protect the corporate executive acting in good-faith if she is charged;[291] (2) there is social utility in this uncertainty; and (3) this is a problem for the über-rich only, so we don't much care.

None of these answers fully address the executive's *ex ante* perspective. Those with a high-degree of confidence that federal prosecutors will not overreach might be satisfied, but this will not stop the critiques from those who lack such confidence in our federal law enforcement officials. An alternative answer is to point out how infrequently corporate executives are prosecuted absent overwhelming evidence of intentional, willful fraud.[292] One obvious illustration of this is that our present financial crisis so far has resulted in no major prosecutions against bank officials, mortgage lenders, or any other Wall

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290 Buell, *supra* note 8.

291 *See* DAVID M. NISSMAN, PROVING FEDERAL CRIMES 717–18 (2005); JUDICIAL COMM. ON MODEL JURY INSTRUCTIONS FOR THE EIGHTH CIRCUIT, MANUAL OF MODEL CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT COURTS OF THE EIGHTH CIRCUIT § 9.08 (2011); COMM. ON PATTERN JURY INSTRUCTIONS, JUDICIAL COUNCIL OF THE ELEVENTH CIRCUIT, PATTERN JURY INSTRUCTIONS (CRIMINAL CASES) Special Instruction 18 (2010); *see also supra* Part III.A.

292 We focus here on personal criminal penalties, not corporate criminal liability. The latter is more like civil sanctions wielded by federal criminal prosecutors. We acknowledge collateral consequences of such liability, such as debarment and negative market response, that firms cannot easily litigate and that can lead to corporate death (à la Arthur Andersen). We bracket that conversation for purposes of this paper.

Street players.[293] Nor have they been divested of the huge profits they received, so apparently the burden of vague federal statutes is not too severe. Finally, the revolving door between big business and high-level law enforcement positions offers some protection.[294]

Similar to our evaluation of the critiques of strict liability offenses, we believe that the Court has gotten things just about right in responding to vagueness challenges to federal criminal statutes. Where Congress has refused to limit broadly worded federal criminal prohibitions, either by clearer definitions or by enhancing culpability requirements, the Supreme Court has once again stepped in to remedy the problem. Opinions in the last few decades have curbed prosecutorial interpretations of congressional statutes in such diverse areas as fraud,[295] firearms offenses,[296] obstruction of justice,[297] witness

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[293] *See, e.g.*, Peter J. Henning, *Making Sure "The Buck Stops Here": Barring Executives for Corporate Violations*, 2012 U. CHI. LEGAL F. (forthcoming 2012) (arguing that the absence of any high-profile prosecutions of Wall Street executives in the wake of our current economic crisis is due to lack of evidence establishing the *mens rea* for any federal fraud statutes); *see also Fresh Air from WHYY: Why Prosecutors Don't Go After Wall Street* (National Public Radio broadcast July 13, 2011), *available at* http://www.npr.org/2011/07/13/137789065/why-prosecutors-dont-go-after-wall-street (noting that the financial meltdown of 2008 has not generated a single prosecution of high-level Wall Street players).

[294] It is worth noting that much of the Chamber of Commerce's legal presentation against the Foreign Corrupt Practices Act (FCPA) was written by Andrew Weisman, now counsel at the FBI, and the Chamber's current attack on the FCPA is spearheaded by former-Attorney General Mukasey.

[295] The Court restricted mail fraud in *Cleveland v. United States* by limiting the statutory definition of "property." 531 U.S. 12, 15 (2000). The defendant, Carl Cleveland, allegedly concealed his ownership interest in a family-operated limited partnership that applied for a license to operate video poker machines under Louisiana law. *Id.* at 16–17. The government argued that the defendant defrauded Louisiana of its "right to control the issuance, renewal, and revocation of video poker licenses," from which it derived substantial sums of money. *Id.* at 23. The Court rejected this formulation of property, stating that "the thing obtained must be property in the hands of the victim" and that "[the] intangible rights of allocation, exclusion, and control amount to no more and no less than Louisiana's sovereign power to regulate." *Id.* at 15, 23. In denying the respondent's definition, the Court stressed that "the Government's reading of § 1341 . . . invites us to approve a sweeping expansion of federal criminal jurisdiction." *Id.* at 24. In a parting shot, the Court implied that it would continue to read broadly drafted provisions of the mail fraud statute against the government without a clearer and more definite statement from Congress. *Id.* at 26. The Court kept its word. *See* Skilling v. United States, 130 S. Ct. 2896 (2010).

[296] The Court placed limits on firearms offenses under 18 U.S.C. § 924 in two recent cases. In *Begay v. United States*, the Court addressed the definition of a "violent felony" within the meaning of the Armed Career Criminal Act. 553 U.S. 137, 139–40 (2008). The case arose after the defendant had three felony DUI convictions on his record, and the trial judge enhanced his sentence under § 924(e), finding that the felony DUIs involved "conduct that present[ed] a serious potential risk of physical injury to another" according to § 924(e)(2)(B)(ii). *Id.* at 140. Rejecting the trial judge's interpretation, the majority read the catch-all language at the end of § 924(e)(2)(B)(ii) to be limited to crimes similar to those enumerated at the beginning of the provision. *Id.* at 142–43. In *Watson v. United States*, the Court rejected the government's interpretation of the word "uses" in 18 U.S.C. § 924(c)(1)(A) as including a defendant who bartered his handgun for drugs. 552 U.S. 74, 76 (2007).

tampering,[298] money laundering,[299] drug facilitation,[300] identity theft,[301] and unlawful gratuities.[302] The United States Courts of Appeals have done likewise, and the Solicitor General's Office rarely requests certiorari in these decisions.

As with strict liability cases, the evolution of Court doctrine concerning vague and broad-reaching federal statutes over the last twenty years is stark. The modern Court has not been shy about limiting the reach of such statutes. For example, in *McNally v. United States* the Court rejected decades of circuit

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[297] United States v. Aguilar, 515 U.S. 593, 599 (1995).

[298] Arthur Andersen LLP v. United States, 544 U.S. 696, 706 (2005).

[299] Cuellar v. United States, 553 U.S. 550 (2008) (holding that the government must show, in an 18 U.S.C. § 1956(a)(2)(B)(i) prosecution, not only that the defendant knowingly hid drug money in his car during his trip to Mexico, but further that the purpose of the trip was to conceal the source or ownership of the funds); United States v. Santos, 553 U.S. 507 (2008) (restricting the scope of "proceeds" within the meaning of 18 U.S.C. § 1956(a)(1) to "profits" in gambling cases), *superseded by statute*, Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, § 2(f)(1)(B), 123 Stat. 1617. The limitation in *Santos* was rejected by Congress in 2009, when it amended the statute to define proceeds as "any property derived from or obtained or retained, directly or indirectly, through some form of unlawful activity, including the gross receipts of such activity." Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, § 2(f)(1)(B), 123 Stat. 1617 (codified in 18 U.S.C. § 1956(c)(9) (2006 & Supp. III 2009)).

[300] The Court in *Abuelhawa v. United States* marked the boundaries of drug facilitation under 21 U.S.C. § 843(b) by limiting the definition of the word "facilitate." *See* 556 U.S. 816, 818 (2009). In *Abuelhawa*, the defendant made six contacts with a drug dealer who was under federal investigation at the time in order to set up two misdemeanor drug transactions (two felony drug sales for the dealer). *Id.* Upon arrest, the government charged the defendant with six counts of felony drug facilitation under the theory that each of the six contacts helped in causing or facilitating the dealer's felony drug sales. *Id.* The government argued that Abuelhawa's cell phone calls facilitated the transaction by "allow[ing] the transaction to take place more efficiently, and with less risk of detection." *Id.* at 819 (internal quotation marks omitted). Rejecting this logic, the Court held that the two primary parties to an exchange do not "facilitate" their own transaction within common usage of the word. *Id.* at 820. In doing so, the Court restricted drug facilitation to actors other than those "primary or necessary" to the underlying transaction. *Id.*

[301] The Court in *Flores-Figueroa v. United States* strictly enforced the mental state element of the aggravated identity theft statute, 18 U.S.C. § 1028A(a)(1), so as to narrow the scope of the crime. 556 U.S. 646, 647 (2009). Defendant Ignacio Flores-Figueroa, an undocumented alien, gave his employer a false name, birth date, Social Security number, and alien registration card. *Id.* at 648–49. Flores-Figueroa was arrested after Immigration and Customs Enforcement noticed that his documents belonged to other people. *Id.* at 649. The government defended its charge of aggravated identity theft, arguing that the statute's mental state only attached to the verbs ("transfers, possesses, or uses"). *See id.* at 650. The Court disagreed and found that the mental state attached to the objects of those verbs. *Id.* at 656–57. In doing so, the Court effectively made identity theft much harder to prosecute by requiring the government to show that the defendant knew that the identification that he unlawfully used in fact belonged to another person. Indeed, the Court made relatively clear that this was its objective. *Id.* at 655–56.

[302] United States v. Sun-Diamond Growers, 526 U.S. 398, 414 (1999) (reversing conviction and holding that in order to establish a violation of 18 U.S.C. § 201(c)(1)(A), the government must prove a link between a thing of value conferred upon a federal official and a specific "official act" for or because of which it was given).

precedent holding that undisclosed corruption, self-dealing, and conflicts of interest could be prosecuted under the theory that the public or private defendant (generally a public official or an employee) defrauded the citizens or his employer of their intangible right to the defendant's "honest services."[303] Congress reinstated this legal theory in 1988 by enacting 18 U.S.C. § 1346, defining "scheme or artifice to defraud" as including any scheme to deprive another of "the intangible right of honest services."[304] Given such a license from Congress, a few federal prosecutors got ham-handed in charging conduct that only bordered on what most of us would recognize as criminal conduct.[305] The Court's response was to narrow the new statute, cabining it much the same way it had over twenty years earlier.

Skilling v. United States[306] concerned the prosecution of Enron's former-CEO for honest services wire fraud based on his role in the demise of the now-defunct energy giant. The jury instructions allowed for conviction based solely

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[303] 483 U.S. 350, 356 (1987) (reversing conviction of state official for defrauding the Commonwealth of Kentucky's citizens of their right to have the Commonwealth's affairs conducted honestly, on grounds that Congress intended the mail fraud statute to reach only the deprivation of property rights), *superseded by statute*, Act of Nov. 18, 1988, Pub. L. 100-690, § 7603(a), 102 Stat. 4508. Justice Stevens, in his dissenting opinion, described the well-established circuit caselaw the majority was now rejecting:

> In the public sector . . . many other state and federal officials have been convicted of defrauding citizens of their right to the honest services of their governmental officials. . . . In the private sector, purchasing agents, brokers, union leaders, and others with clear fiduciary duties to their employers or unions have been found guilty of defrauding their employers or unions by accepting kickbacks or selling confidential information.

Id. at 362–63 (Stevens, J., dissenting) (footnotes omitted).

[304] Act of Nov. 18, 1988, Pub. L. 100-690, § 7603(a), 102 Stat. 4508. One year after *McNally*, Congress responded by passing 18 U.S.C. § 1346, reviving the doctrine of honest services fraud. *See* ABRAMS, BEALE & KLEIN, *supra* note 26, at 143–45 (chronicling the death and rebirth of honest services fraud). The Court has also narrowed the statute in its definition of what constitutes "property" under the garden-variety "obtaining money by fraud" theory of mail fraud. *See* Cleveland v. United States, 531 U.S. 12 (2000).

[305] John C. Coffee, Jr., Essay, *Modern Mail Fraud: The Restoration of the Public/Private Distinction*, 35 AM. CRIM. L. REV. 427 (1998) (arguing that mail fraud prosecutions in the private sector should be limited to conduct that violates state law or an independent federal statute); Dale A. Oesterle, *Early Observations on the Prosecutions of the Business Scandals of 2002-03: On Sideshow Prosecutions, Spitzer's Clash with Donaldson over Turf, the Choice of Civil or Criminal Actions, and the Tough Tactic of Coerced Cooperation*, 1 OHIO ST. J. CRIM. L. 443 (2004); Gregory Howard Williams, *Good Government by Prosecutorial Decree: The Use and Abuse of Mail Fraud*, 32 ARIZ. L. REV. 137 (1990) (arguing generally that the mail fraud statute is vague and therefore gives rise to unfettered prosecutorial discretion). *But see* Geraldine Szott Moohr, *Mail Fraud Meets Criminal Theory*, 67 U. CIN. L. REV. 1, 4 (1998) (arguing that, while the scope of mail fraud is somewhat undefined, courts are generally on "sound theoretical ground" in interpreting the statute).

[306] 130 S. Ct. 2896, 2907 (2010). That same term, the Court granted certiorari in two other mail fraud cases, vacating each after rendering *Skilling*. *See* Black v. United States, 130 S. Ct. 2963 (2010); Weyhrauch v. United States, 130 S. Ct. 2971 (2010) (per curiam).

on the defendant's breach of his duty of honest services to Enron and Enron's loss of its intangible right to his honest services; the instructions did not require that Mr. Skilling obtain kickbacks from third parties in exchange for his deceit.[307] Skilling argued for the total invalidation of § 1346 on grounds of unconstitutional vagueness.[308] Instead, the Court narrowly interpreted the ill-defined provision, holding that § 1346 is limited to schemes involving the receipt of bribes or kickbacks in exchange for official action. In doing so, the majority noted that "[r]eading the statute to proscribe a wider range of offensive conduct . . . would raise the due process concerns underlying the vagueness doctrine."[309]

We saw the same story unfold with federal obstruction statutes. In *United States v. Aguilar*, the Court narrowed the government's interpretation of the most commonly charged obstruction statute, 18 U.S.C. § 1503(a).[310] The defendant, former Judge Robert Aguilar, allegedly lied to federal agents about his conduct relating to the investigation of a union official suspected of racketeering. Upon review, the Court affirmed the Ninth Circuit's reversal of conviction, finding that the government failed to show that Aguilar's actions had the "natural and probable effect of interfering with the due administration of justice."[311] The Court imported this extra-statutory requirement, first articulated in a nineteenth century obstruction case, in order to "place metes and bounds on the very broad language of the catchall provision" of § 1503(a).[312]

Ten years later, in *Arthur Andersen LLP v. United States*,[313] the Court narrowed the scope of the federal witness tampering provision. In the months leading up to Enron's financial meltdown, accounting firm Arthur Andersen earnestly began destroying documents according to its document retention

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307 *Skilling*, 130 S. Ct. at 2907.

308 *Id.* at 2925–26.

309 *Id.* at 2931; *see also id.* at 2933 n.44 (warning Congress that "it would have to employ standards of sufficient definiteness and specificity" if it were to attempt to criminalize non-disclosure and self-dealing). The Senate Judiciary Committee has advanced new legislation to overturn *Skilling* in the Public Corruption Prosecution Improvements Act (PCPIA). *See* S. 401, 112th Cong. (2011); *see also* Clean Up Government Act of 2011, H.R. 2572, 112th Cong. (2011) (related House legislation). This bill includes a provision to allow prosecutors to target undisclosed self-dealing by state and federal public officials, where officials secretly act in their own financial interest rather than in the public's interest. As of this publication date, no action has been taken by Congress, and we doubt that such a showdown is imminent.

310 515 U.S. 593 (1995).

311 *Id.* at 599, 601 (internal quotation marks omitted).

312 *Id.* at 599.

313 544 U.S. 696 (2005).

policy. It did so with full knowledge that a Securities and Exchange Commission investigation could commence at any time, and it stressed to its employees that document shredding pursuant to the retention policy was legal. The government charged the firm with obstruction under 18 U.S.C. § 1512(b). The government advocated a broad reading of the provision, decoupling the requirement of a "knowing" mental state from the act of "corruptly persuad[ing]" another, and stressing that the government need not prove that the defendant knowingly violated the law.[314] The Court rejected this theory, opting for a narrower construction that requires consciousness of wrongdoing on the part of the defendant.[315] In doing so, the Court stated, "it is striking how little culpability the [government's jury] instructions required,"[316] suggesting that the Court's ruling at least in part sought to corral an overbroad statute. As it did in response to *McNally*, Congress again responded with a new witness tampering provision that eliminated part of the *mens rea* requirement.[317] We could find no cases charging this new subsection, but our prediction is that if prosecutors push, the Court will push back.

Though the Court has almost always favored the government in its interpretation of civil and criminal RICO,[318] the criticism that the statute is overbroad and implicates constitutional principles of vagueness is overblown.[319] This statute is neither a strict liability one, nor one that defines

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314 *Id.* at 704–05.

315 *Id.*

316 *Id.* at 706.

317 The Sarbanes-Oxley Act of 2002 amended 18 U.S.C. § 1512 to add a new subsection, which retains the *mens rea* of "corruptly" but eliminates the requirement of "knowingly." Pub. L. No. 107-204, § 1102, 116 Stat. 807 (2002). This same Act added a new provision, 18 U.S.C. § 1519, which criminalizes knowingly shredding a document with the intent to influence the investigation of any matter within the jurisdiction of a department of the United States. *Id.* § 802, 116 Stat. at 800. This provision does not retain the *mens rea* "corruptly." *Id.* This provision was enacted after Arthur Andersen's conduct, so the new provisions could not be applied in that case.

318 Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961–68 (2006). The United States Supreme Court has affirmed the convictions and accepted the government's interpretation of the statute in almost every RICO case it has heard. *See generally* ABRAMS, BEALE & KLEIN, *supra* note 26, at 587–678. The only exception is a civil RICO case, Reves v. Ernst & Young, 507 U.S. 170 (1993), which applies equally to criminal RICO cases, and which held that the plaintiff must prove the defendant operated or managed the enterprise to establish a violation of 18 U.S.C. § 1962(c). We include in this paragraph civil RICO cases where the issues addressed are identical for civil claims and criminal RICO prosecutions: the statutes are identical except for causation and damages, which need be proved only in civil RICO cases.

319 Gerard E. Lynch, *RICO: The Crime of Being a Criminal* (pts. 1 & 2), 87 COLUM. L. REV. 661 (1987). The cases that push the envelope are all civil cases and, unfortunately, the Department of Justice has no control over private plaintiffs who bring this cause of action in common business dispute cases seeking treble damages and attorneys' fees. One easy solution is to divorce civil from criminal RICO. *See, e.g.*, Norman Abrams, *A New Proposal for Limiting Private Civil RICO*, 37 UCLA L. REV. 1 (1989); Paul Edgar Harold, Note, Quo

conduct so broadly that an ordinary individual cannot anticipate in advance whether she is breaking the law. The RICO statute, which consists of three substantive crimes plus a conspiracy to commit any of the three crimes,[320] requires proof of many complicated elements, such as an enterprise,[321] a pattern of racketeering acts (that further requires continuity and relationship),[322] and, for the most commonly used subsection,[323] that the defendant operate or manage the alleged enterprise.[324] A defendant who intends to commit at least two predicate acts of racketeering—such as robbery, murder, loansharking, drug trafficking, or gambling—through a criminal enterprise that effects interstate commerce has sufficient *mens rea* to be properly identified as an appropriate target of federal prosecution.[325] Moreover, the charging and proof involved in a RICO charge are so complicated and specific that there is little chance of arbitrary prosecutorial selection of targets

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Vadis, *Association in Fact? The Growing Disparity Between How Federal Courts Interpret RICO's Enterprise Provision in Criminal and Civil Cases (with a Little Statutory Background to Explain Why)*, 80 NOTRE DAME L. REV. 781 (2005).

320 18 U.S.C. § 1962(a) (2006) makes it "unlawful for any person who has received any income . . . from a pattern of racketeering . . . to use or invest . . . such income . . . in acquisition of any interest in, or the establishment or operation of, any enterprise." 18 U.S.C. § 1962(b) (2006) makes it unlawful to use "a pattern of racketeering activity . . . to acquire or maintain . . . any interest in or control of any enterprise." 18 U.S.C. § 1962(c) (2006) makes it "unlawful for any person employed by or associated with any enterprise . . . to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity." 18 U.S.C. § 1962(d) (2006) makes it a crime to conspire to violate subsections (a) through (c).

321 18 U.S.C. § 1961(4) (2006) defines "enterprise." Various cases have clarified this definition over time. *See* Boyle v. United States, 556 U.S. 938, 941 (2009) (affirming verdict against challenge that jury was not properly instructed that an enterprise must have a "structure"); United States v. Turkette, 452 U.S. 576 (1981) (holding that jury was properly instructed that government must prove that: (1) there was an "ongoing organization" with some sort of framework, formal or informal, for carrying out its objectives; and (2) the various members and associates of the association functioned as a "continuing unit" to achieve a common purpose).

322 A pattern of racketeering activity requires "at least two acts of racketeering activity." 18 U.S.C. § 1961(5) (2006); *see also* H.J. Inc. v. Nw. Bell Tel. Co., 492 U.S. 229 (1989) (noting that a pattern can be established by continuity of conduct and relationship among predicate acts).

323 18 U.S.C. § 1962(c) (2006).

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

325 "Racketeering activity" includes nine state crimes and a very long list of federal crimes believed to be typical of organized crime. 18 U.S.C. § 1961(1) (2006). To be guilty of a RICO conspiracy, a defendant need not agree to personally commit the two predicate racketeering acts, though she must intend that some member of the conspiracy do so. Salinas v. United States, 522 U.S. 52 (1997).

for criminal liability.[326] It is no doubt for this reason (and perhaps because AUSAs undergo a rigorous vetting process with Main Justice before charging RICO)[327] that very few such criminal prosecutions are brought each year.[328]

CONCLUSION

The widely reported problem of over-federalization of crime is largely a myth. Through the empirical data presented in Part I, including federal caseload data from 1940 to 2011, current federal prison population data, comparisons of federal and state court felony convictions, and an analysis of frequently used federal statutes, we have provided ample support for our claim that, despite the large number of federal criminal proscriptions now in existence, the sheer number of criminal statutes in effect at a given time has no demonstrable impact on the balance of power between state and federal law enforcement systems. In fact, state and federal law enforcement entities continue to share the workload much as they always have, with states dominant in areas of traditional local concern, such as violent crime and property crime, and the federal government tackling problems of national and international significance. The reality on the ground, then, is vastly different from the conclusory argument advanced by some that Congress's habit of enacting too many criminal proscriptions has resulted in a significant disruption of traditional federal–state relations. As the data reveals, no such seismic shift has occurred.

While some critics have expressed dissatisfaction with the prevalence of federal prosecutions in areas of concurrent federal and state jurisdiction, particularly in the controlled substance area, such dissatisfaction is likewise not a function of a recent over-federalization phenomenon. Controlled substance

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

[327] U.S.A.M., *supra* note 150, at tit. 9-110.000. Federal prosecutors must obtain prior approval of the Criminal Division before filing a RICO criminal indictment.

[328] In 2011, just 189 defendants were prosecuted for RICO violations in federal court; this low number of prosecutions is consistent with prior years, for example 2007 (147 RICO defendants), 2008 (158 RICO defendants), 2009 (114 RICO defendants), and 2010 (138 RICO defendants). *See* Table D-2, 2011, *supra* note 14, at 86.

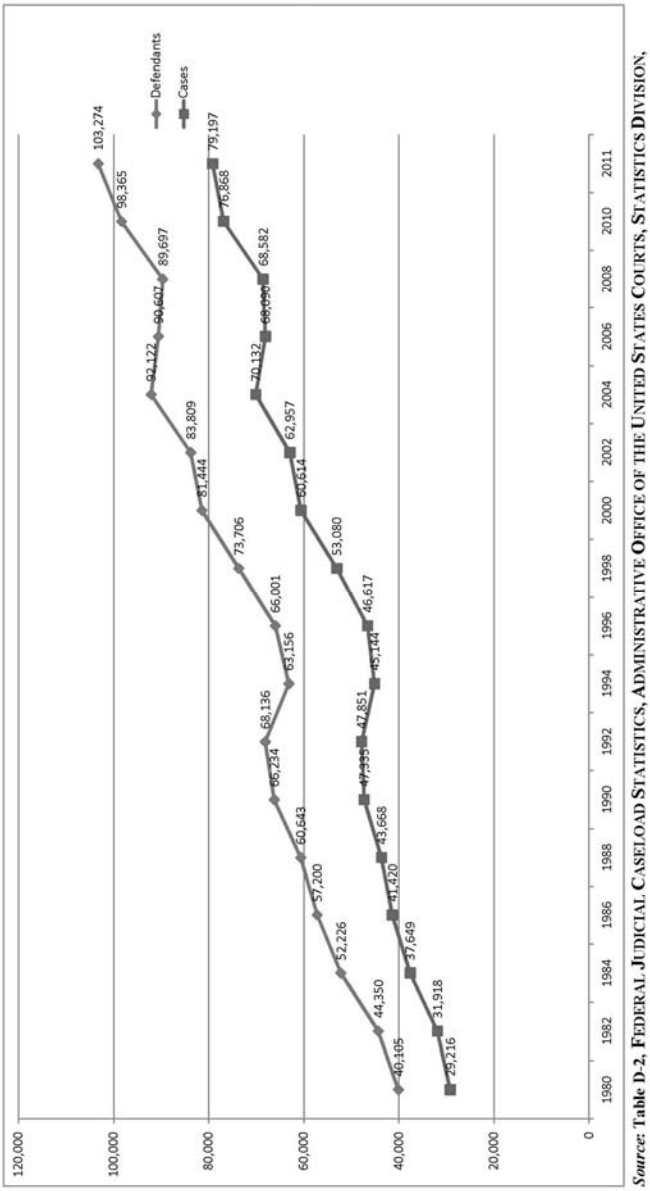
cases on the federal level are prosecuted pursuant to a single statute enacted in 1970.[329] Importantly, these areas of concurrent jurisdiction have not been particularly problematic for state systems, which continue to prosecute the vast majority (more than 95%) of criminal conduct occurring within their borders. Because federal criminal proscriptions do not preempt state law, and because the federal system is very small relative to the states' systems, criminal law enforcement in this country remains the province of state and local criminal justice systems. Individuals who engage in misconduct that violates both state and federal laws have no cause to complain upon prosecution, especially because federal prosecutors will not charge them successively if the state chooses to prosecute first, and various checks and balances ensure that federal prosecutors use good judgment in selecting which defendants are appropriate for federal charges.

Finally, overbroad or vague federal criminal proscriptions, while admittedly troubling, are not a product of over-federalization itself. Vague federal statutes, particularly in the area of fraud, derive from the common law and have been in existence for decades (for example, the frequently charged mail fraud statute, the enactment of which dates back to 1876). While vague statutes have created temporary but serious problems in the federal system, the Supreme Court has managed to interpret such federal proscriptions in a manner that balances the amount of breadth needed to capture new forms of criminal conduct against the level of narrowing necessary for fairness. The Court has taken a similarly active role in curbing what might otherwise constitute strict liability offenses by imposing extra-textual *mens rea* requirements, particularly in the area of regulatory offenses. The Court's active involvement in these areas has served and continues to serve as a powerful antidote to the perceived ills of congressional overreaching, poor statutory drafting, and regulatory criminalization.

[329] Controlled Substances Act, Pub. L. No. 91-513, 84 Stat. 1242 (1970) (codified as amended at 21 U.S.C. § 841 (2006)) (establishing a comprehensive, closed regulatory scheme for controlled substances).

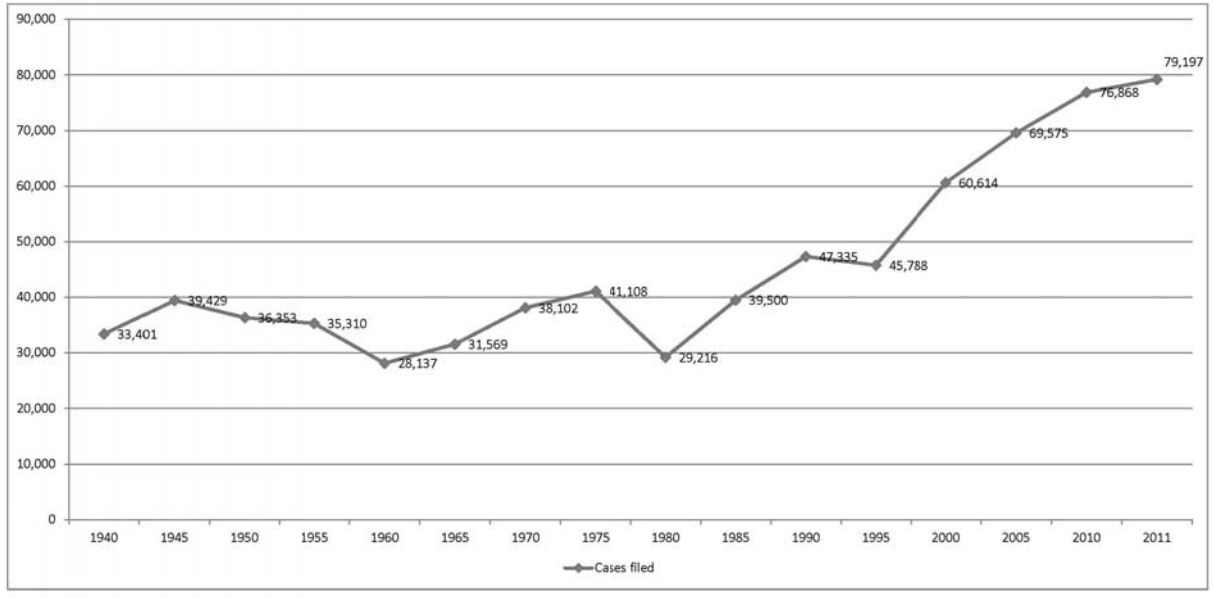
APPENDIX

TABLE 1-A: Criminal defendants and cases commenced in federal court, 1980–2011 (Numbers represent criminal defendants/cases commenced in federal court in a 12-month period.)



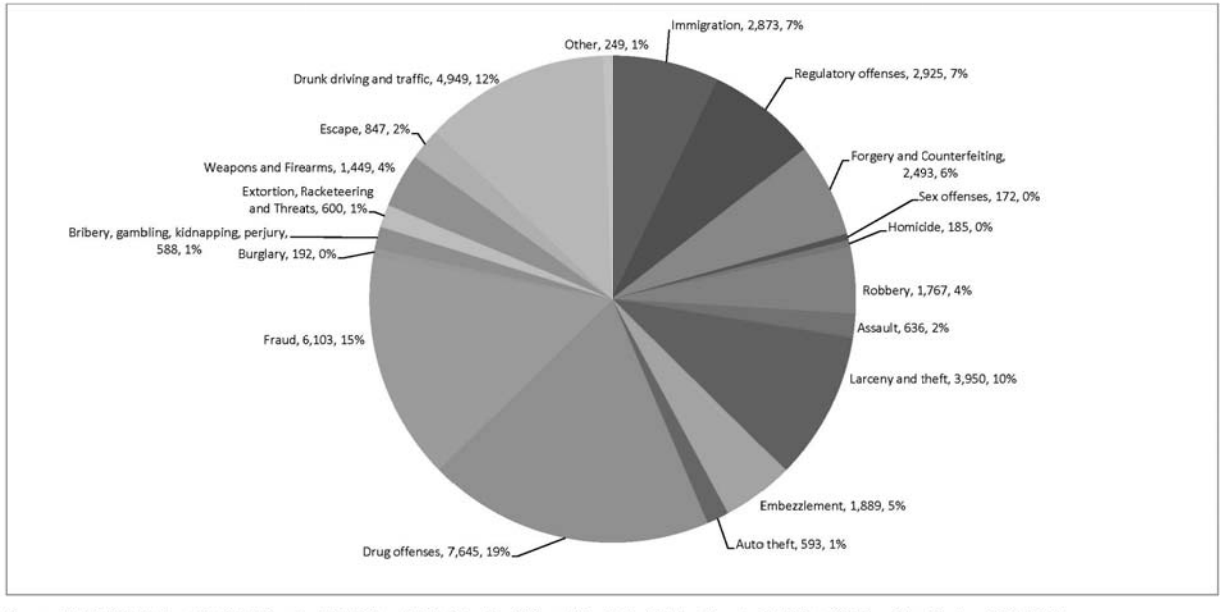
Source: **Table D-2, FEDERAL JUDICIAL CASELOAD STATISTICS, ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, STATISTICS DIVISION, Washington, D.C. 1982–2011.**

TABLE 1-B: Criminal cases commenced in federal district court, 1940–2011 (Numbers represent criminal cases commenced in all federal district courts in a 12-month period.)



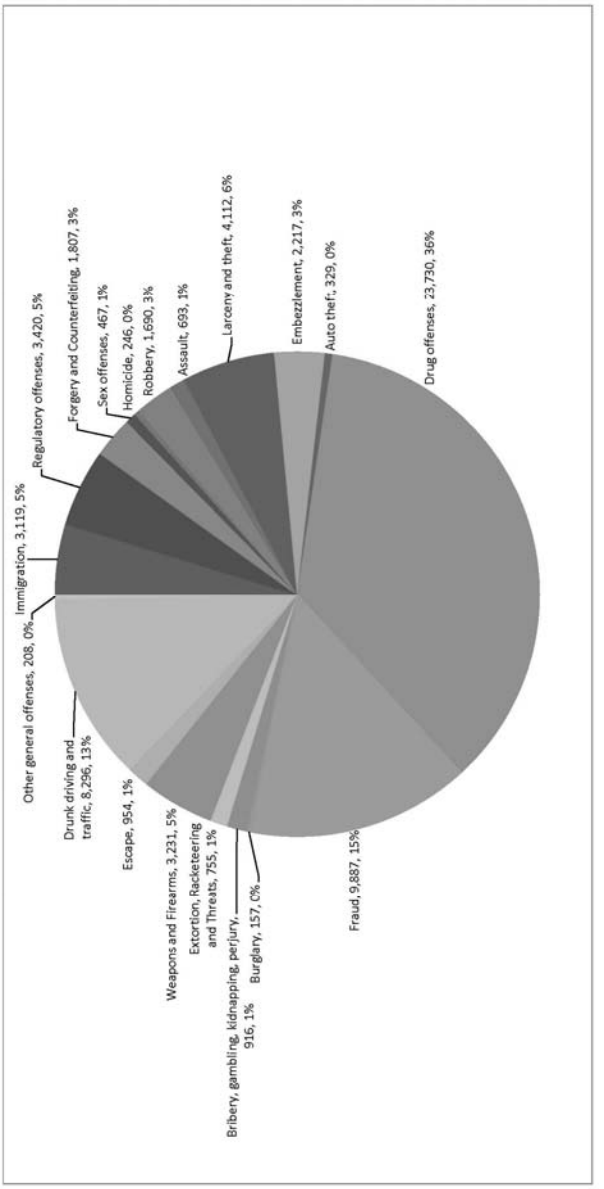
***Sources*: Table D-2, FEDERAL JUDICIAL CASELOAD STATISTICS, ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, STATISTICS DIVISION, (Washington, D.C. 1982–2011); ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, 1940–1970; JUDICIAL BUSINESS OF THE UNITED STATES COURTS ANNUAL REPORT, 1994–2000. *Pre-1980 caseload statistics include petty offenses, which are omitted in post-1980 caseload statistics; comparisons between pre- and post-1980 data should carefully note this change.**

TABLE 2: Criminal defendants by major offense category, 1980 (40,105 total defendants represented; numbers represent defendants commenced in federal court in a 12-month period, as a percentage of total criminal caseload).



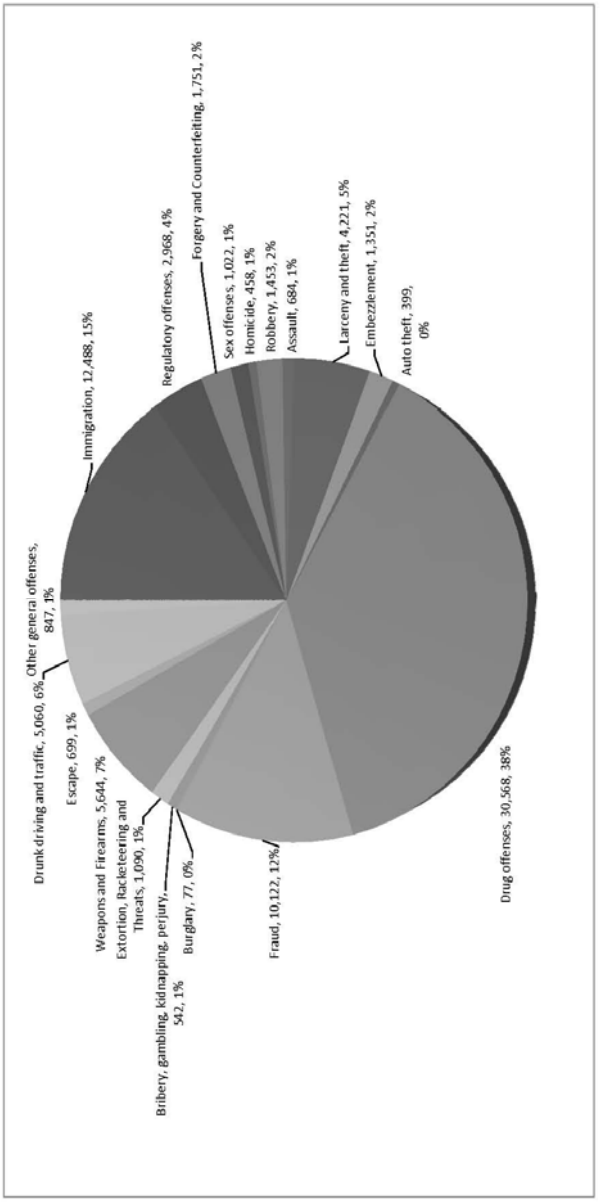
***Source*: Table D-2, Federal Judicial Caseload Statistics, Administrative Office of the United States Courts, Statistics Division, Washington, D.C. 1980.**

TABLE 3: Criminal defendants by major offense category, 1990 (66,234 total defendants represented; numbers represent defendants commenced in federal court in a 12-month period, as a percentage of total criminal caseload).



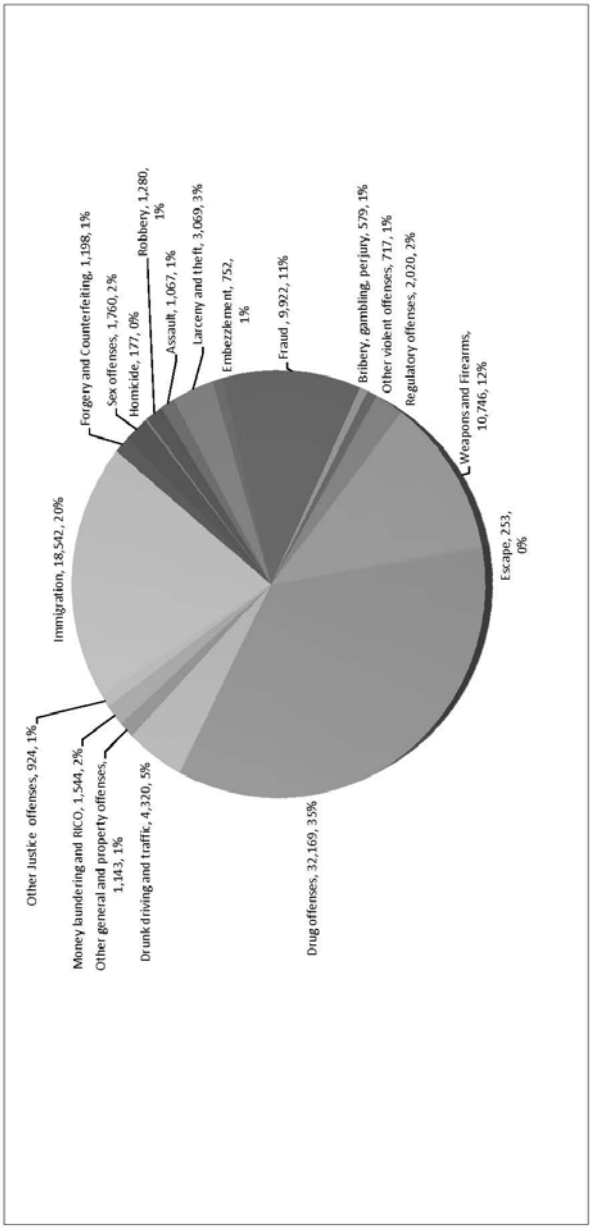
Source: Table D-2, FEDERAL JUDICIAL CASELOAD STATISTICS, ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, STATISTICS DIVISION, Washington, D.C. 1990).

TABLE 4: Criminal defendants by major offense category, 2000 (81,444 total defendants represented; numbers represent defendants commenced in federal court in a 12-month period, as a percentage of total criminal caseload).



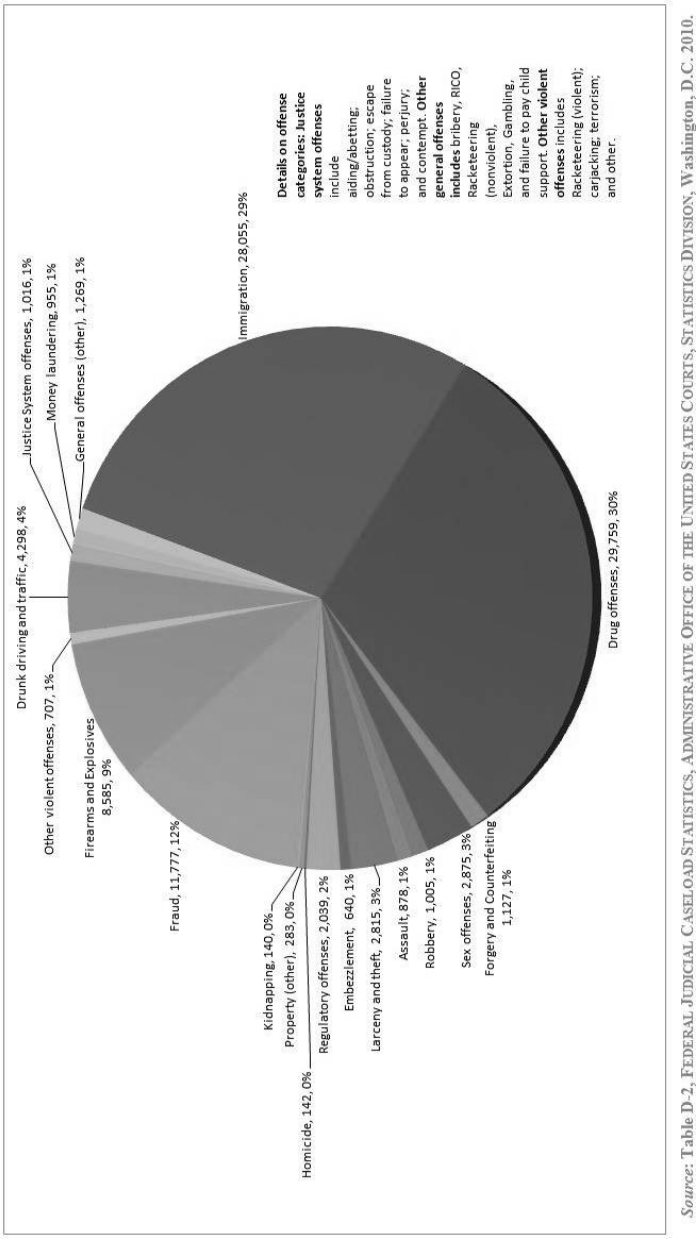
***Source*: Table D-2, FEDERAL JUDICIAL CASELOAD STATISTICS, ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, STATISTICS DIVISION, Washington, D.C. 2000).**

TABLE 5: Criminal defendants by major offense category, 2005 (92,104 total defendants represented; numbers represent defendants commenced in federal court in a 12-month period, as a percentage of total criminal caseload.)



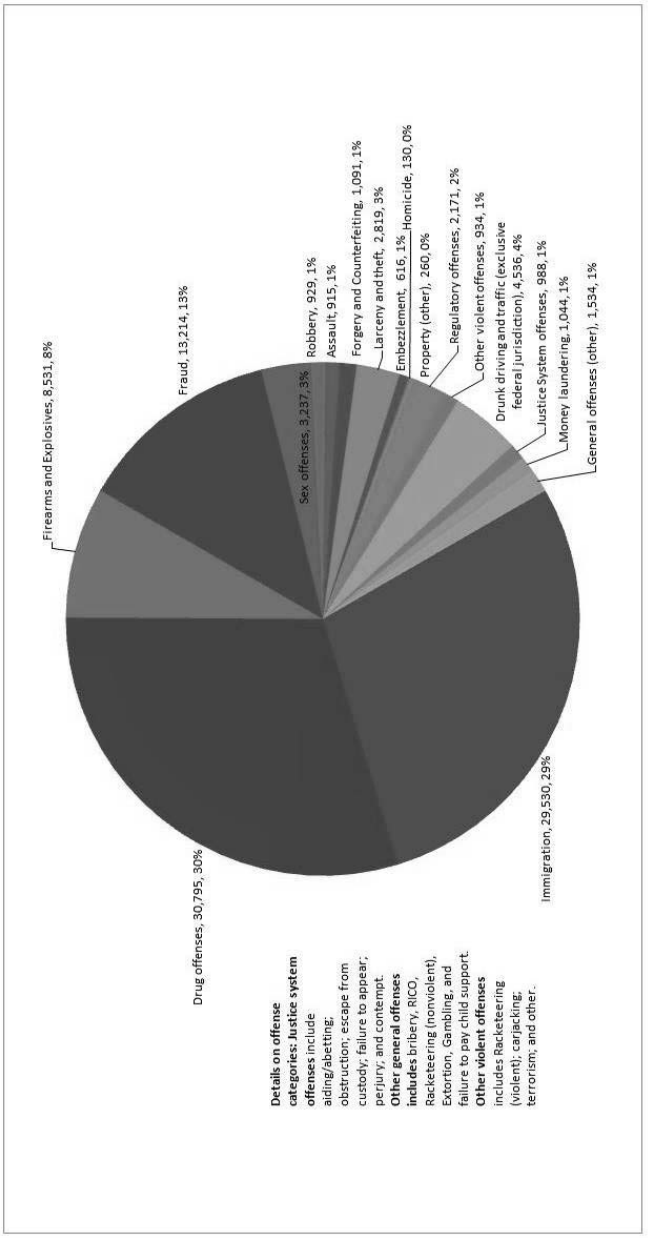
Source: **Table D-2, FEDERAL JUDICIAL CASELOAD STATISTICS, ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, STATISTICS DIVISION, Washington, D.C. 2005).**

TABLE 6-A: Criminal defendants by offense category, 2010 (98,365 total defendants represented; numbers represent defendants commenced in federal court in a 12-month period, as a percentage of total criminal caseload).



Source: Table D-2, FEDERAL JUDICIAL CASELOAD STATISTICS, ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, STATISTICS DIVISION, Washington, D.C. 2010.

TABLE 6-B: Criminal defendants by offense category, updated for 2011 (103,274 total defendants represented; numbers represent defendants commenced in federal court in a 12-month period, as a percentage of total criminal caseload).



Source: Table D-2, FEDERAL JUDICIAL CASELOAD STATISTICS, ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, STATISTICS DIVISION, Washington, D.C. 2011.

TABLES 7-8: Analysis of offense categories for which raw number of prosecutions has Increased (TABLE 7), or Decreased (TABLE 8), 1980–2011

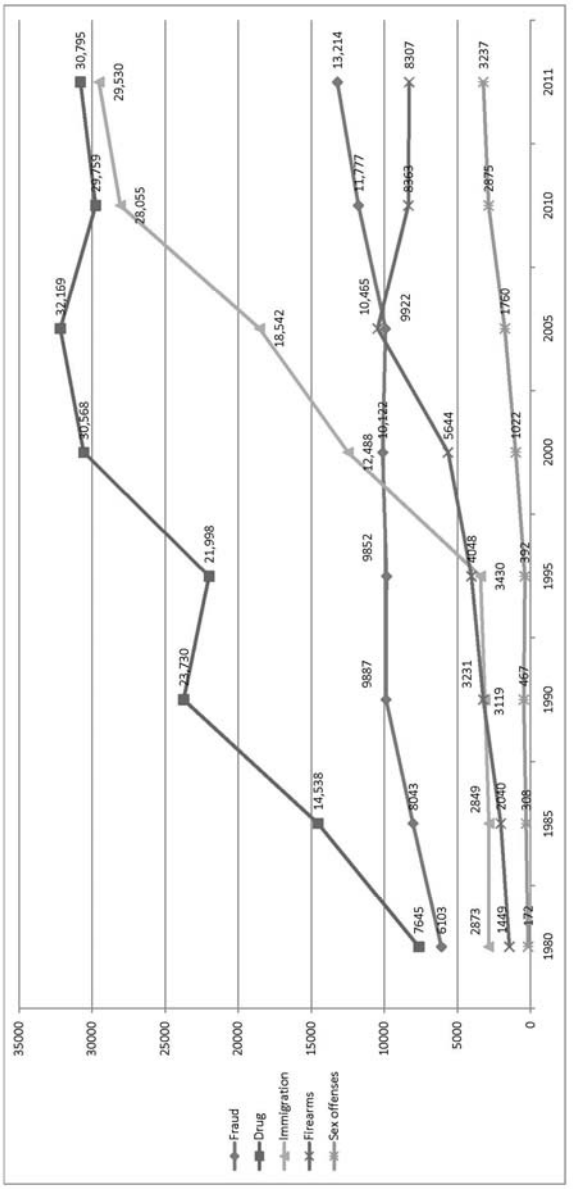


TABLE 7: OFFENSE CATEGORIES FOR WHICH PROSECUTIONS HAVE INCREASED, 1980–2011. (As measured by the number of prosecutions commenced against defendants in a given offense category in a 12-month period. *Source*: Table D-2, FEDERAL JUDICIAL CASELOAD STATISTICS, ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, STATISTICS DIVISION, Washington, D.C. 1982–2011).

TABLES 7-8: Analysis of offense categories for which raw number of prosecutions has Increased (TABLE 7), or Decreased (TABLE 8), 1980–2011

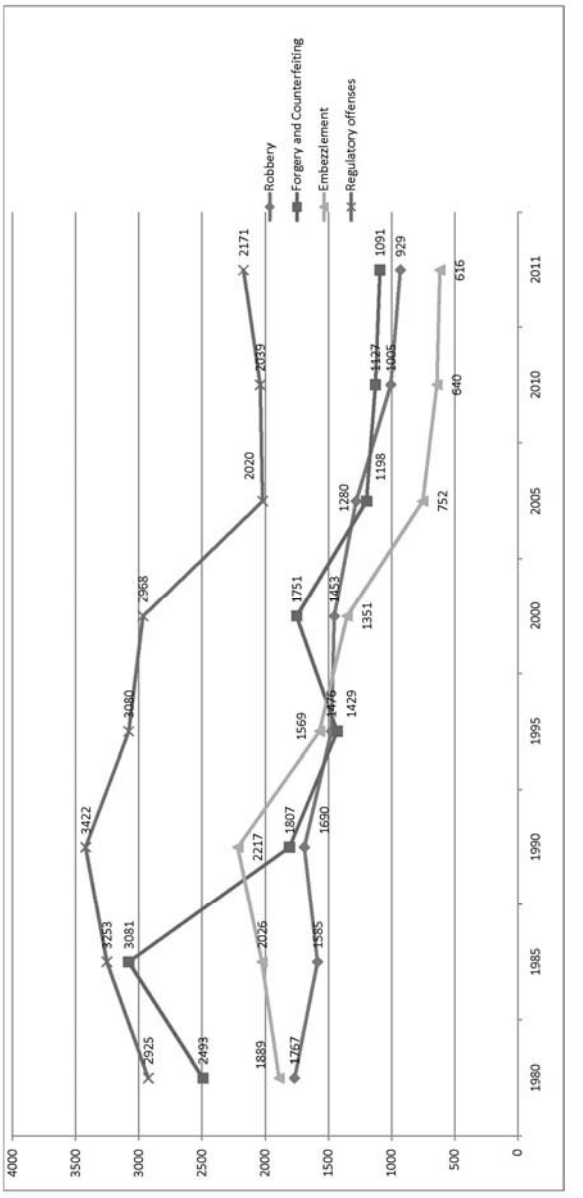
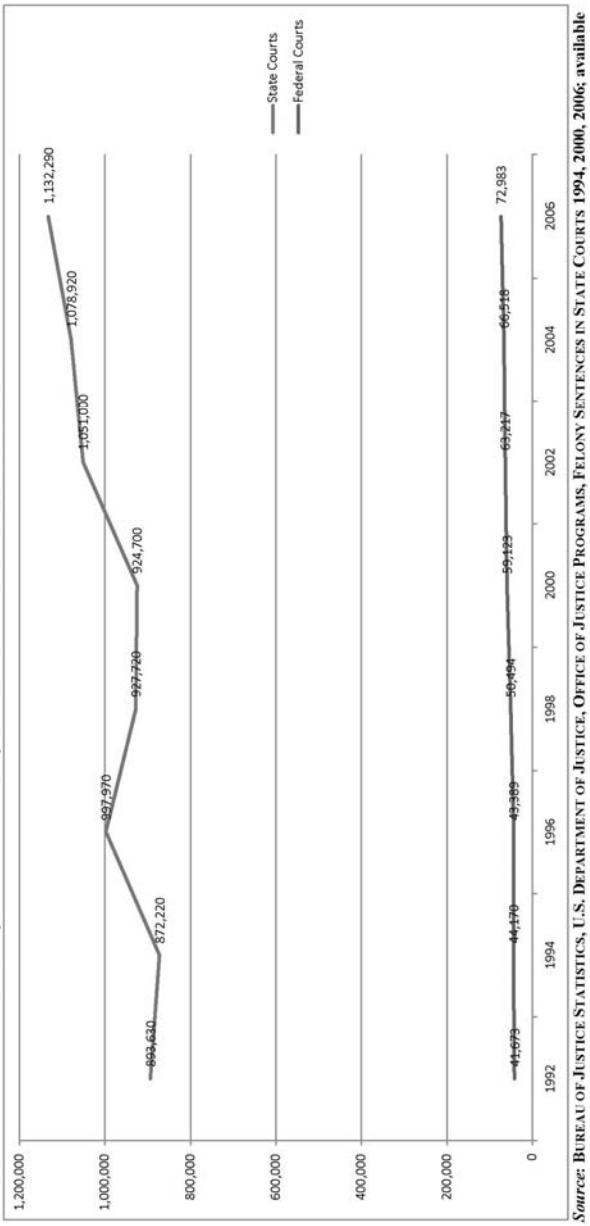


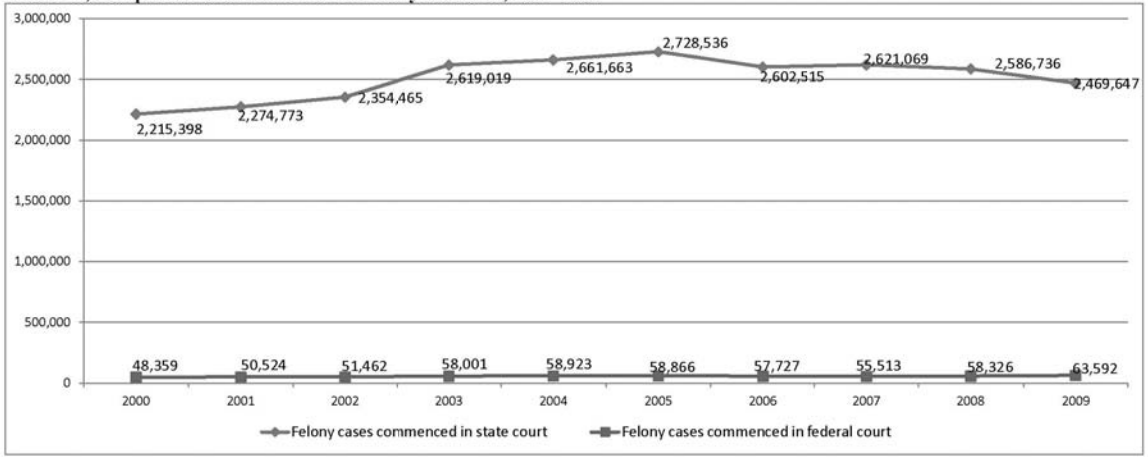
TABLE 8: OFFENSE CATEGORIES FOR WHICH PROSECUTIONS HAVE DECREASED, 1980–2011. (As measured by the number of prosecutions commenced against defendants in a given offense category in a 12-month period. *Source*: Table D-2, FEDERAL JUDICIAL CASELOAD STATISTICS, ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, STATISTICS DIVISION, Washington, D.C. 1982–2011).

TABLE 9-A: Raw number of felony convictions annually in state court and federal court, 1992–2006



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

Table 9-B, Comparison of state and federal felony caseloads, 2000–2009



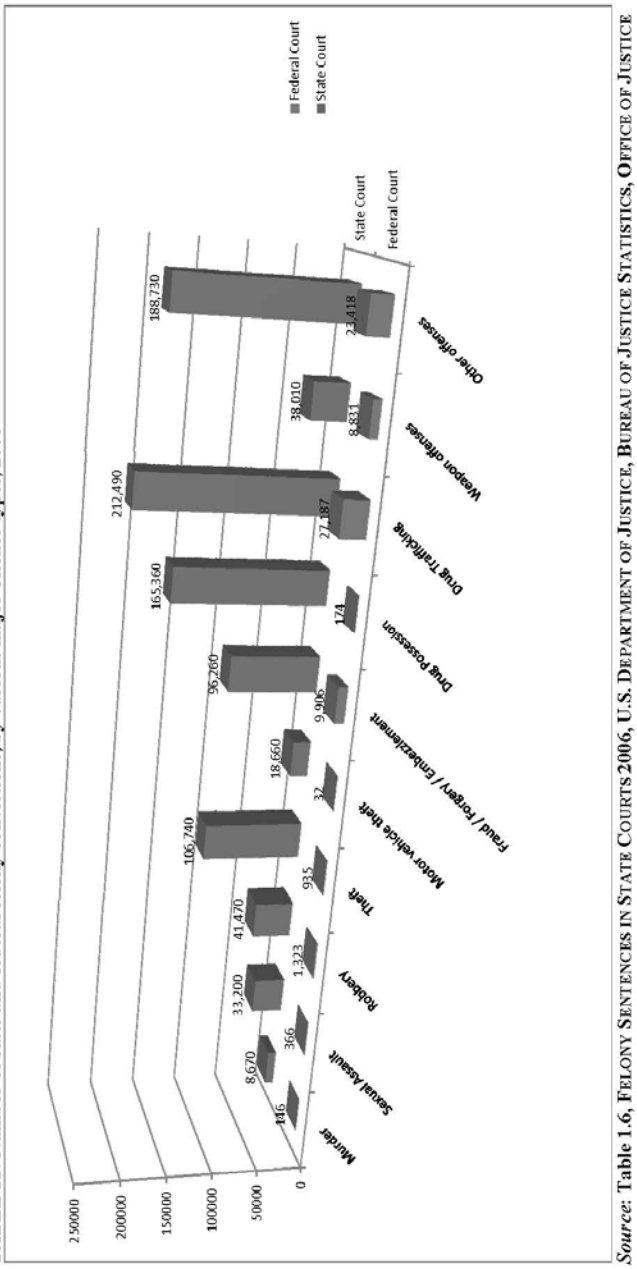
***Sources*: Table D-1, U.S. District Courts–Criminal Cases Commenced, Terminated and Pending, Federal Judicial Caseload Statistics, Statistics Division, Administrative Office of the United States Courts, 2000 – 2009, available at http://www.uscourts.gov/Statistics/FederalJudicialCaseloadStatistics.aspx; Felony Trend in General Jurisdiction Courts 2000–2009, State Court Caseload Statistics, National Center for State Courts, available at: http://www.courtstatistics.org/Other-Pages/StateCourtCaseloadStatistics.aspx.**

***Note on state court data: State court caseload statistics are slightly under- and over-inclusive, as several states did not report data, and some states were unable to fully isolate felony cases from class A misdemeanors. For additional details on the quality of this data, view source documents.**

TABLE 10: Federal felony convictions as a percentage of all felony convictions (state and federal combined), 1994–2006

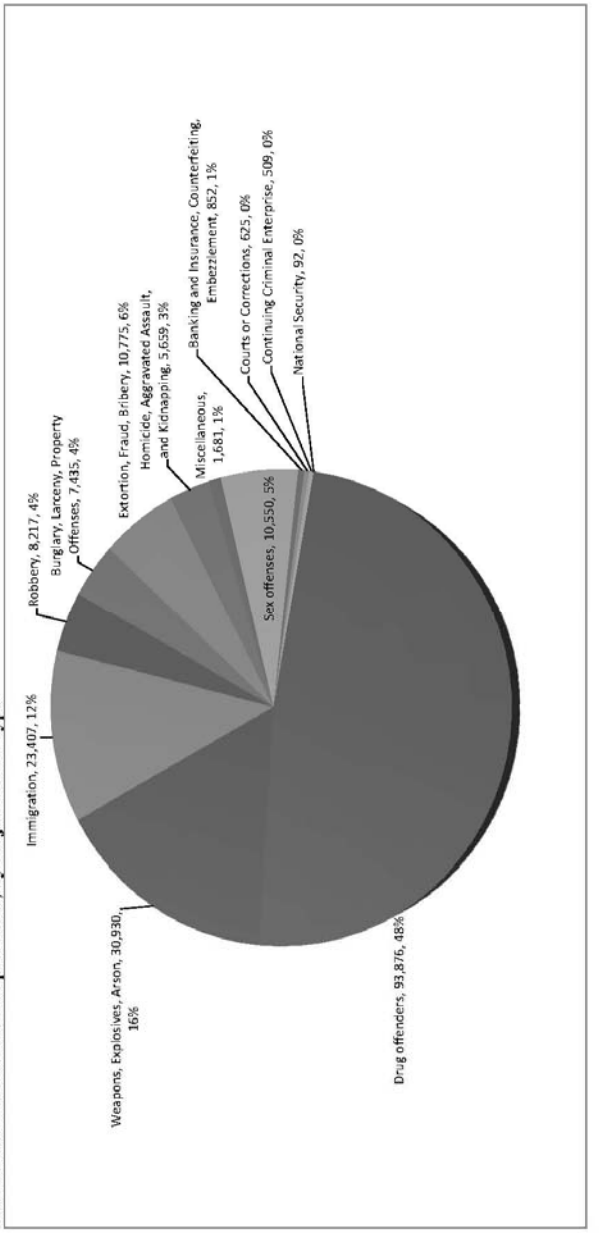
Source: **BUREAU OF JUSTICE STATISTICS, U.S. DEPARTMENT OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, FELONY SENTENCES IN STATE COURTS 1994, 2000, 2006, available at: http://bjs.ojp.usdoj.gov/index.cfm?ty=pbse&sid=28**

TABLE 11: Number of state and federal felony convictions, by various major offense types, 2006



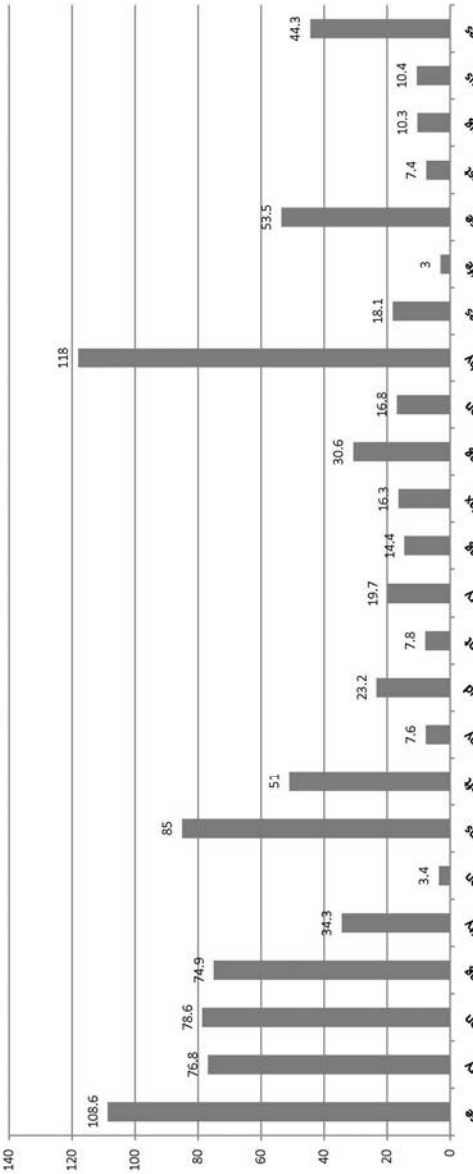
Source: **Table 1.6, FELONY SENTENCES IN STATE COURTS 2006, U.S. DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, OFFICE OF JUSTICE PROGRAMS, available at: http://bjs.ojp.usdoj.gov/content/pub/pdf/fssc06st.pdf**

TABLE 12: Current federal prisoners, by major offense type



Source: BUREAU OF PRISONS, QUICK FACTS, **updated May 26, 2012, available at http://www.bop.gov/news/quick.jsp. This data source is updated regularly to reflect the most current prison population data.**

TABLE 13: Average federal sentences for selected major offenses, in months, fiscal year 2010.



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

CHART OF COMMONLY USED FEDERAL CRIMINAL STATUTES

❖ VIOLENT OFFENSES (all) ❖ 2.9% of all criminal defendants commenced in federal court in 2010	
❖ HOMICIDE 0.1% of defendants in 2010	❖ 18 USC 1111: Murder. Pre 1909. ❖ 18 USC 1112: Manslaughter. Pre 1909 ❖ 18 USC 1113: Attempt to commit murder or manslaughter. Pre 1909. ❖ 18 USC 1114: Protection of officers and employees of US. 1934. ❖ 18 USC 1115: Misconduct or neglect of ship officers. Pre 1909. ❖ 18 USC 1116: Murder or manslaughter of foreign officials, official guests, or internationally protected persons. 1972. ❖ 18 USC 1117: Conspiracy to murder. 1972. ❖ 18 USC 1118: Murder by federal prisoner. 1994. ❖ 18 USC 1119: Foreign murder of United States nationals. 1994. ❖ 18 USC 1120: Murder by escaped prisoners. 1994. ❖ 18 USC 1121: Killing persons aiding Federal investigations or State correctional officers. 1994. ❖ 18 USC 1122: Protection against the HIV virus. 1994.
❖ ROBBERY (all) 1% of defendants in 2010	
➢ BANK ➢ 1% of defendants in 2010	❖ 18 USC 2113(a): Bank robbery and incidental crimes. 1934.
➢ OTHER ROBBERY OFFENSES ➢ 0% of defendants in 2010 (64 prosecutions total)	❖ 18 USC 2111: Special maritime and territorial jurisdiction. Pre 1909. ❖ 18 USC 2112: Personal property of the US. Pre 1909. ❖ 18 USC 2114: Mail, money or other property of the US. Pre 1909. ❖ 18 USC 2115: Post office. Pre 1909. ❖ 18 USC 2116: Railway or steamboat post office. Pre 1909. ❖ 18USC 2117: Breaking or entering carrier facilities. 1913. ❖ 18 USC 2118: Robberies and burglaries involving controlled substances. 1984.
❖ ASSAULT 0.9% of defendants in 2010	❖ 18 USC 111: Assaulting, resisting, or impeding certain officers or Employees. Pre 1909. ❖ 18 USC 112: Protection of foreign officials, official guests, and internationally protected persons. 1940. ❖ 18 USC 113: Assault within maritime and territorial jurisdiction. Pre 1909. ❖ 18 USC 114: Maiming within maritime and territorial jurisdiction. Pre 1909. ❖ 18 USC 115: Influencing, impeding, or retaliating against a Federal official by threatening or injuring a family member. 1984. ❖ 18 USC 116: Female genital mutilation. 1996. ❖ 18 USC 117: Domestic assault by an habitual offender. 2006. ❖ 18 USC 118: Interference with certain protective functions. 2007. ❖ 18 USC 119: Protection of individuals performing certain duties. 2008.
❖ KIDNAPPING .14% of defendants in 2010	❖ 18 USC 1201: Kidnapping. 1932. ❖ 18 USC 1202: Ransom money. 1932. ❖ 18 USC 1203: Hostage taking. 1984.

	❖ 18 USC 1204: International parental kidnapping. 1993.
❖ RACKETEERING—VIOLENT .4% of defendants in 2010	❖ 18 USC 1959: Violent crimes in aid of racketeering activity. 1984.
❖ CARJACKING .15% of defendants in 2010 (148 prosecutions)	❖ 18 USC 2119: Motor vehicles. 1992.
❖ TERRORISM 0% of defendants in 2010 (62 prosecutions total)	❖ 18 USC 2332: Terrorism (murder and conspiracy to commit murder, or assault or conspiracy to commit assault). 1986. ❖ 18 USC 2332a: Use of weapons of mass destruction. 1994. ❖ 18 USC 2332b: Acts of terrorism transcending national boundaries. 1996. ❖ 18 USC 2332d: Financial transactions. 1996. ❖ 18 USC 2332f: Bombings of places of public use, government. 2002. ❖ 18 USC 2332g: Missile systems designed to destroy aircraft. 2004. ❖ 18 USC 2332h: Radiological dispersal devices. 2004. ❖ 18 USC 2339: Harboring or concealing terrorists. 2001. ❖ 18 USC 2339A: Providing material support to terrorists. 1994. ❖ 18 USC 2339B. Providing material support or resources to designated foreign terrorist organizations. 1996. ❖ 18 USC 2339C: Prohibitions against the financing of terrorism. 2002. ❖ 18 USC 2339D: Receiving military-type training from a foreign terrorist organization. 2004. ❖ 18 USC 2340A: Torture committed outside the US. 2006.
❖ OTHER VIOLENT OFFENSES (selected) 0% total in 2010 (84 prosecutions total)	❖ 18 USC 36: Drive-by shooting. 1994. ❖ 18 USC 37: Violence at International Airports. 1994. ❖ 18 USC 351: Congressional, cabinet, and Supreme Court assassination, kidnapping or assault, or conspiracy to commit one of the above. 1971. ❖ 18 USC 372: Conspiracy to impede or injure officer. Pre 1909. ❖ 18 USC 1751: Presidential and Presidential Staff Assassination, Kidnapping, Assault. 1965. ❖ 18 USC 2261: Interstate domestic violence. 1994. ❖ 18 USC 2261A: Interstate stalking. 1996. ❖ 18 USC 2262: Interstate violation of protective order. 1994. ❖ 18 USC 1652: Citizens as pirates (US citizen commits any murder or robbery on the high seas). 1909. ❖ 18 USC 1091: Genocide. 1988. ❖ 18 USC 1364: Interference with foreign commerce by violence (Malicious mischief). 1917. ❖ 18 USC 2441: War Crimes. 1996. ❖ 18 USC 1389: Prohibition on attacks on United States servicemen on account of service. 2009. ❖ 18 USC 1655: Assault on commander as piracy (maritime jurisdiction). Pre 1909. ❖ 42 USC 2283: Protection of nuclear inspectors (assault on, murder of). 1946. ❖ 18 USC 1581: Peonage; obstructing enforcement. Pre 1909. ❖ 18 USC 1582: Vessels for slave trade. Pre 1909. ❖ 18 USC 1583: Peonage, Slavery, and trafficking in persons (enticement into slavery) Pre 1909. ❖ 18 USC 1584: Sale into involuntary servitude. Pre 1909. ❖ 18 USC 1590: Peonage, slavery and trafficking in persons. Trafficking

	with respect to peonage, slavery, involuntary servitude, or forced labor. 2000. ❖ 18 USC 1589: Forced labor (peonage, slavery, and trafficking in persons.) 2000. ❖ 18 USC 956. Conspiracy to kill, kidnap, maim, or injure persons or damage property in a foreign country. 1917. ❖ 18 USC 2280: Violence against maritime navigation. 1994. ❖ 18 USC 2281: Violence against maritime fixed platforms. 1994. ❖ 18 USC 373: Solicitation to commit a crime of violence. 1984.
❖ PROPERTY OFFENSES (all) 16.9% of defendants in 2010	
❖ BURGLARY 0% of defendants in 2010 (57 total prosecutions)	❖ 18 USC 2111: Special maritime and territorial jurisdiction. Pre 1909. ❖ 18 USC 2112: Personal property of the US. Pre 1909. ❖ 18 USC 2114: Mail, money or other property of the US. Pre 1909. ❖ 18 USC 2115: Post office. Pre 1909. ❖ 18 USC 2116: Railway or steamboat post office. Pre 1909. ❖ 18USC 2117: Breaking or entering carrier facilities. 1913. ❖ 18 USC 2118: Robberies and burglaries involving controlled substances. 1984.
❖ LARCENY AND THEFT 2.9% of defendants in 2010	
➢ BANK larceny 0% of defendants in 2010 (69 prosecutions)	❖ 18 USC 2113(b): Bank larceny. 1934. ❖ 18 USC 655: Theft by bank examiner. 1913. ❖ 18 USC 656: Theft, embezzlement, or misapplication by bank officer or employee. 1913.
➢ POSTAL SERVICE (theft) .27 % of defendants in 2010	❖ 18 USC 1710: Theft of newspapers. Pre 1909. ❖ 18 USC 1709: Mail theft by postal employee. Pre 1909. ❖ 18 USC 1708: Theft or receipt of stolen mail matter generally. Pre 1909. ❖ 18 USC 1707: Theft of postal service property. Pre 1909.
➢ INTERSTATE SHIPMENTS (theft) 0 % of defendants in 2010 (47 prosecutions)	❖ 18 USC 659: Interstate or foreign shipments by carrier; state prosecutions. 1913. ❖ 18 USC 660: Carrier's funds derived from commerce; State prosecutions. (common carriers operating in interstate commerce.) 1913.
➢ THEFT—U.S. PROPERTY 1.9% of defendants in 2010	❖ 18 USC 641: Public money, property or records. Pre 1909. ❖ 18 USC 642: Tools and material for counterfeiting purposes. Pre 1909. ❖ 18 USC 663: Solicitation or use of gifts. (Steal gift intended for U.S.) 1942. ❖ 18 USC 666: Federal programs theft. 1984.
➢ THEFT—MARITIME JURISDICTION .2% of defendants in 2010	❖ 18 USC 661: Within special maritime and territorial jurisdiction. (Theft). Pre 1909. ❖ 18 USC 662: Receiving stolen property within special maritime and territorial jurisdiction. Pre 1909.
➢TRANSPORTATION, ETC., STOLEN PROPERTY .15% of defendants in 2010	❖ 18 USC 2314: Transportation of stolen property. 1934 ❖ 18 USC 2315: Sale or receipt of stolen goods. 1934. ❖ 18 USC 2316: Transportation of livestock (stolen). 1940. ❖ 18 USC 2317: Sale or receipt of livestock (stolen). 1940 ❖ 18 USC 2318: Trafficking in counterfeit labels, illicit labels, or

	counterfeit documentation or packaging. 1962. ❖ 18 USC 2320: Trafficking in counterfeit goods or services. 1984. ❖ 18 USC 2321: Trafficking in certain motor vehicles or motor vehicle parts. 1984. ❖ 18 USC 2322: Chop shops. 1992.
➢ Other larceny and theft offenses .1% of defendants in 2010	❖ 18 USC 667: Theft of livestock. 1984. ❖ 18 USC 668: Theft of major artwork. 1994. ❖ 18 USC 669: Theft or embezzlement in connection with health care. 1996. ❖ 18 USC 664: Theft or embezzlement from employee benefit plan. 1962. ❖ 18 USC 665: Theft or embezzlement from employment and training funds; improper inducement; obstruction of investigations. 1973. ❖ 18 USC 1832: Theft of trade secrets. 1996.
❖ EMBEZZLEMENT (ALL) .65% of defendants in 2010	
➢ Bank embezzlement .16% of defendants in 2010	❖ 18 USC 656: Theft, embezzlement, or misapplication by bank officer or employee. 1913.
➢ Postal Service embezzlement .24 % of defendants in 2010	❖ 18 USC 1711: Misappropriation of postal funds. Pre 1909. ❖ 18 USC 1707: Theft of property used by postal service. Pre 1909. ❖ 18 USC 1709: Theft of mail matter by officer or employee. Pre 1909.
➢ Financial Institutions 0% of defendants in 2010 (22 prosecutions in 2010)	❖ 18 USC 657: Lending, credit and insurance institutions. 1913.
➢ Other Embezzlement offenses .2% of defendants in 2010	❖ 18 USC 641: Public money, property or records. Pre 1909. ❖ 18 USC 642: Tools and material for counterfeiting purposes. Pre 1909. ❖ 18 USC 643: Accounting generally for public money (embezzlement of public funds by federal employee). Pre 1909. ❖ 18 USC 644: Banker receiving unauthorized deposit of public money. Pre 1909. ❖ 18 USC 645: Court officers generally (embezzlement by). Pre 1909. ❖ 18 USC 646: Court officers depositing registry moneys. Pre 1909. ❖ 18 USC 647: Receiving loan from court officer. Pre 1909. ❖ 18 USC 648: Custodians, generally, misusing public funds. Pre 1909. ❖ 18 USC 649: Custodians failing to deposit monies; persons affected. Pre 1909. ❖ 18 USC 650: Depositaries failing to safeguard deposits. Pre 1909. ❖ 18 USC 651: Disbursing officer falsely certifying full payment. Pre 1909. ❖ 18 USC 652: Disbursing officer paying lesser in lieu of lawful amount. Pre 1909. ❖ 18 USC 653: Disbursing officer misusing public funds. Pre 1909. ❖ 18 USC 654: Officer or employee of US converting property of another. Pre 1909. ❖ 18 USC 655: Theft by bank examiner. 1913. ❖ 18 USC 658: Property mortgaged or pledges to farm credit agencies. 1933. ❖ 18 USC 659: Interstate or foreign shipments by carrier. 1913. ❖ 18 USC 660: Carrier's funds derived from commerce. 1913. ❖ 18 USC 661: Within special maritime and territorial jurisdiction

	(Embezzlement). Pre 1909 ❖ 18 USC 662: Receiving stolen property within special maritime and territorial jurisdiction. Pre 1909. ❖ 18 USC 663: Solicitation or use of gifts (solicitation of gift for use of the U.S. with intent to embezzle). 1942. ❖ 18 USC 891: Theft or embezzlement from employee benefit plan. 1962. ❖ 18 USC 665: Theft or embezzlement from employment and training funds. 1973. ❖ 18 USC 666: Federal programs embezzlement. 1984. ❖ 18 USC 669: Theft or embezzlement in connection with health care (embezzlement). 1996.
FRAUD (All) 12% of defendants in 2010	
❖ TAX FRAUD .65 % of defendants in 2010	❖ 26 USC 7201: Tax evasion. 1954. ❖ 26 USC 7202: Willful failure to collect or pay over tax. 1954. ❖ 26 USC 7203: Willful failure to file return, supply information, or pay tax. 1954. ❖ 26 USC 7204: Fraudulent statement or failure to make statement to employees. 1954. ❖ 26 USC 7205: Fraudulent withholding exemption certificate or failure to supply information. 1954. ❖ 26 USC 7206: Fraud and false statements (tax returns). 1954. ❖ 26 USC 7207: Fraudulent returns, statements, or other documents. 1954. ❖ 26 USC 7211: False statements to purchasers or lessees relating to tax. 1954. ❖ 26 USC 7212: Attempts to interfere with administration of internal revenue laws. 1954.
❖ FINANCIAL INSTITUTIONS FRAUD .86 % of defendants in 2010	❖ 18 USC 1344: Bank fraud. 1984. ❖ 18 USC 1004: Certification of checks (evasion of check certification requirements). 1882. ❖ 18 USC 1005: Bank entries, reports and transactions. 1933. ❖ 18 USC 1006: Federal credit institution entries, reports and transactions. 1933. ❖ 18 USC 1007: FDIC transactions. 1933. ❖ 18 USC 1011: Federal land bank mortgage transactions. 1933. ❖ 18 USC 1012: Department of Housing and Urban Development transactions. 1967. ❖ 18 USC 1010: Dept. of Housing and Urban Development and Federal Housing Admin. Transactions. 1934 ❖ 18 USC 1013: Farm loan bonds and credit bank debentures. 1923. ❖ 18 USC 1014: Loan and credit applications generally; renewals and discounts; crop insurance. 1940. ❖ 18 USC 1032: Concealment of assets from conservator, receiver, or liquidating agent of financial institution. 1990. ❖ 18 USC 1033: Crimes by or affecting person engaged in the business of insurance whose activities affect interstate commerce. 1994. ❖ 12 USC 1847: Penalties. (Bank holding companies.) 1956.

❖ SECURITIES AND EXCHANGE FRAUD .1 % of defendants in 2010	❖ 18 USC 1348: Securities and Commodities fraud. 2002. ❖ 18 USC 1350: Failure of corporate officers to certify financial reports. 2002. ❖ 15 USC 77e: Prohibitions relating to interstate commerce and the mails. 1933, 1954 ❖ 15 USC 77q: Fraudulent interstate transactions. 1933, 2000 ❖ 15 U.S.C. § 78c(a)(8). Definitions and application. 1934. ❖ 15 USC 78dd-1(a) Foreign securities exchanges. 1934. ❖ 15 USC 78i: Manipulation of security prices. 1982. ❖ 15 USC 78j: Manipulative and deceptive devices. 1934, 2000 ❖ 15 USC 78m(b)(5): Willful falsification. 1934, 1964 ❖ 15 USC 78p. Directors, officers, stockholders. 1934, 1964. ❖ 15 USC 78t: Aiding and abetting. 1934. ❖ 15 USC 77w: Unlawful representations. 1933.
❖ MAIL FRAUD .61% of defendants in 2010	❖ 18 USC 1341: Frauds and Swindles. Pre 1909. ➢18 USC 1346: Honest services fraud definition. 1988. ❖ 18 USC 1342: Fictitious name or address (mail fraud). Pre 1909.
❖ WIRE FRAUD .56% of defendants in 2010	❖ 18 USC 1343: Fraud by wire, radio, or television. 1952.
❖ BANKRUPTCY FRAUD 0 % of defendants in 2010 (74 prosecutions)	❖ 18 USC 152: Concealment of assets; false oaths and claims; bribery. 1898. ❖ 18 USC 153: Embezzlement against estate. 1898 ❖ 18 USC 154: Adverse interest and conduct of officers. 1898 ❖ 18 USC 155: Fee agreements in cases under title 11 and receiverships. 1937 ❖ 18 USC 156: Knowing disregard of bankruptcy law or rule. 1994. ❖ 18 USC 157: Bankruptcy fraud. 1994.
❖ SOCIAL SECURITY FRAUD .54% of defendants in 2010	❖ 42 USC 408 (a) Penalties. 1935. ❖ 42 U.S.C. § 1383a(1)-(3): Concealment of assets. 1972. ❖ 42 U.S.C. § 1383(d)(3): Unauthorized charging of fees. 1972 ❖ 42 U.S.C. § 406(a): Representation of claimants before Commissioner. 1935, 1939
❖ FALSE PERSONATION FRAUD 0% of defendants in 2010 (48 prosecutions)	❖ 18 USC 911: Citizen of the US (false personation). 1940. ❖ 18 USC 912: Officer or employee of the US (false personation). Pre 1909. ❖ 18 USC 913: Impersonator making arrest or search. 1935. ❖ 18 USC 914: Creditors of the US. Pre 1909. ❖ 18 USC 915: Foreign diplomats, consuls, or officers. 1917. ❖ 18 USC 916: 4-H Club members or agents.1939. ❖ 18 USC 917: Red Cross members or agents. 1905
❖ CITIZENSHIP AND NATURALIZATION FRAUD .3% of defendants in 2010	❖ 18 USC 1015: Naturalization, citizenship or alien registry. 1940. ❖ 18 USC 1423: Misuse of evidence of citizenship or naturalization. 1940.
❖ PASSPORT FRAUD .7% of defendants in 2010	❖ 18 USC 1541: Issuance without authority. 1902. ❖ 18 USC 1542: False statement in application and use of passport. 1917. ❖ 18 USC 1543: Forgery or false use of passport. 1917. ❖ 18 USC 1544: Misuse of passport. 1917. ❖ 18 USC 1545: Safe conduct violation (passports and visas). 1940.

❖ IDENTIFICATION DOCUMENTS AND INFORMATION FRAUD 2.4% of defendants in 2010	❖ 18 USC 1028: Fraud and related activity in connection with ID documents and information. 1982. ❖ 18 USC 1028A: Aggravated identity theft. 2004.
❖ FALSE CLAIMS AND SERVICES—GOVERNMENT .23 % of defendants in 2010	❖ 18 USC 285: Taking or using papers relating to claims. Pre 1909 ❖ 18 USC 286: Conspiracy to defraud the government with respect to claims Pre 1909 ❖ 18 USC 287: False, fictitious, or fraudulent claims. 1863. ❖ 18 USC 288: False claims for postal losses. Pre 1909 ❖ 18 USC 289: False claims for pensions. 1898 ❖ 18 USC 290: Discharge papers withheld by claim agent. 1872 ❖ 18 USC 292: Solicitation of employment and receipt of unapproved fees concerning federal employees' compensation. 1966 ❖ 31 USC 3729: False claims. (Claims against the US government). 1982.
❖ FALSE STATEMENTS .65% of defendants in 2010	❖ 18 USC 1001: Statements or entries generally. Pre 1909.
❖ CONSPIRACY TO DEFRAUD THE UNITED STATES 1% of defendants in 2010	❖ 18 USC 371 (defraud clause). Pre 1909.
❖ UNAUTHORIZED ACCESS DEVICES FRAUD .86% of defendants in 2010	❖ 18 USC 1029: Fraud and related activity in connection with access devices. 1984.
❖ COMPUTER FRAUD .1 % of defendants in 2010	❖ 18 USC 1030: Fraud and related activity in connection with computers. 1984.
❖ HEALTH CARE FRAUD .55% of defendants in 2010	❖ 18 USC 1035: False statements relating to health care matters. 1996. ❖ 18 USC 1347: Health care fraud. 1996. ❖ 42 USC 1320a-7b: Medicare-Medicaid Anti-Kickback. 1972.
❖ ATTEMPT AND CONSPIRACY TO DEFRAUD 1.4 % of defendants in 2010 (60% of defendants increase over 2009)	❖ 18 USC 1349: Attempt and conspiracy. 2002.
❖ OTHER FRAUD OFFENSES (selected) 0% of defendants in 2010 (90 prosecutions)	❖ 15 U.S.C. 1644: Credit Card Fraud. 1970. ❖ 18 USC 1016: Acknowledgment or appearance of oath. Pre 1909. ❖ 18 USC 1017: Government seals wrongfully used and instruments wrongfully sealed. 1948. ❖ 18 USC 1018: Official certificates or writings. Pre 1909. ❖ 18 USC 1019: Certificates by consular officers. Pre 1909. ❖ 18 USC 1020: Highway projects. 1922. ❖ 18 USC 1021: Title records. Pre 1909. ❖ 18 USC 1022: Delivery of certificate, voucher, receipt for military or naval property. Pre 1909. ❖ 18 USC 1023: Insufficient delivery of money or property for military or naval service. Pre 1909. ❖ 18 USC 1024: Purchase or receipt of military, naval or veteran's

	facilities property. Pre 1909. ❖ 18 USC 1025: False pretenses on the high seas. Pre 1909. ❖ 18 USC 1026: Compromise, adjustment, or cancellation of farm indebtedness. 1944. ❖ 18 USC 1027: False statements and concealment of facts in relation to document required by the Employee Retirement Income Security Act of 1974. 1962. ❖ 18 USC 1036: Entry by false pretenses to any real property, vessel, or aircraft of the United States or secure area of any airport or seaport. 2000. ❖ 18 USC 1037: Fraud and related activity in connection with electronic mail. 2003. ❖ 18 USC 1038: False information and hoaxes. 2004. ❖ 18 USC 1039: Fraud and related activity in connection with obtaining confidential phone records information of a covered entity. 2007. ❖ 18 USC 1040: Fraud in connection with major disaster or emergency benefits. 2008. ❖ 18 USC 2326: Telemarketing fraud. 1994. ❖ 18 USC 1351: Fraud in foreign labor contracting. 2008. ❖ 18 USC 1002: Possession of false papers to defraud the US. Pre 1909. ❖ 18 USC 1003: Demands against the US. Pre 1909. ❖ 18 USC 1031: Major fraud against the US. 1988. ❖ 7 USC 2024: Food stamps. 1961.
FORGERY AND COUNTERFEITING 1.1% of defendants in 2010	❖ 18 USC 470: Counterfeit acts committed outside the US. 1994. ❖ 18 USC 471: Obligations or securities of the US. Pre 1909. ❖ 18 USC 472: Uttering counterfeit obligations or securities. Pre 1909. ❖ 18 USC 473: Dealing in counterfeit obligations or securities. Pre 1909. ❖ 18 USC 474: Plates or stones for counterfeiting obligations and securities. Pre 1909. ❖ 18 USC 475: Imitating obligations or securities; advertisements. Pre 1909. ❖ 18 USC 476: Taking impressions of tools used for obligations and securities. Pre 1909. ❖ 18 USC 477: Possessing or selling impressions of tools used for obligations or securities. Pre 1909. ❖ 18 USC 478: Foreign obligations or securities. Pre 1909. ❖ 18 USC 479: Uttering counterfeit foreign obligations or securities. Pre 1909. ❖ 18 USC 480: Possessing counterfeit foreign obligations or securities. Pre 1909. ❖ 18 USC 481: Plates or stones for counterfeiting foreign obligations or securities. Pre 1909. ❖ 18 USC 482: Foreign bank notes. Pre 1909. ❖ 18 USC 483: Uttering counterfeit foreign bank notes. Pre 1909. ❖ 18 USC 484: Connecting parts of different notes. Pre 1909. ❖ 18 USC 485: Coins or bars. Pre 1909. ❖ 18 USC 486: Uttering coins of gold, silver or other material. Pre 1909. ❖ 18 USC 487: Making or possessing counterfeit dies for coins. Pre 1909. ❖ 18 USC 488: Making or possession counterfeit dies for foreign coins. Pre 1909. ❖ 18 USC 489: Making or possessing likeness of coins . Pre 1909. ❖ 18 USC 490: Minor coins (counterfeiting one and five cent coins). Pre

	1909. ❖ 18 USC 491: Tokens or paper used as money. Pre 1909. ❖ 18 USC 492: Forfeiture of counterfeit paraphernalia. Pre 1909. ❖ 18 USC 493: Bonds and obligations of certain lending agencies. 1933. ❖ 18 USC 494: Contractors' bonds, bids and public records (forges or counterfeits any bid for the purpose of defrauding the US). Pre 1909. ❖ 18 USC 495: Contracts, deeds and powers of attorney (forging power of attorney to enable any other person to obtain or receive a sum of money from agents of the US). Pre 1909. ❖ 18 USC 496: Customs matters (Counterfeiting and forgery). Pre 1909. ❖ 18 USC 497: Letters patent. Pre 1909. ❖ 18 USC 498: Military or naval discharge certificates (Counterfeiting and forgery of). 1917 ❖ 18 USC 499: Military, naval or official passes (Counterfeiting and forgery of) 1917 ❖ 18 USC 500: Money orders (Counterfeiting and forgery of) . Pre 1909. ❖ 18 USC 501: Postage stamps, postage meter stamps, and postal cards. Pre 1909. ❖ 18 USC 502: Postage and revenue stamps of foreign governments. Pre 1909. ❖ 18 USC 503: Postmarking stamps (Counterfeiting and forgery of) 1935 ❖ 18 USC 504: Printing and filming of US and foreign obligations and securities. 1923 ❖ 18 USC 505: Seals of courts; signatures of judges, or court officers. Pre 1909. ❖ 18 USC 506: Seals of departments or agencies. 1917 ❖ 18 USC 507: Ship's papers. Pre 1909. ❖ 18 USC 508: Transportation requests of government. 1926 ❖ 18 USC 509: Possessing and making plates or stones for government transportation requests. 1926. ❖ 18 USC 510: Forging endorsements on Treasury checks or bonds or securities of the US. 1983. ❖ 18 USC 511: Altering or removing motor vehicle ID numbers. 1984. ❖ 18 USC 511A: Unauthorized application of theft prevention decal or device. 1994. ❖ 18 USC 513: Securities of the states and private entities. 1984 ❖ 18 USC 514: Fictitious obligations. 1996 ❖ 18 USC 331: Mutilation, diminution, and falsification of coins. Pre 1909. ❖ 18 USC 332: Debasement of coins, alternation of official scales, or embezzlement of metals. Pre 1909 ❖ 18 USC 333: Mutilation of national bank obligations. Pre 1909.
AUTO THEFT 0% of defendants in 2010 (64 prosecutions)	❖ 18 USC 2312: Transportation of stolen vehicles. 1919. ❖ 18 USC 2313: Sale or receipt of stolen vehicles. 1919.
OTHER PROPERTY OFFENSES (selected) .16% of defendants in 2010	❖ 18 USC 81: Arson within special maritime and territorial jurisdiction. 2011. ❖ 18 USC 33: Destruction of motor vehicles. 1956. ❖ 18 USC 1361: Government property or contracts (Malicious mischief) Pre 1909 ❖ 18 USC 1362: Communication lines, stations or systems (Malicious mischief) Pre 1909

	❖ 18 USC 1363: Buildings or property within special maritime and territorial jurisdiction (Malicious Mischief – destruction of or attempt) Pre 1909 ❖ 18 USC 1366: Destruction of energy facility. 1984. ❖ 18 USC 1367: Interference with operation of a satellite. 1986. ❖ 18 USC 2071: Concealment, removal, or mutilation generally (Records and reports). Pre 1909. ❖ 18 USC 43: Animal enterprise terrorism. (causes physical disruption to functioning of animal enterprise by damaging its property.) 1992.
CONTROLLED SUBSTANCES: SELL, DISTRIBUTE, OR DISPENSE 24.8% of defendants in 2010	❖ 21 USC 841. Prohibited Acts A. 1970. ➢(a)(1): Manufacture, distribute, or dispense, or possess with intent to do so. ➢(a)(2): to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance. ❖ 21 USC 842. Prohibited Acts B. 1970. ❖ 21 USC 846: Conspiracy to commit drug offense. 1970
CONTROLLED SUBSTANCES: IMPORT/EXPORT 2.6% of defendants in 2010	❖ 21 USC 953: Exportation of controlled substance. 1970. ❖ 21 USC 954: In-transit shipment of controlled substances. 1970. ❖ 21 USC 959: Possession, manufacture, or distribution for purposes of unlawful importation. 1970. ❖ 21 USC 960: Import/export controlled substance. 1970. ❖ 21 USC 963: Attempt and Conspiracy (import and export). 1970.
CONTROLLED SUBSTANCES: MANUFACTURE 1.1% of defendants in 2010	❖ 21 USC 841 (a), (b): Prohibited Acts. 1970.
CONTROLLED SUBSTANCES: POSSESSION 1.6% of defendants in 2010	❖ 21 USC 844: Penalties for Simple possession. 1970.
OTHER DRUG OFFENSES .12% of defendants in 2010	❖ 21 USC 856: Maintaining drug-involved premises. 1986. ❖ 21 USC 860: Distribution or manufacturing in or near schools or colleges. 1984. ❖ 21 USC 861: Employment or use of persons under 18 years of age in drug operations. 1986. ❖ 21 USC 843: Use of communication facility. 1970. ❖ 21 USC 848: Continuing Criminal Enterprise. 1970. ❖ 21 USC 849: Transportation safety offenses. 1994.
❖ FIREARMS (all)	
POSSESSION BY PROHIBITED PERSONS (firearms) 5% of defendants in 2010	❖ 18 USC 922: Unlawful acts (firearms). Original enactment 1968. ➢ (g) possession by certain prohibited individuals (felons, undocumented immigrants, etc.) ➢ (h) possession by employee of certain prohibited individuals ➢ (x) possession by juvenile
➢ FURTHERANCE OF VIOLENT/DRUG-TRAFFICKING CRIMES 2.1 % of defendants in 2010	❖ 18 USC 924: Firearms penalties. 1986. ➢ (c): uses or carries a firearm in relation to any crime of violence or drug trafficking crime ➢ (h): transfers a firearm knowing that such firearm will be used to commit a crime of violence or drug trafficking crime

➢ OTHER FIREARMS OFFENSES 1.4% of defendants in 2010	❖ 18 USC 923: Handgun licensing (no importing, manufacturing, dealing in firearms without license). 1968. ❖ 18 USC 922: Unlawful acts. 1968. ➢ (a) unauthorized importation, manufacturing, dealing, shipping, transporting; sales of firearms to out of state residents ➢ (a)(6) making of false statement in connection with firearm sales ➢ (a)(7) importation of armor piercing ammunition ➢ (a)(8) sale of armor piercing ammunition ➢ (a)(9) receipt of firearms for non-sporting purposes (non-resident of any state) ➢ (b) sell or deliver to specified prohibited individuals; sell or deliver specified destructive device or machinegun; sell or deliver without proper recording ➢ (d) sell or dispose or firearm to specified prohibited individuals ➢ (e) deliver or cause to be delivered unlawfully ➢ (f)(1) transport or deliver with knowledge of unlawful transport/delivery ➢ (f)(2) delivery of firearm without receipt ➢ (i) transport or ship stolen firearms or ammunition ➢ (j) possession or sale of stolen firearm ➢ (k) removed serial numbers ➢ (l) unlawful importation ➢ (m) false entry of records ➢ (n) shipping or receipt of firearm by felon ➢ (o) machinegun possession ➢ (p) manufacture, sell, deliver, possess firearm undetectable by metal detector or X ray machine ➢ (q) possess or discharge weapon that has traveled in interstate commerce in school zone ➢(r) assembly of prohibited weapon ➢(s) sale of handgun without license ➢(t) unauthorized transfer of firearm to person without license ➢(u) steal or take firearm from a licensed importer or dealer ➢(x) sell, deliver or transfer to juvenile ➢(z) sale of handgun to person without license unless person is provided with secure gun storage or safety device ❖ 18 USC 924: Firearms penalties. 1968. ➢(a): makes any false statement with respect to the information required by this chapter ❖ 18 USC 931: Prohibition on purchase, ownership, or possession of body armor by felon. 2002. ❖ 22 U.S.C. § 2778. Arms exports and imports. 1976.
❖ EXPLOSIVES .2% of defendants in 2010 (222 total prosecutions)	❖ 18 USC 842. Unlawful acts. 1970. ➢ (a): importation, manufacture, distribution and storage of explosive materials without license ➢ (b) knowingly distributes explosive material to any person other than a licensee ➢ (c): distributes explosive material to a person who the licensee knows will transport the explosives to a state where such explosives are prohibited ➢ (d): distribution of explosives to certain persons (minors, felons, fugitives, drug addict, or mental defective) ➢ (e): distributes explosives to a person in any state where such

	distribution violates local law ➢ (f): manufactures or imports explosives without making records required by regulations ➢ (g): false entry into license records ➢ (h): receives, transports, sells stolen explosive materials ➢ (j): stores explosive material in manner that does not comply with regulations ➢ (k): failure to report knowledge of stolen explosives ❖ 18 USC 844: Importation, Manufacture, Distribution and Storage of explosive materials. 1970. ➢ (d): transports or receives in interstate commerce any explosive for purposes of murder, intimidation or property damage ➢ (e): use of mails or wire to make a threat or convey false information concerning an attempt to kill, injure or intimidate (bomb threats) ➢ (f): damages or destroys by means of fire or explosive any property owned by US ➢ (h): use of fire or explosive to commit a federal felony ➢ (i): destroys and building or vehicle or other property used in interstate commerce or affecting commerce (federal arson statute) ➢ (m): conspires to commit an offense under subsection (h)
❖ SEXUAL ABUSE OF ADULTS .1 % of defendants in 2010	❖ 18 USC 2241: Aggravated sexual abuse (maritime or territorial jurisdiction). 1986. ❖ 18 USC 2242: Sexual abuse (maritime or territorial jurisdiction). 1986.
❖ SEXUAL ABUSE OF MINORS .6% of defendants in 2010	❖ 18 USC 2243. Sexual abuse of minor or ward. 1986. ❖ 18 USC 2245: Offenses resulting in death (sexual abuse). 1994
❖ SEXUALLY EXPLICIT MATERIAL 1.8% of defendants in 2010	❖ 18 USC 2251: Sexual exploitation of children. 1978. ❖ 18 USC 2252: Certain activities relating to material involving the sexual exploitation of minors. 1978. ❖ 18 USC 2252A. Certain activities relating to material constituting or containing child pornography. 1996. ❖ 18 USC 2260. Production of sexually explicit depictions of a minor for importation into the United States. 1994.
❖ TRANSPORTATION FOR ILLEGAL SEXUAL ACTIVITY .15 % of defendants in 2010	❖ 18 USC 2421: Transportation for illegal sexual activity and related crimes. 1910. ❖ 18 USC 2422: Coercion and Enticement. 1910. ➢ (a): coerces or entices to travel in interstate commerce for prostitution ➢ (b): use of mails or within maritime jurisdiction, convinces a person under 18 to engage in prostitution ❖ 18 USC 2423. Transportation of minors. 1910. ❖ 18 USC 2424. Filing factual statement about alien individual. 1910. ❖ 18 USC 2425. Use of interstate facilities to transmit information about a minor. 1910.
❖ SEX OFFENDER REGISTRY .28% of defendants in 2010	❖ 18 USC 2250: Failure to register. 2006.

❖ OTHER SEX OFFENSES 0% of defendants in 2010 (5 prosecutions total)	❖ 18 USC 2244: Abusive sexual contact. 1986. ❖ 18 USC 2251A: Selling or buying of children. 1988. ❖ 18 USC 2252B. Misleading domain names on the Internet. 2003. ❖ 18 USC 2252C. Misleading words or digital images on the Internet. 2006. ❖ 18 USC 2257. Record keeping requirements. 1988 ❖ 18 USC 2257A. Record keeping requirements for simulated sexual conduct. 2006. ❖ 18 USC 2258. Failure to report child abuse. 1990
❖ AIDING, ABETTING, ACCESSORY, ETC .17% of defendants in 2010	❖ 18 USC 2: Principals, aiders and abettors. Pre 1909. ❖ 18 USC 3: Accessory after the fact. (giving aid or comfort to one known to have committed an offense against the U.S.) Pre 1909. ❖ 18 USC 4: Misprision of felony (knowing of commission of felony, does not advise authorities). Pre 1909.
❖ OBSTRUCTION OF JUSTICE .3% of defendants in 2010	❖ 18 USC 1501: Assault on process server. Pre 1909. ❖ 18 USC 1502: Resistance to extradition agent. 1940. ❖ 18 USC 1503: Influencing or injuring officer or juror generally. Pre 1909. ❖ 18 USC 1504: Influencing juror by writing. Pre 1909. ❖ 18 USC 1505: Obstruction of proceedings before departments, agencies and committees. Pre 1909. ❖ 18 USC 1506: Theft or alteration of record or process; false bail. Pre 1909. ❖ 18 USC 1507: Picketing or parading. 1950. ❖ 18 USC 1508: Recording, listening to, or observing proceedings of grand or petit juries. 1956. ❖ 18 USC 1509: Obstruction of court orders. 1960. ❖ 18 USC 1510: Obstruction of criminal investigations. 1967. ❖ 18 USC 1511: Obstruction of state or local law enforcement. 1970. ❖ 18 USC 1512: Tampering with a witness, victim, or an informant. 1982. ❖ 18 USC 1513: Retaliating against a victim, witness or informant. 1982. ❖ 18 USC 1516: Obstruction of federal audit. 1988 ❖ 18 USC 1517: Obstructing examination of financial institution. 1990. ❖ 18 USC 1518: Obstruction of criminal investigations of health care offenses. 1996. ❖ 18 USC 1519: Destruction, alteration, or falsification or records in federal investigations and bankruptcy. 2002 ❖ 18 USC 1520: Destruction of corporate audit records. 2002. ❖ 18 USC 1521: Retaliating against a federal judge or federal law enforcement officer by false claim or slander. 2008.
❖ ESCAPE FROM CUSTODY .27% of defendants in 2010	❖ 18 USC 751: Prisoners in custody or institution or officer. 1930. ❖ 18 USC 752: Instigating or assisting escape. Pre 1909. ❖ 18 USC 753: Rescue to prevent execution. Pre 1909. ❖ 18 USC 755: Officer permitting escape. 1905 ❖ 18 USC 756: Internee of belligerent nation (Escape and rescue of) 1917 ❖ 18 USC 757: Prisoners of war or enemy aliens (Escape and rescue of) 1945. ❖ 18 USC 758: High speed flight from immigration checkpoint. 1996. ❖ 18 USC 1071: Concealing person from arrest. Pre 1909.

	❖ 18 USC 1072: Concealing escaped prisoner. 1930. ❖ 18 USC 1073: Flight to avoid prosecution or giving testimony. 1934. ❖ 18 USC 1074: Flight to avoid prosecution for damaging or destroying any building or property. 1960.
❖ FAILURE TO APPEAR .19% of defendants in 2010	❖ 18 USC 3146. Penalty for failure to appear. 1984.
❖ PERJURY 0% of defendants in 2010 (33 prosecutions)	❖ 18 USC 1621: Perjury. Pre 1909. ❖ 18 USC 1622: Subornation of perjury. Pre 1909. ❖ 18 USC 1623: False declarations before grand jury or court. 1970.
❖ CONTEMPT 0% of defendants in 2010 (44 prosecutions)	❖ 18 USC 401: Power of court (Contempt). 1911. ❖ 18 USC 402: Contempts constituting crimes. 1914. ❖ 18 USC 403: Protection of privacy of child victims and child witnesses. 1990.
❖ IMMIGRATION OFFENSES (all) 28.5% of defendants in 2010	
❖ ALIEN SMUGGLING 3.1% of defendants in 2010	❖ 8 U.S.C. 1324 (a): Smuggling, transporting, encouraging, inducing, and harboring certain aliens. 1952. ❖ 8 USC 1323: Unlawful bringing of aliens into the United States. 1952. ❖ 8 USC 1327: Aiding or assisting certain aliens to enter. 1952. ❖ 8 USC 1328: Importation for immoral purposes. 1952.
❖ IMPROPER ENTRY BY ALIEN 1.5% of defendants in 2010	❖ 8 USC 1325. Improper entry by alien. 1952.
❖ IMPROPER REENTRY BY ALIEN 22.4% of defendants in 2010	❖ 8 USC 1326: Reentry of removed aliens. 1952.
❖ FRAUD AND MISUSE OF VISA/PERMIT 1.5% of defendants in 2010	❖ 18 USC 1546: Fraud and misuse of visas, permits and other documents. 1948. ❖ 8 USC 1325(c) Marriage fraud. 1952, 1986.
❖ OTHER IMMIGRATION OFFENSES 0% (63 prosecutions in 2010)	❖ 8 USC 1306: Failure to register. 1952. ❖ 8 USC 1253: Penalties related to removal. 1952. ❖ 8 USC 1367: Penalties for disclosure of information. 1996. ❖ 8 USC 1324a: Unlawful employment of aliens. 1952. ❖ 8 USC 1324(c): preparation of false application for immigration benefits with intent to conceal. 1996. ❖ 8 USC 1324c: Penalties for document fraud. 1952. ❖ 18 U.S.C. 1546(b): Misuse of valid ID documents, or use of false documents, to gain employment. 1948. ❖ 18 USC 1424: Personation or misuse of papers in naturalization proceedings. 1948. ❖ 18 USC 1425: Procurement of citizenship or naturalization unlawfully. 1948. ❖ 18 USC 1426: Reproduction of naturalization or citizenship papers. 1948. ❖ 18 USC 1427: Sale of naturalization or citizenship papers. 1948. ❖ 18 USC 1428: Surrender of canceled naturalization certificate (refusal to surrender). 1948.

❖ BRIBERY .15% of defendants in 2010	❖ 18 USC 201: Bribery of public officials and witnesses; 1962 ❖ 18 USC 203: Compensation to members of Congress in matters affecting government. 1962. ❖ 18 USC 209: Salary of US government official payable only by the US. 1962 ❖ 18 USC 210: Offer to procure appointive public office. 1926. ❖ 18 USC 211: Acceptance or solicitation to obtain appointive public office. 1926. ❖ 18 USC 212: Offer of loan or gratuity to bank examiner. 2003 ❖ 18 USC 213: Acceptance of loan or gratuity by bank examiner. 2003. ❖ 18 USC 214: Offer for procurement of federal reserve bank loan and discount of commercial paper. 1913. ❖ 18 USC 215: Receipt of commissions or gifts for procuring loans. 1913. ❖ 18 USC 217: Acceptance of consideration for adjustment of farm indebtedness. 1944. ❖ 18 USC 219: Officers and employees acting as agents of foreign principals. 1966. ❖ 18 USC 224: Bribery in sporting contests. 1964. ❖ 18 USC 225: Continuing financial crimes enterprise (Bribery, graft and conflicts of interest). 1990. ❖ 18 USC 226: Bribery affecting port security. 2006. ❖ 18 USC 227: Wrongfully influencing a private entity's employment decisions by a Member of Congress. 2007. ❖ 18 USC 666: Federal programs bribery. 1984.
❖ MONEY LAUNDERING 1% of defendants in 2010	❖ 18 USC 1956: Money Laundering. 1986. ➢ Promotion of specified unlawful activity. (a)(1)(A)(i) ➢ Intent to evade taxes. (a)(1)(A)(ii) ➢ Intent to conceal proceeds of unlawful activity (a)(1)(B)(i) ➢ Intent to evade currency reporting requirements (a)(1)(B)(ii) ➢ 1956 (h): Conspiracy and Criminal international transfers of funds ❖ 18 USC 1957: Engaging in monetary transactions in property derived from specified unlawful activity. 1986.
❖ RICO .14% of defendants in 2010	❖ 18 USC 1962. RICO. 1970. ➢ (a) use or invest, directly or indirectly, any part of such income ➢ (b) acquire or maintain, directly or indirectly, any interest in or control of any enterprise ➢ (c) conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs ➢ (d) conspiracy.
❖ RACKETEERING—GENERAL 0% of defendants in 2010 (61 prosecutions total)	❖ 18 USC 1951: Interference with commerce by threats or violence. 1946. (Hobbs Act) ❖ 18 USC 1952: Interstate and foreign travel or transportation in aid of racketeering enterprises. (Travel Act.) 1961. ❖ 18 USC 1953: Interstate transportation of wagering paraphernalia. 1961. ❖ 18 USC 1954: Offer, acceptance, or solicitation to influence operations of employee benefit plan. 1962. ❖ 18 USC 1958: Use of interstate commerce facilities in the commission of murder-for-hire. 1984. ❖ 18 USC 1960: Prohibition of unlicensed money transmitting businesses. 1992.

❖ EXTORTION AND THREATS .15% of defendants in 2010	❖ 18 USC 871: Threats against president and successors to presidency. 1917. ❖ 18 USC 872: Extortion by officers or employees of the US. Pre 1909. ❖ 18 USC 873: Blackmail. Pre 1909. ❖ 18 USC 875: Interstate communications. 1934. ❖ 18 USC 876: Mailing threatening communications. 1932. ❖ 18 USC 877: Mailing threatening communications from foreign country. 1932. ❖ 18 USC 878: Threats and extortion against foreign officials. 1976. ❖ 18 USC 879: Threats against former Presidents and certain other persons. 1982. ❖ 18 USC 880: Receiving the proceeds of extortion. 1994. ❖ 18 USC 892: Making extortionate extensions of credit. 1968. ❖ 18 USC 893: Financing extortionate extensions of credit. 1968. ❖ 18 USC 894: Collection of extensions of credit by extortionate means. 1968. ❖ 18 USC 874: Kickbacks from public works employees. 1934.
❖ GAMBLING AND LOTTERY 0% of defendants in 2010	❖ 18 USC 1955: Prohibition of illegal gambling business. 1970. ❖ 18 USC 1082: Gambling ships. 1949. ❖ 18 USC 1083: Transportation between shore and ship; penalties. 1949. ❖ 18 USC 1084: Transmission of wagering information. 1961. ❖ 18 USC 1301: Importing or transporting lottery tickets. Pre 1909 ❖ 18 USC 1302: Mailing lottery tickets or related matter. Pre 1909. ❖ 18 USC 1303: Postmaster or employee as lottery agent. Pre 1909. ❖ 18 USC 1304: Broadcasting lottery information. 1934. ❖ 18 USC 1306: Participation by financial institutions (Lottery). 1967.
❖ FAILURE TO PAY CHILD SUPPORT 0% of defendants in 2010	❖ 18 USC 228: Failure to pay child support obligations (with respect to a child who lives in another state). 1992.
❖ OTHER GENERAL OFFENSES (selected) .65% of defendants in 2010	❖ 18 USC 204: Practice in US courts by members of Congress (conflicts of interest). 1962. ❖ 18 USC 205: Activities of officers and employees in claims against the government (conflicts of interest). 1962. ❖ 18 USC 207: Restrictions on former officers, employees and elected officials of the executive and legislative branches (conflicts of interest). 1962. ❖ 18 USC 208: Acts affecting a personal financial interest (conflicts of interest). 1962. ❖ 18 USC 371: Conspiracy. Pre 1909. ❖ 18 USC 611: Voting by aliens. 1996. ❖ 18 USC 1429: Penalties for neglect or refusal to answer subpoena. (Nationality). 1952. ❖ 18 USC 1460: Possession with intent to sell, and sale of, obscene matter on federal property. 1988. ❖ 18 USC 1461: Mailing obscene or crime inciting matter. Pre 1909. ❖ 18 USC 1462: Importation or transportation of obscene matter. Pre 1909. ❖ 18 USC 1463: Mailing indecent matter on wrappers or envelopes. Pre 1909. ❖ 18 USC 1464: Broadcasting obscene language. 1934. ❖ 18 USC 1465: Transportation of obscene matters for sale or distribution. 1955. ❖ 18 USC 1466: Engaging in business of selling or transferring obscene

	matter. 1988. ❖ 18 USC 1466A: Obscenity / sexual abuse of children. 2003. ❖ 18 USC 1468: Distributing obscene material by cable or subscription television. 1988. ❖ 18 USC 1470: Transfer of obscene material to minors. 1998. ❖ 18 USC 1752: Restricted building or grounds. Temporary residences and offices of president and others. 1971. ❖ 40 USC 5104: Unlawful activities (Capitol grounds.) 2002. ❖ 18 USC 2233: Rescue of seized property (unauthorized) – searches and seizures. Pre-1909. ❖ 18 USC 2232: Destruction or removal of property to prevent seizure. Pre-1909. ❖ 2 USC 194 or 92: Certification of failure to testify or produce; Congress. 1936. ❖ 18 USC 2511: Interception of wire, oral or electronic communications. 1968.
❖ REGULATORY OFFENSES (selected) 2 % of defendants in 2010	
❖ CIVIL RIGHTS 113 prosecutions .1% of defendants in 2010	❖ 18 USC 241: Conspiracy against rights. Pre 1909. ❖ 18 USC 242: Deprivation of rights under color of law. Pre 1909. ❖ 18 USC 243. Exclusion of jurors on account of race or color. 1875. ❖ 18 USC 244. Discrimination against person wearing uniform of armed forces. 1911. ❖ 18 USC 245 (b): Federally protected activities (by force or threat of force, intimidates or interferes with any person because he is voting). 1968. ❖ 18 USC 246: Deprivation of relief benefits. 1976. ❖ 18 USC 247: Damage to religious property; obstruction of persons in the free exercise of religious beliefs. 1988. ❖ 18 USC 248: Freedom of access to clinic entrances. 1994. ❖ 18 USC 249: Hate crimes acts. 2009. ❖ 18 USC 592: Troops at polls. Pre 1909. ❖ 18 USC 593: Interference by armed forces (Elections and Political Activities) Pre 1909 ❖ 18 USC 594: Intimidation of voters. 1939 ❖ 18 USC 595: Interference by federal or state employees (Elections and Political Activities). 1939. ❖ 42 USC 3631: Fair Housing – prevention of intimidation – Violations; penalties. 1968.
❖ COPYRIGHT 0% of defendants in 2010 (60 prosecutions)	❖ 18 USC 2319: Criminal infringement of copyright. 1982 ❖ 18 USC 2319A: Unauthorized fixation of and trafficking in sound recordings and music videos of live musical performances. 1994. ❖ 18 USC 2319B: Unauthorized recording of motion pictures in a motion picture exhibition facility. 2005 ❖ 17 USC 506(a). Criminal infringement. 1976.
❖ FOOD AND DRUG 0% of defendants in 2010 (65 prosecutions)	❖ 21 USC 675: Assaulting, resisting, or impeding certain persons; murder; protection of such persons. 1907. (Meat inspection) 1907 ❖ 21 USC 676: Violations. (Meat inspection.) 1907. ❖ 21 USC 461: Offenses and punishment (poultry inspection.) 1957. ❖ 21 USC 1041: Egg products inspection. Enforcement provisions. 1970. ❖ 21 USC 101: Importation of animals. 1890.

	❖ 18 USC 1365: Tampering with consumer products and labels (Malicious mischief). 1983 ❖ 21 USC 331. Prohibited acts. (FDA Act). 1938, 1941.
❖ HAZARDOUS WASTE TREATMENT, DISPOSAL, AND STORAGE 0% of defendants in 2010 (43 prosecutions)	❖ 33 USC 1251. Water pollution prevention and control. 1972. ❖ 33 USC 1401. Ocean dumping regulations. 1972. ❖ 33 USC 1901. Pollution from ships. 1980. ❖ 42 USC 300f. Public water systems. 1944, 1974. ❖ 49 U.S.C. §5104(b). Representation and tampering. 1994. ❖ 49 USC 5124. Criminal penalty. (Transportation of hazardous material). 1994.
❖ TELEGRAPH, TELEPHONE, AND RADIOGRAPH 0% of defendants in 2010 (7 prosecutions)	❖ 47 U.S.C. § 223. Obscene or harassing telephone calls. (DC or interstate commerce.) 1934. ❖ 47 USC 13. Violations, punishment, action for damages. 1888. ❖ 47 USC 21: Willful injury to submarine lines. 1888 ❖ 47 USC 37. Violations; punishments. 1921. ❖ 47 USC 25. Fishing vessels. 1888. ❖ 47 USC 227. Restrictions on use of telephone equipment. 1934.
❖ NATIONAL DEFENSE 0% of defendants in 2010 (34 prosecutions)	22 USC 611. Registration of foreign agents. 1938. 18 USC 219. Agents of foreign principals. 1966. 18 USC 831: Prohibited transactions involving nuclear materials. 1982. 18 USC 792: Harboring or concealing persons. 1917. 18 USC 793: Gathering, transmitting or losing defense information. 1917. 18 USC 794: Gathering or delivering defense information to aid foreign government. 1917. 18 USC 795: Photographing and sketching defense installations. 1938. 18 USC 796: Use of aircraft for photographing defense installations. 1938. 18 USC 797: Publication and sale of photographs of defense installations. 1938. 18 USC 798: Disclosure of classified information. 1951. 18 USC 798A: Temporary extension of section 794. 1953. 18 USC 799: Violation of regulations of National Aeronautics and Space Administration. 1958. 18 USC 1831: Economic espionage. 1996. 42 USC 2122. Prohibitions governing atomic weapons. 1946. 18 USC 175. Prohibitions with respect to biological weapons. 1990. ❖ Atomic Energy Act ➢42 U.S.C. 2272. Violation of specific sections. 1946. ➢42 USC 2273. Violation of sections. 1946. ➢42 USC 2274. Communication of restricted data. 1954. ➢42 USC 2275. Receipt of restricted data. 1954. ➢42 USC 2276. Tampering with restricted data. 1954. ❖ Sabotage. 18 USC 2152 – 56. 1918. ❖ 18 USC 2383. Rebellion or insurrection. Pre 1909. ❖ 18 USC 2384. Seditious conspiracy. Pre 1909. ❖ 18 USC 2385. Advocating overthrow of government. 1940. ❖ 18 USC 2386. Registration of certain organizations. 1940. ❖ 18 USC 2387. Activities affecting armed forces. 1940. ❖ 50 U.S.C. §§ 851 to 857. Registration of certain persons trained in foreign espionage systems. 1956.

❖ ANTITRUST 0% of defendants in 2010	❖ 15 USC 1. Trusts, etc., in restraint of trade illegal; penalty. 1890.
❖ LABOR 0 % of defendants in 2010 (88 prosecutions)	❖ 29 USC 186: Union bribery and gratuities (restrictions on financial transactions.) 1947. ❖ 29 USC 501 (c): Embezzlement. 1959. ❖ 18 USC 1231: Transportation of strikebreakers. 1948. ❖ 29 U.S.C. § 1801. Migrant and seasonal worker protection. 1983. ❖ 29 U.S.C. § 666. Civil and criminal penalties. 1970. ❖ 29 USC 1131. Criminal penalties. (Benefit rights.) 1974. ❖ 29 USC 1141. Coercive interference. 1974. ❖ 29 USC 530: Deprivation of rights by violence. 1959. ❖ 45 USC 151. Railway labor. 1926. ❖ 45 USC 152. Duties. 1926. ❖ 29 U.S.C. § 216(a) Fair Labor Standards Act. 1938. ❖ 29 U.S.C. § 162 Interference with National Labor Relations Board Agent. 1935. ❖ 29 U.S.C. § 461. Labor Organization Under Trusteeship. 1959. ❖ 29 USC 463. Labor Organization Under Trusteeship. 1959. ❖ 29 U.S.C. § 502 Bonding of Officers and Employees of Labor Organizations. 1959. ❖ 29 U.S.C. § 503 Loans to Union Officers and Payment of Fines by Unions and Employers. 1959. ❖ 29 U.S.C. § 439. Violations and penalties. (Reporting and disclosure). 1959. ❖ 29 USC 1111. Prohibition from holding office. 1974. ❖ 29 USC 1131. Criminal penalties. (ERISA). 1974.
❖ GAME AND CONSERVATION .2% of defendants in 2010 (258 prosecutions)	❖ 18 USC 47: Use of aircraft or vehicles to hunt certain wild horses or burros. 1959. ❖ 16 USC 5606: NORTHWEST ATLANTIC FISHERIES CONVENTION – prohibited acts and penalties. 1995. ❖ 16 USC 5505: High seas fishing compliance – unlawful activities.1995. ❖ 16 USC 5106 (e): ATLANTIC COASTAL FISHERIES COOPERATIVE MANAGEMENT – prohibited acts during moratorium. 1993. ❖ 16 USC 5009: NORTH PACIFIC ANADROMOUS STOCKS CONVENTION – unlawful activities. 1992. ❖ 16 USC 3637: Pacific Salmon fishing – prohibited acts and penalties. 1985. ❖ 16 USC 2435: ANTARCTIC MARINE LIVING RESOURCES CONVENTION. Unlawful activities. 1984. ❖ 16 USC 2403: Antarctic conservation – prohibited acts. 1978. ❖ 16 USC 1436: Marine sanctuaries – prohibited activities. 1984. ❖ 16 USC 1417: INTERNATIONAL DOLPHIN CONSERVATION PROGRAM. Prohibitions. 1992. ❖ 16 USC 973c: South Pacific Tuna fishing. Prohibited acts. 1988. ❖ 15 USC 1825: Protection of horses. Violations and Penalties. 1970. ❖ 16 USC 1437: Marine Sanctuaries. 1984. ❖ 30 USC 1461: Mineral lands and mining – prohibited acts. 1980. ❖ 7 USC 2146 (b): Penalties for interfering with official duties (transportation, sale and handling of certain animals) 1966 ❖ 16 USC 1857: Fishery conservation and management – prohibited acts. 1976.

	❖ 16 USC 6906: WESTERN AND CENTRAL PACIFIC FISHERIES CONVENTION – prohibited acts. 2007. ❖ Fish and Wildlife Coordination Act, 16 U.S.C. § 661 et seq. 1934. ❖ Bald and Golden Eagle Protection Act, 16 U.S.C. § 668 et seq. 1940, 1959 ❖ National Wildlife Refuge System Administration Act, 16 U.S.C. § 668dd et seq. 1966. ❖ Sikes Act, 16 U.S.C. § 670a et seq. 1960, 1974. ❖ Northern Pacific Halibut Act of 1982, 16 U.S.C. § 773 et seq. 1982. ❖ Whaling Convention Act, 16 U.S.C. § 916 et seq. 1970. ❖ Fur Seal Act of 1966, 16 U.S.C. § 1151 et seq. 1966, 1983 ❖ Marine Mammal Protection Act, 16 U.S.C. § 1361 et seq. 1972. ❖ Endangered Species Act of 1973, 16 U.S.C. § 1531 et seq. 1973. ❖ Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. § 1801 et seq. 1976. ❖ Antarctic Conservation Act, 16 U.S.C. § 2401 et seq. 1978. ❖ Antarctic Marine Living Resources Convention, 16 U.S.C. § 2431 et seq. 1984. ❖ Lacey Act Amendments of 1981 ("Lacey Act"). 16 U.S.C. § 3371 et seq. 1981. ❖ Atlantic Salmon Convention Act, 16 U.S.C. § 3601 et seq. 1982. ❖ Pacific Salmon Fishing Act, 16 U.S.C. § 3631 et seq. 1985. ❖ African Elephant Conservation Act, 16 U.S.C. § 4201 et seq. 1988. ❖ Wild Exotic Bird Conservation Act, 16 U.S.C. § 4901 et seq. 1992. ❖ North Pacific Anadromous Stocks Convention Act, 16 U.S.C. § 5001 et seq. 1992. ❖ Atlantic Coastal Fisheries Cooperative Management Act, 16 U.S.C. § 5101 et seq. 1933. ❖ Rhinoceros and Tiger Conservation Act, 16 U.S.C. § 5301 et seq. 1994. ❖ High Seas Fishing Compliance Act, 16 U.S. C. § 5501 et seq. 1995. ❖ Northwest Atlantic Fisheries Convention Act, 16 U.S.C. § 5601 et seq. 1995. ❖ Hunting, fishing, trapping; disturbance or injury on wildlife refuges, 18 U.S.C. § 41. 1905. ❖ Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), 7 U.S.C. § 136 et seq. 1948, 1978 ❖ Energy Supply and Environmental Coordination Act, 15 U.S.C. § 791 et seq. 1974. ❖ Toxic Substances Control Act (TSCA), 15 U.S.C. § 2601 et seq. 1976. ❖ Surface Mining Control and Reclamation Act, 30 U.S.C. § 1201 et seq. 1977. ❖ Protection of Navigable Waters and of Harbor and River Improvements Generally. 33 U.S.C. § 401. Pre 1909. ❖ Federal Water Pollution Control Act (also known as the Clean Water Act), 33 U.S.C. § 1251 et seq. 1948, 1972 ❖ Marine Protection Research and Sanctuaries Act. 33 U.S.C. § 1401 et seq. 1972. ❖ Deepwater Port Act, 33 U.S.C. § 1501 et seq. 1975. ❖ Act to Prevent Pollution From Ships, 33 U.S.C. § 1901 et seq. 1980. ❖ Safe Drinking Water Act, 42 U.S.C. § 300f et seq. 1974. ❖ Solid Waste Disposal Act, 42 U.S.C. § 6901 et seq. 1976. ❖ Clean Air Act, 42 U.S.C. § 7401 et seq. 1970.

	❖ Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. § 9601 et seq. 1980. ❖ Emergency Planning and Community Right to Know Act. 42 U.S.C. § 11001 et seq. 1986. ❖ Outer Continental Shelf Lands Act, 43 U.S.C. § 1331. 1953. ❖ Federal Hazardous Material Transportation Law ➢ 49 U.S.C. § 5104. Tampering. 1994. ➢ 49 USC 5105. Transportation of certain radioactive material. 1994. ❖ 18 USC 46: Transportation of water hyacinths. 1956.
❖ NATIONAL PARKS .1% of defendants in 2010 (151 prosecutions)	❖ 16 U.S.C. § 3. Rules and regulations of national parks. 1916. ❖ 16 U.S.C. § 26. Regulations for hunting and fishing in park. 1894. ❖ 16 U.S.C. §413. Offenses relating to structures and vegetation. 1897. ❖ 16 USC 414. Trespassing for hunting or shooting. 1897. ❖ 16 U.S.C. § 470ee. Prohibited acts and penalties. 1979. ❖ 16 U.S.C.§ 45e. Violations of park regulations. 1926. ❖ 16 USC 60. Hunting or fishing prohibited. 1920. ❖ 16 USC 63. Transportation of birds, animals or fish. 1920. ❖ 16 USC 98. Protection of game and fish. (Mount Rainier) 1916. ❖ 16 U.S.C. 114. Removal, disturbance, destruction, or molestation of ruins. (Mesa Verde). 1906. ❖ 16 U.S.C. 425g. Protection of monuments. 1927.
❖ CUSTOMS .1% of defendants in 2010 (116 prosecutions)	❖ 18 USC 42: Importation or shipment of injurious mammals, birds, fish, amphibian, and reptiles; permits, specimens for museums; regulations. Pre 1948. ❖ 18 USC 541: Entry of goods falsely classified. Pre 1909. ❖ 18 USC 542: Entry of goods by means of false statements. 1930. ❖ 18 USC 543: Entry of goods for less than legal duty. Pre 1909. ❖ 18 USC 544: Relanding of goods. 1930. ❖ 18 USC 545: Smuggling goods into US. 1930. ❖ 18 USC 546: Smuggling goods into foreign countries. 1935. ❖ 18 USC 547: Depositing goods in buildings on boundaries. 1930. ❖ 18 USC 548: Removing or repacking goods in warehouse. 1930. ❖ 18 USC 549: Removing goods from customs custody, breaking seals. 1930. ❖ 18 USC 550: False claim for refund of duties. 1930. ❖ 18 USC 551: Concealing or destroying invoices or other papers. Pre 1909. ❖ 18 USC 552: Officers aiding importation of obscene or treasonous books and articles. 1930. ❖ 18 USC 553(a)(1): Importation or exportation of stolen motor vehicles, off highway mobile equipment, vessels or aircraft; (a)(2): importation of motor vehicles, etc., with knowledge that the identification number has been removed. 1984.
❖ POSTAL SERVICE .1 % of defendants in 2010 (98 prosecutions)	❖ 18 USC 1693: Carriage of mail generally. Pre 1909. ❖ 18 USC 1695: Carriage of matter out of mail on vessels. Pre 1909 ❖ 18 USC 1696: Private express for letters and packets. Pre 1909 ❖ 18 USC 1700: Desertion of mails. Pre 1909. ❖ 18 USC 1701: Obstruction of mails. Pre 1909 ❖ 18 USC 1702: Obstruction of correspondence. Pre 1909. ❖ 18 USC 1703: Delay or destruction of mail or newspapers. Pre 1909. ❖ 18 USC 1704: Keys or locks stolen or reproduced. Pre 1909. ❖ 18 USC 1705: Destruction of letter boxes or mail. Pre 1909. ❖ 18 USC 1706: Injury to mail bags. Pre 1909.

	❖ 18 USC 1711: Misappropriation of postal funds. Pre 1909. ❖ 18 USC 1712: Falsification of postal returns to increase compensation. Pre 1909. ❖ 18 USC 1715: Mailing firearms. 1927. ❖ 18 USC 1716: Mailing of injurious articles. Pre 1909. ❖ 18 USC 1716A: Nonmailable locksmithing devices and motor vehicle master keys. 1968. ❖ 18 USC 1716B: Nonmaileable plants. 1988 ❖ 18 USC 1716C: False agricultural certifications.1988. ❖ 18 USC 1716D: Nonmaileable injurious animals, plant pests, plants, fish, wildlife. 1994. ❖ 18 USC 1717: Letters and writing as nonmailable. 1917. ❖ 18 USC 1720: Canceled stamps and envelopes. Pre 1909. ❖ 18 USC 1721: Sale or pledge of stamps. Pre 1909. ❖ 18 USC 1726: Postage collected unlawfully. Pre 1909. ❖ 18 USC 1728: Weight of mail increased fraudulently. Pre 1948. ❖ 18 USC 1729: Post office conducted without authority. Pre 1909. ❖ 18 USC 1730: Uniforms of carriers (falsely wearing). Pre 1909. ❖ 18 USC 1731: Vehicles falsely labeled as carriers. Pre 1948. ❖ 18 USC 1732: Approval of bond or sureties by postmaster. Pre 1948 ❖ 18 USC 1733: Mailing periodicals without prepaying postage. 1960. ❖ 18 USC 1735: Sexually oriented advertisements. 1970. ❖ 18 USC 1737: Manufacturer of sexually related mail matter. 1970.
❖ REPORTING OF MONETARY TRANSACTIONS .3% of defendants in 2010 (301 prosecutions)	❖ 31 USC 5313: Reports on coin and currency transactions. 1970 ❖ 31 USC 5314: Records and reports on foreign financial agency transactions. 1970. ❖ 31 USC 5215: Reports on foreign currency transactions. 1973. ❖ 31 USC 5316: Reports on exporting and importing monetary instruments. 1970. ❖ 31 USC 5318: Compliance, exemptions, and summons authority. 1970. ❖ 31 USC 5318A: Special measures. 2001. ➢5322(b) = willful failure of any of these regulations = (felony). 1970. ❖ 31 USC 5324: Structuring transactions to evade reporting requirement. 1986. ❖ 31 USC 5332: Bulk cash smuggling into or out of the United States. 2001. ❖ 31 USC 5331: Reports related to currency received in nonfinancial transactions. 2001. ❖ 26 USC 6050I: Returns relating to cash received in trade or business. 1984.
❖ MIGRATORY BIRD .13% of defendants in 2010 (132 prosecutions)	❖ Migratory Bird Treaty Act, 16 U.S.C. § 703. 1918. ❖ Migratory Bird Conservation Act, 16 U.S.C. § 715. 1929.
❖ MARITIME AND SHIPPING .12% of defendants in 2010 (119 prosecutions)	❖ 46 USC 11501: Penalties for specified offenses. (Shipping – vessels and seamen) 1983. ❖ 46 USC 3718 (b): Penalties (CARRIAGE OF LIQUID BULK DANGEROUS CARGOES). 1983. ❖ 33 USC 1321: Oil and hazardous substance liability. 1972. ❖ 18 USC 2271. Conspiracy to destroy vessels. Pre 1948. ❖ 18 USC 2272. Destruction of vessel by owner. Pre 1948 ❖ 18 USC 2273. Destruction of vessel by nonowner. Pre 1948

	❖ 18 USC 2274. Destruction or misuse of vessel by person in charge. 1917 ❖ 18 USC 2275. Firing or tampering with vessel. 1917 ❖ 18 USC 2276. Breaking and entering vessel. Pre 1909 ❖ 18 USC 2277. Explosives or dangerous weapons aboard vessels. 1941 ❖ 18 USC 2278. Explosives on vessels carrying steerage passengers. 1882. ❖ 18 USC 2280. Violence against maritime navigation. 1994 ❖ 18 USC 2281. Violence against maritime fixed platforms. 1994 ❖ 18 USC 2282A. Devices or dangerous substances in waters of the United States. 2006 ❖ 18 USC 2282B. Violence against aids to maritime navigation. 2006 ❖ 18 USC 2283. Transportation of chemical, biological, or radioactive or nuclear materials. 2006. ❖ 18 USC 2284. Transportation of terrorists. 2006 ❖ 18 USC 2285. Operation of submersible vessel or semi-submersible vessel without nationality. 2008.
❖ AIRCRAFT REGULATIONS 0 % of defendants in 2010 (67 prosecutions)	❖ 18 USC 32 (a), (b), (c): Destruction of aircraft or aircraft facilities. 1956. ❖ 18 USC 35 (b): Imparting or conveying false information (aircraft and motor vehicles offenses). 1956. ❖ 49 USC 46504: Interference with flight crew members and attendants. (Assault or intimidation of.) 1994. ❖ 49 USC 46503: Interference with security screening personnel. 2001. ❖ 49 USC 46502: Aircraft piracy. 1994. ❖ 49 USC 46507. False information and threats. 1994. ❖ 49 USC 46505. Carrying a weapon or explosive on an aircraft. 1996. ❖ 49 USC 46506. Application of certain criminal laws to acts on aircraft. 1994. ❖ 19 USC 1590: Aviation smuggling. 1930.
❖ OTHER REGULATORY OFFENSES (selected) .37% of defendants in 2010 (367 prosecutions)	❖ 18 USC 334: Issuance of federal reserve or national bank notes. 1935. ❖ 18 USC 435: Contracts in excess of specific appropriation (federal employees regulations). Pre 1909. ❖ 18 USC 436: Convict labor contracts. 1887. ❖ 18 USC 440: Mail contracts. Pre 1909. ❖ 18 USC 441: Postal supply contracts. 1912. ❖ 18 USC 442: Printing contracts. 1895. ❖ 18 USC 443: War contracts (willfully destroys records of war contractor relating to negotiation of a war contract of $25,000 or more). 1944. ❖ 18 USC 596: Polling of armed forces. 1942. ❖ 18 USC 597: Expenditures to influence voting. 1925. ❖ 18 USC 598: Coercion by means of relief appropriations. 1939. ❖ 18 USC 599: Promise of appointment by candidate. 1925. ❖ 18 USC 600: Promise of employment or other benefit for political activity. 1939. ❖ 18 USC 601: Deprivation of employment or other benefit for political contribution. 1939. ❖ 18 USC 602: Solicitation of political contributions. Pre 1948. ❖ 18 USC 603: Making political contributions. Pre 1909. ❖ 18 USC 604: Solicitation from persons on relief. 1939. ❖ 18 USC 605: Disclosure of names of persons on relief. 1939. ❖ 18 USC 606: Intimidation to secure political contributions. Pre 1948.

	❖ 18 USC 1262: Transportation into state prohibiting sale (Liquor Traffic). 1936. ❖ 18 USC 1263: Marks and labels on packages (Liquor Traffic). Pre 1909. ❖ 18 USC 1264: Delivery to consignee (Liquor Traffic). Pre 1909. ❖ 18 USC 1265: COD shipments prohibited (Liquor Traffic). 1994. ❖ 18 USC 2342: Trafficking in contraband cigarettes. 1978 ❖ 18 USC 2343: Record Keeping and reporting (cigarettes). 1978 ❖ 7 USC 511i: Offenses (interference with tobacco inspection). 1935. ❖ 7 USC 473c-1: Offenses in relation to sampling of cotton for classification. 1927. ❖ 7 USC 87b: Prohibited Acts (grain standards – interfering with inspection). 1916.
❖ DRUNK DRIVING .16% of defendants in 2010	❖ 18 USC 342: Operation of common carrier under the influence of alcohol or drugs. 1986. ❖ 18 USC 13: Assimilative Crimes. (Laws of states adopted for areas within federal jurisdiction.) Pre 1909.
❖ OTHER TRAFFIC OFFENSES 2.8% of defendants in 2010	❖ 18 USC 13: Assimilative Crimes. (Laws of states adopted for areas within federal jurisdiction.) Pre 1909.