

Federalizing Crime: Assessing the Impact on the Federal Courts

By SARA SUN BEALE

ABSTRACT: This article examines the history of federal criminal jurisdiction and criminal enforcement, and reviews federal caseload statistics. The federal criminal caseload grew dramatically between 1980 and the mid-1990s, but this increase tells only part of the story. The federal criminal caseload has fluctuated widely over the past two decades, and the number of criminal cases today is about the same as it was in the early 1970s. Although criminal cases now account for only one-fifth of the federal caseload, they take a large and disproportionate share of federal judicial resources. In more than one-third of federal judicial districts, criminal cases now compose more than half of the trial docket. The increased allocation of judicial resources to criminal cases reflects not only changes in the kinds of criminal cases being prosecuted but factors including more time-consuming sentencing procedures and a higher conviction rate.

Sara Sun Beale is professor of law at Duke University School of Law, where her teaching includes a course in federal criminal law. She earlier served in the Department of Justice's Office of Legal Counsel and the Office of the Solicitor General. She has also served as a reporter for the Federal Courts Study Committee and a federal-state working group studying federal criminal jurisdiction. Among her publications, she is the coauthor, with Norman Abrams, of Federal Criminal Law and Its Enforcement (2d ed., 1993).

THERE is substantial support, particularly among federal judges, for the view that the increasing criminal caseload threatens the functioning of the federal courts. In 1990, the Federal Courts Study Committee concluded that the federal courts are in a state of "impending crisis" and that their most pressing problems arise from the expansion of the federal criminal docket, particularly the unprecedented number of federal drug prosecutions.¹ This view has not gone unchallenged. Critics argue that the federal courts have ample resources to handle their dockets—resources that far exceed those available to the state courts—and that judicial objections to legislative expansion of federal criminal jurisdiction smack of elitism and a disdain for drug and firearms cases.²

This article seeks to chart the expansion of federal criminal jurisdiction and the growth in the resources provided to federal investigators and prosecutors, and then to measure the impact of these developments on the functioning of the federal courts.³

THE HISTORICAL DEVELOPMENT OF FEDERAL CRIMINAL JURISDICTION

Federal criminal jurisdiction has expanded dramatically in the 200

years since the drafting of the Constitution.⁴ The original scope of the federal courts' criminal jurisdiction was very narrow, and crime control was left largely to the states. The expansion of federal criminal jurisdiction occurred in stages linked to broader changes in the role of the federal government.

Federal jurisdiction before the Civil War

Until the Civil War, there were only a small number of federal offenses, and they generally dealt with injury to or interference with the federal government itself or its programs. The federal offenses of the time included treason, bribery of federal officials, perjury in federal court, theft of government property, and revenue fraud. Since the federal government was small and it conducted few programs, the list of actions classified as offenses for the protection of federal interests was correspondingly restricted.

Except in those areas where federal jurisdiction was exclusive—the District of Columbia and the federal territories—federal law did not reach crimes against individuals. Crimes against individuals—such as murder, rape, arson, robbery, and fraud—were the exclusive concern of the states. State law defined these offenses, which were prosecuted by state or local officials in the state courts.

1. *Report of the Federal Courts Study Committee*, 2 Apr. 1990, pp. 4, 35.

2. Rory K. Little, "Myths and Principles of Federalization," *Hastings Law Journal*, 46:1029, 1038-45 (1995).

3. For a more extended treatment of the increases in the federal criminal caseload and its impact on the federal courts, see Sara Sun Beale, "Too Many and Yet Too Few: New Principles to Define the Proper Limits for Federal

Criminal Jurisdiction," *Hastings Law Journal*, 46:979 (1995).

4. For a general discussion of the history of federal criminal jurisdiction, see Sara S. Beale, "Federal Criminal Jurisdiction," in *Encyclopedia of Crime and Justice*, 2:775-79.

*The first expansion:
crimes of the mails
and the rails*

The first dramatic expansion of federal criminal jurisdiction occurred immediately after the Civil War. Congress enacted a series of criminal statutes dealing with the misuse of the mails and interstate commerce, including the first federal legislation dealing with subjects that were clearly within the gambit of the states' police powers.

The first federal legislation aimed at the victimization of private citizens was the mail fraud statute, enacted in 1872. It was a response to a variety of fraudulent schemes that bilked large numbers of victims over broad geographic areas by use of the mails.

Other new statutes were enacted in response to the unprecedented postwar growth in interstate transportation and commerce promoted by the railroads. Initially, Congress enacted narrowly tailored provisions in response to problems that could not adequately be dealt with by local officials. For example, interstate transportation of cattle with contagious diseases was made a federal crime. These narrower provisions paved the way for the enactment of much broader provisions, including the Sherman Antitrust Act (1890) and the Interstate Commerce Commission (ICC) Act (1887). The ICC Act was especially significant because it set the pattern for later legislation, establishing a federal administrative agency, a regulatory framework, and a comprehensive range of criminal as well as civil penalties. This pattern was followed, for example, in the Fed-

eral Food, Drug, and Cosmetic Act (1906), which established the Food and Drug Administration.

The new federal legislation was controversial because it extended into areas previously the exclusive province of state law. In a pivotal decision issued in 1903, a sharply divided Supreme Court upheld the constitutionality of a federal law making it a crime to transport lottery tickets across state lines.⁵ The Court concluded that Congress could employ its power to regulate interstate commerce to assist the states and supplement state law, which might otherwise be overwhelmed.

*Prohibition, the depression,
and the New Deal*

Prohibition, the Great Depression, and the New Deal spurred the next major period of expansion for federal criminal jurisdiction.

The Eighteenth Amendment prohibited the sale or distribution of liquor and explicitly granted "concurrent" enforcement authority to the states and the federal government. Prohibition resulted in a phenomenal increase in the number of federal prosecutions in the 1920s and 1930s. In the peak year, 1932, there were 65,960 Prohibition-related criminal cases in the federal courts.⁶

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

5. *Champion v. Ames*, 188 U.S. 321 (1903).

6. Edward Rubin, "A Statistical Study of Federal Criminal Prosecutions," *Law and Contemporary Problems*, 1:494, 497 (tab. 1) (1934).

Depression. In 1937 a blue-ribbon congressional committee concluded that criminal activity was rampant and the states were incapable of responding to it.⁷ Responding to this alarm and fully conscious that it was extending federal law to matters previously left to the states, Congress enacted a series of federal crimes that targeted violence against private individuals and businesses. The new federal offenses included bank robbery; extortion and robbery affecting interstate commerce; interstate transmission of extortionate communications; interstate flight to avoid prosecution; and interstate transportation of stolen property. During the same period, Congress also enacted the Lindbergh kidnapping law, the federal securities laws, and the first federal firearms legislation. These enactments reflected a willingness on the part of the Congress that had enacted the New Deal social and economic legislation to assert jurisdiction over an increasingly broad range of conduct clearly within the traditional police powers of the states.

Congress also returned repeatedly to the pattern established in the ICC Act, setting up comprehensive regulatory schemes including criminal penalties. An early example was the comprehensive regulation of national labor relations, including the adoption of criminal penalties for conduct such as extortion or bribery of union officials and embezzlement or graft in connection with union funds. As the scope of federal regulatory activities expanded, the scope of federal criminal laws extended as well. Fed-

eral criminal penalties were included in the new regulatory schemes dealing with a wide range of topics, such as occupational health and safety and air and water pollution.

The Supreme Court decisions upholding the New Deal economic legislation established that congressional authority over commerce extended to local activities that affected interstate commerce. This expansive interpretation of federal authority laid the groundwork for later criminal statutes that swept even more broadly.

*More federal crimes based
on the commerce clause*

The modern phase of federal criminal jurisdiction began in the 1960s and 1970s, when Congress relied upon the commerce power to enact criminal provisions targeting organized crime, illegal drugs, and violence, while continuing to employ criminal sanctions for a wide variety of other social ills.

A new perception developed that organized crime was a significant national problem and that the federal government should play a leading role in fighting it. The first federal organized crime statute, passed in 1961, reached only persons who had traveled across state lines in support of racketeering activity. Next, Congress made all extortionate credit collection, or loan-sharking, a federal crime based on its finding that loan-sharking as a class of activity provided funds for organized crime. This statute broke new ground because it did not require any showing of any interstate travel or impact on commerce in an individual prosecution,

7. U.S., Congress, Senate, S. Rep. No. 1189, 75th Cong., 1st sess., 1937, p. 38.

and thus it could reach even the smallest local loan-sharking transaction. Congress also relied upon the commerce power to enact the Racketeer Influenced and Corrupt Organizations Act, which provides for heavy penalties, forfeiture, and private treble-damage actions.

A comprehensive federal drug control statute was enacted in 1970. This statute reached all controlled substances, even those possessed or distributed locally, based upon a congressional finding that federal control of the intrastate aspects of drug trafficking is essential to control of the interstate aspects. Subsequently, federal antidrug legislation added new drug crimes—such as possession within 1000 feet of a school—and increased the penalties for existing offenses. In the 1980s and 1990s, Congress buttressed the drug and tax laws with criminal statutes dealing with currency reporting and money laundering.

Crimes of violence and other new federal offenses

The 1980s and 1990s brought increased public concern with violent crime, and Congress responded with the enactment of a number of new federal offenses—such as carjacking and new firearms offenses—which it based upon the commerce clause.⁸

8. The Supreme Court's 5-to-4 decision in *United States v. Lopez*, 115 S. Ct. 1624 (1995), held that the Gun Free School Zones Act exceeded Congress's power under the commerce clause. See generally Kathleen F. Brickey, "The Commerce Clause and Federalized Crime: A Tale of Two Thieves," this issue of *The Annals of the American Academy of Political and Social Science* (reading *Lopez* narrowly). Although the decision is narrowly drawn, it may

Congress also enacted legislation specifically aimed at violent career criminals and penalty-enhancement provisions. The 1994 Crime Bill authorized the death penalty for more than sixty federal offenses.

While the most highly publicized new federal offenses of the 1980s and early 1990s dealt with crimes of violence, during this period Congress also created new federal crimes to deal with a variety of other social ills. These crimes du jour included odometer tampering, the failure to pay child support, computer fraud, and the disruption of laboratories where research on animals is performed.

3000 federal crimes

In general, Congress simply added each new provision to the statutes already on the books. The last recodification of federal crimes occurred in 1948, when the existing federal offenses were gathered into Title 18 of the United States Code and the grossest inconsistencies were eliminated. In 1970 a national commission concluded that "chaos reigns" within Title 18, which it described as a hodgepodge of offenses (some of which were still formulated in archaic language dating from as early as the fourteenth century).⁹ Title 18 included many trivial offenses, while other more serious federal offenses were scattered through other titles of the federal code. Despite this grave

nonetheless signal a new willingness to place greater limits on the commerce power.

9. National Commission on Reform of Federal Criminal Laws, *Study of a New Federal Criminal Code* (Washington, DC: Government Printing Office, 1970), p. xxvi.

assessment, efforts in the 1970s and 1980s to enact comprehensive criminal code reform failed.

By the mid-1990s, there were more than 3000 federal crimes,¹⁰ though it is doubtful that anyone has an exact count since federal crimes may be found scattered throughout the 50 titles of the United States Code. The accumulation of statutes reversed the pattern that had held for the first century of the nation: the bulk of the federal criminal code now treats conduct that is also subject to regulation under the states' general police powers.

In general, the new federal laws supplement state law rather than nullifying or displacing it. The result is a system of dual jurisdiction, where conduct that violates both federal and state law may be prosecuted by federal authorities, state authorities, or both.

FEDERAL FUNDING FOR CRIMINAL PROSECUTIONS

Federal law enforcement dates back to 1789, when Congress created the office of Attorney General of the United States and also established United States Attorneys for each judicial district.¹¹ The Revenue Cutter Service, established the same year, was the first federal police agency. After the Civil War, Congress authorized a federal detective force of 25 and

established the Department of Justice, appropriating \$50,000 for the detection and prosecution of crime. The Federal Bureau of Investigation (FBI) was established within the Department of Justice in 1908.

Federal police agencies

There are now more than fifty major federal law enforcement agencies concerned with the enforcement of federal criminal laws, including the FBI, the Drug Enforcement Administration, the Immigration and Naturalization Service, the Customs Service, the Internal Revenue Service, the Secret Service, and the Bureau of Alcohol, Tobacco and Firearms.¹² In addition, the armed services maintain personnel with similar investigative duties. The largest of the civilian police agencies, the FBI, employed more than 23,000 persons, including more than 10,000 special agents, by the early 1990s. The work of the major federal investigative agencies is supplemented by more than 100 other federal agencies that have some role in criminal enforcement.

The key criminal investigative agencies received very large increases in number of positions and in budgets between the mid-1970s and the mid-1990s. For example, the Bureau of Alcohol, Tobacco and Firearms received a 299 percent increase in its budget and a 20 percent increase in the number of positions; the Tax Division of the Internal Revenue Service had a 268 percent increase in its

10. Roger J. Miner, "Crime and Punishment in the Federal Courts," *Syracuse Law Review*, 43:681 (1992) ("about 3,000").

11. For a general discussion of the history of federal law enforcement, see Norman Abrams, "Federal Criminal Law Enforcement," in *Encyclopedia of Crime and Justice*, 2:779, 780.

12. For a general discussion of federal police agencies, see Norman Abrams and Sara Sun Beale, *Federal Criminal Law and Its Enforcement*, 2d ed. (St. Paul, MN: West, 1993), pp. 5-9.

budget and a 15 percent increase in positions.¹³

Federal prosecutors

The principal responsibility for prosecuting federal crimes is divided between the Criminal Division in the Department of Justice and the United States Attorneys' Offices. Since the mid-1970s, the budget authority for federal prosecutions has increased dramatically, with the lion's share of the increase going to the United States Attorneys' Offices.¹⁴

Increased funding has translated into a large increase in the number of federal prosecutors, particularly in the United States Attorneys' Offices. The number of federal prosecutors in United States Attorneys' Offices increased from approximately 3000 in the mid-1970s to more than 8000 in the 1990s.¹⁵

INCREASES IN THE FEDERAL CRIMINAL CASELOAD

In light of the expanded reach of federal criminal statutes and the increased resources provided for federal prosecutions, it is not surprising that the federal criminal caseload has expanded. The most rapid increase occurred between 1980 and 1992. During this period, the number of criminal cases filed in the federal courts grew by 70 percent, from 27,968 to 47,472, and the number of defendants prosecuted rose 78 per-

cent, from 38,033 to 67,635.¹⁶ The increase in federal drug and firearms offenses was even sharper. The number of drug cases filed in the federal courts roughly quadrupled, from 3130 cases (6678 defendants) to 12,833 cases (25,033 defendants). Firearms prosecutions also quadrupled, from 931 prosecutions in 1980 to 3917 in 1992. During the same period, annual criminal case filings per sitting judge increased from 58 to 84, and criminal filings in the appellate courts doubled.¹⁷

While the increases since 1980 have been significant, the current criminal caseload is not unprecedented.¹⁸ As revealed in Figure 1, the criminal caseload has fluctuated widely since 1960, and the number of federal criminal prosecutions was approximately the same in 1972 as it is today. Indeed, since the number of federal judges has increased substantially since 1972, the number of criminal

16. Administrative Office of the United States Courts, *Annual Report of the Director, 1980* (Washington, DC: Government Printing Office, 1980), tab. D-2; idem, *Annual Report of the Director, 1992* (Washington, DC: Government Printing Office, 1992), tab. D-2. These tables are also the source of the data regarding drug and firearms prosecutions.

17. William W. Schwarzer and Russell R. Wheeler, *On the Federalization of the Administration of Civil and Criminal Justice*, Long Range Planning Series, paper no. 2 (Washington, DC: Federal Judicial Center, 1994), p. 3.

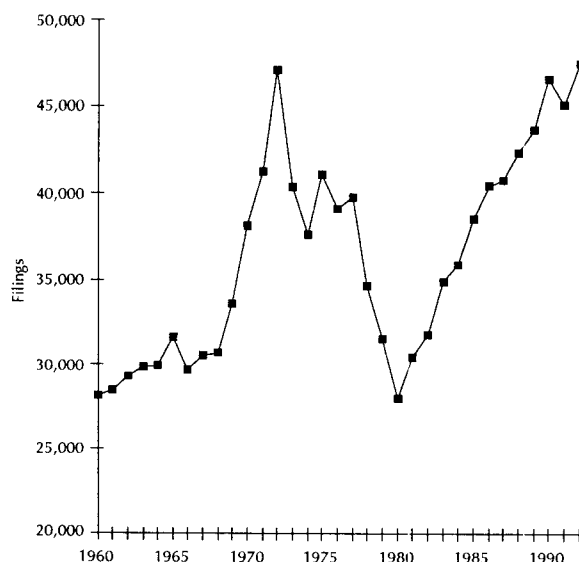
18. The federal criminal caseload reached its all-time high in 1932, as Prohibition cases swelled the total number of cases to 92,174, more than two and a half times the total number of cases in 1918, the last year before Prohibition. Edward Rubin, "A Statistical Study of Federal Criminal Prosecutions," *Law and Contemporary Problems*, 1:494, 497 (tab. 1) (1934). Other caseload spikes occurred when war-related and selective service cases were prosecuted. See *ibid.*, p. 497.

13. Administrative Office of the United States Courts, "The Criminal Caseload: The Nature of Change" (Manuscript, Administrative Office of the United States Courts, 1994), p. 16.

14. See *ibid.*, p. 17 (chart 18).

15. *Ibid.*, p. 17 (chart 17).

FIGURE 1
FEDERAL CRIMINAL CASES COMMENCED, EXCLUDING TRANSFERS, 1960-92



SOURCE: Administrative Office of the United States Courts, Statistics Division. See William W. Schwarzer and Russell R. Wheeler, *On the Federalization of the Administration of Civil and Criminal Justice*, Long Range Planning Series, paper no. 2 (Washington, DC: Federal Judicial Center, 1994), p. 51.

filings per judge was significantly higher during that period than it is today. Moreover, federal criminal filings now account for a smaller percentage of the federal courts' caseload than they did in 1972. Today criminal cases account for only 17 percent of all filings in the district courts, compared with roughly one-third of all filings in 1972.

MEASURING THE IMPACT OF THE INCREASED CRIMINAL CASELOAD

How has the demand for resources in criminal cases affected the functioning of the federal courts? As noted previously, the number of cases has increased substantially in the past 15

years, but not to historic highs. Moreover, criminal cases now make up a smaller percentage of the federal courts' total caseload than they did in the 1970s. Does this disprove the claim that the increase in federal criminal cases is a matter of grave concern?

Despite their relatively small numbers, criminal cases are now consuming a disproportionate and unprecedented share of federal judicial resources. Although criminal cases currently account for only 17 percent of the federal judicial docket, 38 of the 92 federal districts devoted more than 50 percent of their trial dockets to criminal cases in 1992.¹⁹ In many

19. Administration Office of the United States Courts, "Criminal Caseload," p. 1.

districts, the situation is considerably more extreme. The chief judge of the Southern District of Florida reported in 1993 that district judges in his district spent 84 percent of their trial time on criminal cases, leaving only 16 percent for a wide range of civil cases.²⁰ Judges in some districts have been unable to try any civil case for periods of a year or more.

Other data indicate the same pattern: criminal trials have been displacing civil trials in the federal system. The total number of trials in the federal system held relatively constant from 1980 to 1992, at approximately 20,000,²¹ but the number of criminal trials increased while the number of civil trials decreased during this period. Between 1980 and 1993, the number of civil trials declined by 20 percent, from 13,191 to 10,527. During the same period, the number of criminal trials increased by 43 percent, from 6634 to 9465.

It should be noted, moreover, that the decline in the number of civil trials has occurred despite the fact that growth in the civil docket has outpaced growth in the criminal docket. Civil filings rose from approximately 125,000 in 1975 to approximately 227,000 in 1992. Thus, criminal trials appear to be displacing civil trials despite the fact that criminal cases now account for less

than one-fifth of total federal filings. Furthermore, since these figures are based upon national averages, they underrepresent the changes experienced in districts where the criminal caseload has exploded.

It is this shift in resources from civil to criminal cases—and the resulting shortage of resources for civil cases—that has fueled the complaints about the increasing federal criminal docket. While the particulars vary from district to district, an example gives a sense of the trade-offs involved. In the District of Columbia, district judges complained publicly in 1991 that the United States Attorney was bringing minor drug cases—such as those involving \$20 sales of crack cocaine or youthful first offenders arrested as couriers—in federal district court rather than superior court.²² The judges stated that the pressure of the criminal caseload had severely disrupted the court's civil calendar: civil cases had been postponed or simply not set for trial; important rulings had been delayed; and emergency cases had been routed to the court of appeals because the district judges lacked the time to consider them.²³ The magnitude in the shift is reflected in the number of requests for criminal jury trials in the District of Columbia, which grew 360 percent between 1986 and 1990,

20. Stanley Marcus, "The Federalization of State Law," in "Proceedings of the Western Regional Conference on State-Federal Judicial Relationships," ed. John B. Oakley, 155 F.R.D. 301, 303 (1994).

21. There were 19,825 trials in 1980 and 19,992 in 1992. *Statistical Abstract of the United States 1993* (Washington, DC: Department of Commerce, Bureau of the Census, 1993), p. 206 (tab. 332).

22. Garry Sturgess, "Judges Rap Stephens on Drug Cases," *Legal Times*, 11 Feb. 1991, p. 7.

23. Ibid. But see Tracy Thompson, "Stop Complaining, Stephens Tells Judges; Federal Jurists Bristle When U.S. Attorney Suggests They Don't Work Very Hard," *Washington Post*, 8 June 1991 (federal courts in District of Columbia are not overburdened; it is 79th of 94 federal districts in number of criminal cases per judge).

while falling in civil cases.²⁴ The civil cases that were put on hold included a complex consolidation of thirty cases arising from the collapse of a national bank, a challenge to Environmental Protection Agency clean air and water standards, and a constitutional challenge to the federal government's use of a pre-employment urinalysis test.²⁵

MAKING SENSE OF THE DATA

Why are criminal cases now requiring such a disproportionate—and unprecedented—share of federal judicial resources? Indeed, since criminal cases make up a smaller percentage of the total caseload than they did 20 years ago, why have the resources allocated to criminal cases increased—to the point that these cases account for more than half of the trial docket in 38 of the 92 federal judicial districts?

Changes in the makeup of the federal criminal caseload

The makeup of the federal criminal caseload has changed significantly, requiring more judicial resources. The federal caseload in the early 1970s included a substantial number of relatively straightforward offenses that could typically be disposed of quickly, such as auto theft, forgery, counterfeiting, and selective service offenses. These offenses ac-

counted for roughly one-quarter of all federal defendants charged in 1972, but only 4 percent in 1992.²⁶ During the same period, the percentage of federal defendants charged with drug offenses grew from 18 to 41 percent.²⁷ The character of the charges in federal drug cases has also changed, with drug distribution cases increasing and simpler possession cases decreasing sharply. The effect of this change is substantial. For example, cocaine and heroin distribution cases take four times as much judicial time per defendant as cases involving possession of the same drugs.²⁸

The increased complexity of the current federal prosecutions has been reflected in the increased length of federal criminal trials.²⁹ In 1970, the average length of a criminal jury trial in federal court was 2.5 days; it is now 4.4 days. Very long trials have now become commonplace. The number of criminal trials in the 6- to 20-day range has more than doubled since 1973.

More complex sentencing procedures and new judicial duties

New federal sentencing procedures³⁰ have also dramatically in-

26. Administrative Office of the United States Courts, "Criminal Caseload," pp. 5-6 (charts 4 and 6).

27. Ibid.

28. Ibid., p. 8 (distribution cases take an average of 6 hours compared with 1.5 hours for possession cases; marijuana cases show a similar pattern).

29. All statistics in this paragraph are derived from Administrative Office of the United States Courts, "Criminal Caseload," pp. 1, 14.

30. The Sentencing Reform Act of 1984, Pub. L. 98-473, 98 Stat. 1987 (1984), authorized the appointment of a federal sentencing

24. The number of requests for jury trials in criminal cases increased from 81 to 294 during this period, while requests for civil jury trials fell from 120 to 93. Garry Sturgess, "Another Clash over Criminal Caseload," *Legal Times*, 1 Apr. 1991, p. 7.

25. Sturgess, "Judges Rap Stephens on Drug Cases," p. 7.

creased the resources required for each case. The Sentencing Guidelines, which went into effect in 1987, require extensive factual findings and legal conclusions in each case and thus increase significantly the time that district judges spend on sentencing. More than half of judges reported that the time they devoted to sentencing had increased at least 25 percent, and a third reported an increase of over 50 percent.³¹ These estimates were confirmed by a time study, which found that sentencing took 25 percent longer in guidelines cases.³² Additionally, sentencing appeals have resulted in an increased burden on the courts of appeals.³³

commission and initiated a complete overhaul of federal sentencing procedures. See generally Kevin R. Reitz, "The Federal Role in Sentencing Law and Policy," this issue of *The Annals of the American Academy of Political and Social Science*.

31. *Report of the Federal Courts Study Committee*, p. 137.

32. John E. Shapard, Research Division of the Federal Judicial Center, to Sara S. Beale, 29 Mar. 1995. The study included sentencing data for 1934 cases filed between 1988 and 1990.

33. The Sentencing Reform Act permits either the defendant or the government to appeal a sentence. Even a defendant who pleads guilty may nonetheless file an appeal to contest his or her sentence. Each year from 1990 to 1993, appeals raising sentencing issues alone accounted for at least 26 percent of the classified criminal appeals in cases subject to the Sentencing Guidelines. Prior to the reform of the sentencing process, few if any of these appeals could have been brought. The appeal of sentencing issues has also made appeals from convictions more complex and difficult to resolve, and most appeals from convictions now also raise one or more sentencing issues. In 1993, for example, only 30 percent of criminal appeals did not involve a sentencing issue, and that percentage falls to 15 percent

The sentencing reforms also gave the federal courts new responsibility for supervision of defendants following conviction. The Sentencing Reform Act requires that most defendants be sentenced to a term of supervised release and provides that the federal courts, rather than the parole board, monitor supervised release. The impact of monitoring supervised release is just beginning to be felt, as defendants sentenced under the Sentencing Guidelines are beginning to complete their sentences in large numbers. In just two years, from 1990 to 1992, the number of persons serving supervised release roughly quadrupled, growing from 5011 to 19,362.³⁴ While the impact of this new responsibility has been modest to date, it is likely to add significantly to the federal courts' workload as the number of persons on supervised release grows.

The effect of an increasing conviction rate

Another major change affecting the criminal caseload has occurred, and it, too, has resource implications: the conviction rate in federal criminal cases has increased substantially

if the calculations exclude cases that occurred before the effective date of the Sentencing Guidelines in 1987. The changes flowing from the reform of the sentencing process have a substantial effect on the workload of the courts of appeals since criminal appeals now account for approximately one-fourth of the appellate caseload. See Administrative Office of the United States Courts, *Federal Judicial Workload Statistics* (Washington, DC: Administrative Office of the United States Courts, 1993), p. 10 (tab. B-1).

34. Administrative Office of the United States Courts, "Criminal Caseload," p. 10.

since the 1970s. In two decades, the conviction rate has risen gradually from approximately 75 percent to approximately 85 percent.³⁵ Although the number of prosecutions was nearly the same in 1972 as in 1992, there were 37,220 convictions in 1972 and 50,260 in 1992.³⁶ This larger number of defendants must be sentenced, and, as noted, sentencing procedures themselves have become substantially more time-consuming.

*The mismatch between
increases in prosecutorial
and judicial resources*

As noted, when Congress expanded the reach of federal criminal jurisdiction, it also provided greatly enhanced resources for federal prosecutors and criminal investigators. Although the resources provided for the federal courts have also increased significantly, the number of prosecutors and investigators has risen far more quickly than the number of federal judges.

The number of prosecutors per federal judicial officer has doubled in the last 10 years, and there are now about four federal prosecutors for every federal judge.³⁷ Moreover, the increase in the number of federal prosecutors has outpaced the increase in the caseload. While the caseload grew 60 percent between 1981 and

1994, the number of prosecutors in U.S. Attorneys' Offices grew 125 percent. This pattern is consistent with the view that the current criminal docket consists of more complex, resource-intensive cases than in the past.

*Criminal cases get priority,
civil cases get ADR*

Even assuming that federal criminal cases are increasingly resource intensive, that still does not explain why criminals go to trial at the cost of the civil docket. When resources are not sufficient to take all cases to trial promptly, criminal cases receive top priority because the Speedy Trial Act requires dismissal of charges that are not brought within specified time limits.³⁸ Although the speedy-trial clock stops running during certain pretrial proceedings, the total time allotted—70 days before trial—is so short that the act places significant pressure on prosecutors and court personnel.

On the other hand, other changes are occurring in the federal courts that make it more difficult to establish a clear cause-and-effect relationship. One such change is the federal courts' increasing reliance on alternative dispute resolution (ADR) mechanisms in civil cases. ADR techniques include, for example, court-annexed mediation and arbitration. While the shift in trial resources from civil to criminal cases may partially explain the growing reliance on ADR programs in the federal courts, ADR has many proponents and the growth

35. Ibid.

36. Administrative Office of the United States Courts, *Annual Report of the Director, 1972* (Washington, DC: Government Printing Office, 1973), tab. D-4; idem, *Annual Report of the Director, 1992*, tab. D-4.

37. Administrative Office of the United States Courts, "Criminal Caseload," p. 1. See also *ibid.*, pp. 15-19.

38. Speedy Trial Act of 1974, as amended, 18 U.S.C. §§ 3161-62, 3164.

in the criminal docket tells only one part of the story.

CONCLUSION

The real impact of the federal criminal caseload comes from the proportion of judicial resources these cases consume, not simply the number of cases filed. Although criminal cases actually make up a smaller fraction of the criminal docket than they did two decades ago, these cases now take up a disproportionate share of total federal judicial resources. At

the trial level, criminal cases appear to be displacing civil cases on the trial dockets. In more than one-third of federal judicial districts, criminal cases account for more than half of the trial docket, and fewer resources are available to service the much larger civil docket. While this may not represent a crisis, there is a trade-off being made in favor of criminal cases at the expense of the civil cases, which span the gamut from commercial litigation to environmental and civil rights cases.

The Myth of Cost-Free Jurisdictional Reallocation

By JOHN B. OAKLEY

ABSTRACT: The recent trend to make federal crimes of essentially local criminal activity involving violence or drugs reflects the competing pressures on Congress and the president to maintain fiscal austerity while responding to public concerns that administration of the criminal law by state courts is ineffective. This trend has been encouraged by the myth that the federalization of crime is essentially cost free. In reality, this trend threatens serious harm to the ability of federal courts to perform their core functions, and to the ability of federal judges to discharge their duties with customary excellence. Rather than burdening the federal courts with these hidden institutional costs, Congress should recognize that there is no cost-free way to improve the administration of the criminal law, and despite the pressure to reduce federal spending, it should assist state courts with a substantial program of federal subsidization.

John B. Oakley is professor of law at King Hall, the School of Law of the University of California at Davis, where his teaching interests include federal jurisdiction and jurisprudence. His extensive experience with the judicial system includes numerous positions with advisory committees to state and federal courts. Since 1991, he has served as reporter to the Committee on Federal-State Jurisdiction of the Judicial Conference of the United States.

NOTE: The views expressed in this article are solely those of the author.