

## *Articles and Comments*

# Too Many and Yet Too Few: New Principles to Define the Proper Limits for Federal Criminal Jurisdiction

by  
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### Introduction

The scope of the federal government's criminal authority has expanded significantly in the last quarter of the twentieth century, and the pace of this expansion has accelerated in the 1980s and 1990s.<sup>1</sup> Congress responded to increasing public concern about violent crime by enacting a number of new federal offenses such as carjacking, new firearms offenses, and legislation specifically aimed at violent career criminals.<sup>2</sup> Congress also created new federal crimes to deal with a variety of other societal ills such as the failure to pay child support, fraud in connection with identification documents, computer fraud, and the disruptive conduct of animal rights activists.<sup>3</sup> The 1994 Crime Bill<sup>4</sup> continued this process of rapid expansion, adding dozens of new

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1. For a general description of the history of federal criminal jurisdiction, see Sara Sun Beale, *Federal Criminal Jurisdiction*, in 2 *ENCYCLOPEDIA OF CRIME AND JUSTICE* 775-79 (1983).

2. 18 U.S.C. § 2119 (Supp. V 1993) (carjacking), § 922(q) (Supp. V 1993) (gun-free school zones), § 924(e) (1988 & Supp. V 1993) (armed career criminals).

3. 18 U.S.C. § 228 (Supp. V 1993) and § 3563(b)(21) (1988 & Supp. V 1993) (child support), § 1028 (1988 & Supp. V 1993) and § 1738 (1988) (false identification), § 1030 (1988 & Supp. V 1993) (computer fraud and abuse), § 43 (Supp. V 1993) (animal enterprise protection).

4. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (to be codified in scattered sections of 18 U.S.C.).

offenses and significantly broadening existing offenses.<sup>5</sup> Most of the new offenses involve some form of violence, including interstate domestic violence,<sup>6</sup> drive-by shootings, violence at international airports, use of weapons of mass destruction, and providing material support to terrorists.<sup>7</sup> The 1994 legislation added a number of firearms offenses, including theft of firearms and explosives, smuggling firearms in aid of drug trafficking, transfer of a handgun to a juvenile, possession of a handgun by a juvenile, and receipt of firearms by a nonresident.<sup>8</sup> It also contained a potpourri of offenses not involving violence, including theft of major artwork, crimes by or affecting persons engaged in the business of insurance, and mailing of injurious animals, plant pests, and illegally taken fish, wildlife, and plants.<sup>9</sup>

In general, these new statutes have been layered over the existing federal criminal statutes. As a result, there are now more than 3,000 federal crimes.<sup>10</sup> By the mid-1990s, the accumulation of new statutes had reversed the pattern that held for the first century of the nation: the bulk of the federal criminal code now treats conduct that is also

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5. For example, the 1994 legislation extended the reach of the Mail Fraud Act to cases in which the defendant employed a "private or commercial interstate carrier," such as United Parcel Service, and added attempt provisions to the robbery, kidnapping, smuggling, and property damage statutes. *Id.* §§ 250006, 320903, 108 Stat. 1796, 2087, 2124-25.

6. The statute defines the offense as crossing a state line (or leaving Indian country) with the intent to injure, harass, or intimidate the person's spouse or intimate partner and causing bodily injury to such spouse or partner. 18 U.S.C.A. § 2261 (West Supp. 1995).

7. 18 U.S.C.A. § 36 (West Supp. 1995) (drive-by shootings), § 37 (West Supp. 1995) (airport violence), § 2332a (West Supp. 1995) (weapons of mass destruction), § 2339A (West Supp. 1995) (material support to terrorists). Other crimes of violence added by the 1994 legislation are murder by a federal prisoner, 18 U.S.C.A. § 1118 (West Supp. 1995), murder of United States nationals abroad, 18 U.S.C.A. § 1119 (West Supp. 1995), violence against maritime navigation and against fixed maritime platforms, 18 U.S.C.A. § 2280 (West Supp. 1995), killing persons aiding federal investigations or state corrections officers, 18 U.S.C.A. § 1121 (West Supp. 1995), receiving the proceeds of extortion, 18 U.S.C.A. § 880 (West Supp. 1995), and receiving the proceeds of postal robbery, 18 U.S.C.A. § 2114(b) (West Supp. 1995).

8. 18 U.S.C.A. §§ 924(a)(k) & (b)(k) (West Supp. 1995) (theft of firearms and explosives); § 924(j) (West Supp. 1995) (smuggling firearms in aid of drug trafficking); § 922(x)(1) (West Supp. 1995) (transfer of handgun to juvenile); § 922(x)(2) (West Supp. 1995) (possession of handgun by juvenile); § 922(a)(9) (West Supp. 1995) (receipt of firearm by nonresident).

9. 18 U.S.C.A. § 668 (West Supp. 1995) (theft of major artwork); § 1033 (West Supp. 1995) (insurance crimes); § 1716D (West Supp. 1995) (mailing of injurious or illegally gained animals and plants).

10. The figure 3,000 is taken from Hon. Roger J. Miner, *Crime and Punishment in the Federal Courts*, 43 SYRACUSE L. REV. 681, 681 (1992). Though it has been only two years since the publication of Judge Miner's article, many new offenses have been enacted since then, including those in the 1994 Crime Bill.

subject to regulation under the states' general police powers.<sup>11</sup> The new federal criminal provisions do not preempt state law. Instead, they permit dual jurisdiction by both federal and state authorities.

The thesis of this Article is that there are presently both too many federal criminal prosecutions and too few. There is ample evidence that there are presently too many federal criminal prosecutions, and this point has been made convincingly elsewhere.<sup>12</sup> I shall argue that there are too many federal criminal prosecutions as measured by both the present and future capacity of the federal courts and, though this is more debatable, as measured by the proper balance of federal and state responsibility. This difficulty cannot be resolved by the addition of more federal judges because the expansion of the federal courts on the scale required would fundamentally alter their character and throw into question their ability to perform their constitutional role. Moreover, there are sound reasons for the states rather than the federal government to play the leading role in general criminal enforcement. According to this reasoning, the number of federal criminal prosecutions should be reduced—certainly not expanded—in order to safeguard the functioning of the federal courts and to reintroduce a better balance between the state and federal governments.

I will also argue for a seemingly inconsistent point: there are too few federal criminal prosecutions. When Congress has chosen to legislate by adding new federal crimes, it has neither preempted state law as a formal matter nor provided sufficient resources to supplant state enforcement as a practical matter. Federal authorities typically have the resources to prosecute only a fraction, often only a tiny fraction, of the offenses that fall under the purview of many of the federal criminal statutes. The remaining offenses of a similar character continue to be prosecuted by the states. This arrangement is deeply problematic

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11. Prior to the Civil War, only a small number of federal offenses existed, and there was little if any overlap between the offenses subject to federal and state prosecution. Federal crimes were limited to those necessary to prevent injury to or interference with the federal government and its programs. The principal antebellum federal crimes were (1) acts threatening the existence of the federal government (*e.g.*, treason); (2) misconduct of federal officers (*e.g.*, bribery); (3) interference with the operation of the federal courts (*e.g.*, perjury); and (4) interference with other governmental programs (*e.g.*, theft of government property and revenue fraud). See Beale, *supra* note 1, at 776. For commentary on this shift in the function of federal criminal law, see William Van Alstyne, *Dual Sovereignty, Federalism, and National Criminal Law: Modernist Constitutional Doctrine and the Nonrole of the Supreme Court*, 26 AM. CRIM. L. REV. 1740 (1989).

12. See, *e.g.*, REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 4-10, 35-38 (1990) (federal courts nearing caseload crisis, most pressing problems stem from unprecedented number of narcotics prosecutions).

because it is increasingly clear that similarly situated offenders now receive radically different sentences in federal and state court. The mismatch between the wide sweep of the federal criminal statutes and the relatively limited federal resources—both prosecutorial and judicial—virtually guarantees the continuation of this disparity among offenders who are similarly situated in every respect except one: whether they are prosecuted in state or federal court. This structurally produced inequality is increasing because of the expanded scope of federal criminal law and the disparity between the stringent sentences applicable under federal law and the more lenient discretionary sentencing regimes of many states. This increasing structural disparity is incompatible with the premises of the Sentencing Reform Act of 1994.<sup>13</sup> The Sentencing Reform Act established the Federal Sentencing Commission and authorized the promulgation of sentencing guidelines in order to eliminate the unjustified sentencing disparities within the federal system. Given the large pool of similar cases subject to dual jurisdiction under many federal offenses, the deliberate selection of only a handful of those cases for harsher treatment in federal court reintroduces the same disparity that Congress sought to eliminate when it reformed the federal sentencing process. Thus, in this sense, there are too few federal prosecutions.

Parts I and II of this Article marshal the arguments supporting the seemingly conflicting claims that there are both too many federal prosecutions and too few. Part III seeks to develop a principle to limit federal jurisdiction in order to avoid both of the difficulties identified in Parts I and II. Prior efforts to develop principles to limit federal criminal jurisdiction have attempted to define when a sufficiently strong federal interest exists to warrant federal prosecution. The difficulty with the resulting principles is that they have been far too expansive. Like the constitutional power available to Congress under the Commerce Clause, principles defining federal interests almost inevitably lead to more criminal legislation than fits comfortably within the structure of the federal courts and more than Congress is willing to pay to have generally enforced. Accordingly, Part III argues that the principles for identifying a sufficient federal interest should be coupled with additional mechanisms that will tailor the federal criminal caseload to fit the inherent size limitations of the federal courts. Such principles should not rely on a system of intermittent federal enforce-

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13. Sentencing Reform Act of 1984, Pub. L. No. 98-473, tit. II, § 211, 98 Stat. 1987 (1984) (codified at 18 U.S.C. §§ 3551-3559 (1988 & Supp. V 1993)).

ment that necessarily introduces unjustified sentencing disparities among similarly situated defendants.

Part III proposes a disaggregation of the concept of federal criminal jurisdiction in order to separate the question of when federal *judicial* resources should be employed from the broader question of when some form of federal regulation or resources may be warranted. Congress may provide support to state and local criminal justice efforts by many means other than creating federal crimes that must be prosecuted in the federal courts. Because of the small size of the federal courts, Part III argues that there should be a presumption in favor of using other means, including, if necessary, the prosecution of some federal crimes in the state courts. In general, Congress should provide for the prosecution of crime in the federal courts only when the unique resources of the federal judicial system—not federal resources in general—are necessary. Part III also proposes a significant change in prosecutorial charging policy. Because acceptance of the principle of disaggregation by itself will probably not be sufficient to match the criminal caseload to the capacity of the courts, it will still be necessary for federal prosecutors to exercise some charging discretion. Part III proposes that, in order to avoid unjustified sentencing disparities, prosecutorial discretion must shift from the present model of individual case discretion to the definition of categories of cases that will be subject to general federal prosecution.

### **I. Too Many Criminal Prosecutions: Impairing the Functioning of the Federal Courts and Trenching on State Authority**

The explosion of new federal criminal statutes has serious costs. Perhaps the most visible cost is the burden imposed on the relatively small federal judicial system. As detailed below, the increasing criminal caseload threatens to impair the quality of the justice meted out in criminal cases and significantly impairs federal judges' ability to perform their core constitutional functions in civil cases. One logical response to this difficulty would be to greatly enlarge the federal courts to correspond with the expansion of federal statutory jurisdiction over crime. This would be a mistake. The federal courts cannot be enlarged indefinitely without completely altering their character in ways inimical to their constitutional functions of interpreting federal statutory and constitutional law. Moreover, such an expansion of the federal courts would take the federal government even further into areas better left to the states in our federal system.

### A. The Impact of the Expansion of Federal Criminal Jurisdiction

#### (1) *Increases in the Criminal Caseload and in the Resources Allocated to Criminal Cases*

Between 1980 and 1992, the number of criminal cases filed in the federal courts increased by 70 percent (from 27,968 to 47,472) and the number of defendants prosecuted rose 78 percent (from 38,033 to 67,632).<sup>14</sup> The increase in federal drug and firearm offenses was even sharper. The number of drug cases filed in the federal courts roughly quadrupled, from 3,130 cases (6,678 defendants) to 12,833 cases (25,033 defendants).<sup>15</sup> Firearms prosecutions also quadrupled, from 931 prosecutions in 1980 to 3,917 in 1992.<sup>16</sup> Annual criminal case filings per sitting judge increased from 58 to 84 during the same period.<sup>17</sup> Criminal filings in the appellate courts have also doubled since 1980.<sup>18</sup>

The real impact of the criminal docket, however, comes not so much from the absolute number of cases as the proportion of resources they consume. In absolute numbers, the current caseload is not unprecedented.<sup>19</sup> 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.<sup>20</sup> Indeed, federal criminal filings actually account for a smaller percentage of the federal courts' caseload than they did in 1972.<sup>21</sup>

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14. ADMINISTRATIVE OFFICE OF THE U.S. COURTS, 1980 ANNUAL REPORT OF THE DIRECTOR A-56 tbl. D-2; ADMINISTRATIVE OFFICE OF THE U.S. COURTS, 1992 ANNUAL REPORT OF THE DIRECTOR 248 tbl. D-2.

15. *Id.*

16. *Id.*

17. FEDERAL JUDICIAL CTR., ON THE FEDERALIZATION OF THE ADMINISTRATION OF CIVIL AND CRIMINAL JUSTICE 3 (1994).

18. *Id.*

19. The number of federal criminal cases reached its all-time high in 1932, as a flood of Prohibition cases swelled the total number of cases to 92,174, more than 2 1/2 times the total number of cases in 1918, the last year before Prohibition. Edward Rubin, *A Statistical Study of Federal Criminal Prosecutions*, 1 LAW & CONTEMP. PROBS. 494, 497 tbl. 1 (1934). For a discussion of the problems caused by this enormous expansion in caseload, see NATIONAL COMM. ON LAW OBSERVANCE & ENFORCEMENT, REPORT ON THE ENFORCEMENT OF THE PROHIBITION LAWS OF THE UNITED STATES, H.R. REP. NO. 722, 71st Cong., 3d Sess. 55-58 (1931). Other significant spikes occurred during periods when war-related and selective service cases were prosecuted. See Rubin, *supra*, at 497 tbl. 1 (19,830 "war cases" in 1920 compared to a total prewar caseload of 19,628 three years earlier).

20. FEDERAL JUDICIAL CTR., *supra* note 17, at 31 n.84 (47,043 criminal cases were filed in 1972, and 47,467 cases were filed in 1992). See also *id.* at 51 fig. 1 (graphically depicting criminal caseload from 1960 to 1992).

21. Today criminal cases account for only 17% of all filings in the district courts, compared with roughly 1/3 of all filings in 1972. Moreover, given the substantial increase in the

Criminal cases are consuming an increasing share of federal judicial resources. Though criminal cases presently account for only seventeen percent of the total federal judicial docket, they take up a disproportionate share of judicial resources—indeed the lion's share in some judicial districts. For example, in the Southern District of Florida, district judges spend eighty-four percent of their trial time on criminal cases, leaving only sixteen percent for a wide range of civil cases.<sup>22</sup> By 1992, thirty-eight of the ninety-two federal districts devoted more than fifty percent of their trial dockets to criminal cases.<sup>23</sup> Some district judges have been unable to try a civil case for a year or more.<sup>24</sup>

Several factors appear to account for the increased share of federal judicial resources being consumed by criminal cases. First, the cases themselves are different today than at any time in the past, and they require more judicial resources. Twenty years ago the federal caseload included a substantial number of relatively straightforward offenses that could typically be disposed of quickly. Selective service offenses, auto theft, forgery, and counterfeiting accounted for twenty-three percent of federal defendants charged in 1972, and only four percent in 1992.<sup>25</sup> Only eighteen percent of federal defendants were charged with drug offenses in 1972, in contrast to forty-one percent in 1992.<sup>26</sup> Not only have drug filings increased, but the nature of the charges in drug cases has also changed, with the percentage of drug distribution cases increasing and the percentage of the simpler possession cases decreasing sharply.<sup>27</sup> The effect of this change is substantial. A Federal Judicial Center (FJC) time study found that cocaine

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size of the federal judiciary, there are substantially fewer criminal case filings per district judge in 1992 than in 1972. Compare ADMINISTRATIVE OFFICE OF THE U.S. COURTS, 1992 ANNUAL REPORT OF THE DIRECTOR 54, 64-65 with ADMINISTRATIVE OFFICE OF THE U.S. COURTS, 1972 ANNUAL REPORT OF THE DIRECTOR 108 tbl. 15.

22. Judge Stanley Marcus, Speech at the Western Regional Conference on State-Federal Judicial Relationships 4 (June 5, 1993) (transcript on file with the *Hastings Law Journal*).

23. ADMINISTRATIVE OFFICE OF THE U.S. COURTS, THE CRIMINAL CASELOAD: THE NATURE OF CHANGE 1 (1994) [hereinafter THE CRIMINAL CASELOAD].

24. Miner, *supra* note 10, at 686 (quoting a judge from the Eastern District of New York). See also Stephen Labaton, *New Tactics in the War on Drugs Tilt Scales of Justice Off Balance*, N.Y. TIMES, Dec. 29, 1989, at A1, A18 (district judge only able to try one civil jury case in two years, has 20 civil cases ready for trial but neither time nor resources to begin trial).

25. THE CRIMINAL CASELOAD, *supra* note 23, at 5-6 figs. 4, 6.

26. *Id.*

27. *Id.* at 7.

and heroin distribution cases take four times as much judicial time per defendant as cases involving possession of the same drugs.<sup>28</sup>

While the overall percentage of multiple defendant cases has remained fairly stable since the early 1970s, the number of multi-defendant cases has grown by seventy percent since 1980, and the number of multi-defendant drug cases has grown by thirty percent in just the last four years.<sup>29</sup> The number of jury trials with more than one defendant increased by thirty-five percent in the last four years.<sup>30</sup> Multi-defendant cases are more complex, and they consume far more judicial resources than cases involving a single defendant. A recent FJC time study found that the average judge time per defendant was 5.8 hours in multi-defendant cases, but only 3.0 hours in single defendant cases.<sup>31</sup>

The number of federal criminal trials is at an all-time high—ten percent higher than the previous high reported in 1970.<sup>32</sup> Perhaps even more important, federal criminal trials are getting longer. In 1970 the average length of a criminal jury trial in federal court was 2.5 days; it is now 4.4 days.<sup>33</sup> Very long trials are now commonplace: criminal trials in the 6 to 20-day range have increased 118 percent since 1973.<sup>34</sup>

Another very significant change in the federal system is the increased judicial time being devoted to sentencing. The Sentencing Guidelines, which went into effect in 1987, require extensive factual findings and legal conclusions in each case. The Guidelines have significantly increased the time district judges spend on sentencing.<sup>35</sup> Sentencing appeals have also resulted in an increased burden on the courts of appeals. Each year from 1990 to 1993, appeals raising sentencing issues alone accounted for at least twenty-six percent of crimi-

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28. *Id.* at 8 (distribution cases take an average of 6 hours compared with 1.5 hours for possession cases). Marijuana cases show a similar pattern. *Id.*

29. THE CRIMINAL CASELOAD, *supra* note 23, at 1.

30. *Id.*

31. *Id.*

32. *Id.* at 12.

33. *Id.* at 1.

34. *Id.*

35. Ninety percent of federal district judges surveyed by the Federal Courts Study Committee stated that sentencing had become more time consuming, with more than half reporting an increase of at least 25% and a third reporting an increase of more than 50% in the time required for sentencing. REPORT OF THE FEDERAL COURTS STUDY COMMITTEE, *supra* note 12, at 137.



nal appeals in cases subject to the Guidelines.<sup>36</sup> Prior to the reform of the sentencing process, few if any of these appeals could have been brought. The appeal of sentencing issues has made appeals from convictions more complex and difficult to resolve, and most appeals from convictions now also raise one or more sentencing issues. In 1993, for example, only thirty percent of criminal appeals did not involve a sentencing issue, and that percentage falls to fifteen percent if the calculations are based exclusively on cases to which the Guidelines are applicable.<sup>37</sup> These changes flowing from the reform of the sentencing process have a substantial effect on the workload of the courts of appeals since criminal appeals now account for approximately one-fourth of the appellate caseload.<sup>38</sup>

Another factor, which has not been noted generally, has also resulted in an increased allocation of judicial time to sentencing issues in criminal cases. The overall conviction rate has increased substantially since the 1970s. Two decades ago, the conviction rate was approximately seventy-five percent; it has risen gradually and is now holding steady at roughly eighty-five percent.<sup>39</sup> Though the number of prosecutions was nearly the same in 1972 as in 1992, there were 37,220 convictions in 1972 and 50,260 in 1992.<sup>40</sup> As noted above, this larger number of defendants must be sentenced in accordance with more time-consuming procedures.

(2) *Corresponding Decline in the Resources Available for Civil Cases*

The increased criminal caseload has an inevitable impact on the remainder of the federal courts' dockets. Criminal cases receive top priority because of the Speedy Trial Act, which requires dismissal of charges that are not brought within specified time periods.<sup>41</sup> While

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36. The calculations in notes 36 and 37 were based upon data provided in a memorandum from Marilyn Ducharme of the Administrative Office of the U.S. Courts to the author (copy on file with the *Hastings Law Journal*). The calculations include only classified cases to which the Guidelines were applicable, excluding a small number of cases (612 in 1993) in which the type of appeal was not classified. Although the Guidelines became effective on November 1, 1987, there are still some non-Guidelines appeals (1,870 in 1993).

37. These calculations are based exclusively on classified cases, excluding the few cases (612 in 1993) that were not classified.

38. In the twelve months ending on March 31, 1993, criminal appeals accounted for 24% of the filings in the courts of appeals. ADMINISTRATIVE OFFICE OF THE U.S. COURTS, FEDERAL JUDICIAL WORKLOAD STATISTICS 10 tbl. B-1 (1993).

39. THE CRIMINAL CASELOAD, *supra* note 23, at 10.

40. ADMINISTRATIVE OFFICE OF THE U.S. COURTS, 1972 ANNUAL REPORT OF THE DIRECTOR 381 tbl. D-4; ADMINISTRATIVE OFFICE OF THE U.S. COURTS, 1992 ANNUAL REPORT OF THE DIRECTOR 266 tbl. D-4.

41. 18 U.S.C. § 3162(a) (1985).

the speedy trial clock is tolled during certain pretrial proceedings,<sup>42</sup> the total time allotted—seventy days<sup>43</sup>—is so short that the Act places significant pressure on prosecutors and court personnel. The federal courts have responded to the increased pressure from the criminal caseload by reducing the resources available for civil cases. This trend is most apparent in the case of trial resources.

The total number of trials in the federal system remained relatively constant from 1980 to 1992, at approximately 20,000,<sup>44</sup> but the number of criminal trials increased while civil trials decreased. Given the priority accorded to criminal trials, the dramatic expansion of the criminal trial docket, the greater percentage of complex cases, and the increased call on judicial resources for sentencing appeals, it is not surprising that the resources available for civil trials have been substantially reduced. Between 1980 and 1993, the number of civil trials declined by 20 percent (from 13,191 to 10,527) while the number of criminal trials increased by 43 percent (from 6,634 to 9,465).<sup>45</sup> Moreover, the decline in the number of civil trials has occurred despite the fact that the civil docket has continued to grow, and indeed has grown far more rapidly than the criminal docket.<sup>46</sup> Because these figures are based upon national averages, they underrepresent the changes experienced in districts where the criminal caseload has exploded. As noted above, in more than one-third of the federal judicial districts more than one-half of the district courts' trial time is currently allocated to criminal cases.<sup>47</sup>

(3) *Potential for Impairment of the Federal Courts' Core Constitutional Functions*

The federal courts' core constitutional functions are interpreting federal law, declaring federal rights, and providing a neutral forum for

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42. See 18 U.S.C. § 3161(h) (1985).

43. 18 U.S.C. § 3161(c)(1) (1985); 18 U.S.C. § 3162(a)(2) (1985).

44. There were 19,825 trials in 1980 and 19,992 in 1992. 1993 STATISTICAL ABSTRACT OF THE UNITED STATES 206 tbl. 332.

45. *Id.* During this period, while the percentage of civil jury trials decreased slightly, the percentage of criminal jury trials increased from 52% to 60%. *Id.* The percentage of jury trials in civil cases fell from 43% in 1980 to 41% in 1992. *Id.*

46. The number of civil filings rose from approximately 125,000 in 1975 to approximately 227,000 in 1992. This represents a slight decrease from the high of 275,000 cases filed in 1985 before the statutory increase in the required amount in controversy in diversity cases. ADMINISTRATIVE OFFICE OF THE U.S. COURTS, 1992 ANNUAL REPORT 55.

47. See *supra* note 22 and accompanying text.

interstate disputes.<sup>48</sup> With less than 650 trial judges nationwide, the federal judicial system performs a distinctive function not shared by the much larger state judicial systems. While a full account of the functions of the federal courts is beyond the scope of this Article, the general contours can be sketched quickly.

The federal courts have the principal responsibility of interpreting the provisions of the federal Constitution that limit government authority, including the First Amendment protections of speech and religion and the Fifth and Fourteenth Amendment requirements of equal protection and due process. A related function is the federal courts' jurisdiction over habeas corpus petitions challenging the constitutionality of federal or state confinement.

The federal courts also have the responsibility of interpreting and applying an enormous range of federal statutory law dealing with subjects as diverse as federal taxation; the regulation of the securities industry; occupational health and safety; labor and management relations; the purity and efficacy of drugs; air and highway safety; environmental regulation; and the cleanup of hazardous wastes. Many of these statutes implement complex federal regulatory schemes that could be frustrated if judicial enforcement were not available. Enforcement in the federal courts implements the underlying federal policies and ensures uniformity. Other federal statutes forbid discrimination in employment, housing, education, and lending, and enforcement of these laws is also available in the federal courts. In some cases, such as bankruptcy, patent, and trademark law, federal statutory jurisdiction is exclusive, meaning that parties have no alternative to federal judicial proceedings to vindicate their rights.

The federal courts are the forum of choice for other civil litigation that would be difficult, if not impossible, to accommodate in the state courts, particularly litigation spanning multiple state lines. Traditionally, the federal courts have also provided a forum for diversity cases

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48. The text of Article III reflects these functions. It provides for federal judicial power in all cases "arising under" the Constitution and laws and treaties of the United States; it also provides for federal judicial power in a variety of interstate cases, including controversies between two or more states, between citizens of two or more states, and between a state and citizens of another state. U.S. CONST. art. III, § 2. Interstate cases played a proportionally larger role in the first century of the federal courts' development than they do today. The Judiciary Act of 1789 provided for diversity jurisdiction, 1 Stat. 78, § 11, but there was no general federal question jurisdiction until 1875. Act of Mar. 3, 1875, § 1, 18 Stat. 470 (codified at 28 U.S.C. § 1331(a) (1988)).

and other suits when the neutrality of the state courts might be questioned.<sup>49</sup>

As the federal criminal caseload has grown, the federal courts have performed a necessary triage. Criminal cases have been receiving priority under the dictates of the federal Speedy Trial Act, and judicial resources have been diverted from civil to criminal cases. Increasingly, civil litigants—from corporations to taxpayers to civil rights plaintiffs—are finding that the federal courts lack the resources to permit a complete and timely resolution of their claims.

While the particulars vary from district to district, an example gives a sense of the tradeoffs involved. In the District of Columbia, district judges complained publicly in 1991 that the United States Attorney was bringing minor drug cases (such as the \$20 sale of two rocks of crack cocaine and youthful first offenders arrested as couriers) in federal district court rather than superior court.<sup>50</sup> The judges said 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 were delayed, and emergency cases were routed to the court of appeals because the district judges lacked the time to consider them.<sup>51</sup> The magnitude in the shift is reflected in requests for jury trials. The number of criminal jury trial requests grew from 81 in 1986 to 294 in 1990; during the same period, the requests for civil jury trials fell.<sup>52</sup> The civil cases that had been put on hold included a complex consolidation of thirty cases arising from the collapse of the National Bank of Washington and a challenge to EPA clean air and water standards.<sup>53</sup> In one case involving a constitutional challenge to the federal government's use of a preemployment urinalysis test, the district judge advised the plaintiff to apply for a prelimi-

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49. The amount in controversy requirement for diversity jurisdiction has been raised repeatedly, and there is substantial support for further restrictions on diversity jurisdiction. See, e.g., COMMITTEE ON LONG RANGE PLANNING, JUDICIAL CONFERENCE OF THE UNITED STATES, PROPOSED LONG RANGE PLAN FOR THE FEDERAL COURTS 25-27 (1994) (advocating elimination of diversity jurisdiction with narrow exceptions, e.g., when plaintiff can clearly demonstrate local prejudice in state court or imposition of other limits).

50. Garry Sturgess, *Judges Rap Stephens on Drug Cases*, LEGAL TIMES, Feb. 11, 1991, at 7.

51. *Id.* But see Tracy Thompson, *Stop Complaining, Stephens Tells Judges; Federal Jurists Bristle When U.S. Attorney Suggests They Don't Work Very Hard*, WASH. POST, June 8, 1991, at B1, B7 (noting that federal courts in District of Columbia are not as congested as other districts and that district is 79th of 94 federal districts in number of criminal cases per district judge).

52. Garry Sturgess, *Another Clash Over Criminal Caseload*, LEGAL TIMES, Apr. 1, 1991, at 7. Requests for civil jury trials fell from 120 to 93. *Id.*

53. Sturgess, *supra* note 50.

nary injunction, which he would deny, so that the case could be heard immediately in the appellate court.<sup>54</sup>

**B. Constraints Arising from the Size and Structure of the Federal Judiciary**

The information presented in the preceding Section establishes that the federal courts require additional resources to handle their growing criminal caseload without giving short shrift to their civil docket. While some increase in resources is warranted, the federal judiciary cannot accommodate unlimited increases in its criminal (or civil) docket by expansion. As the Federal Courts Study Committee concluded, "The reason that the federal courts cannot accommodate unlimited increases in the demand for their services by expanding their personnel lies both in the character of the federal judiciary and the limitations of the pyramidal three-tier system within which federal courts now operate."<sup>55</sup> If there were thousands of federal judges, presidential nomination and senatorial confirmation would be merely pro forma, and there would be a significant dilution of the prestige and responsibility that have historically served as chief incentives and permitted the recruitment of persons of real distinction.<sup>56</sup> As the Committee concluded, the structure of the federal courts is also an obstacle to their enlargement:

The more trial judges there are, the more appeals judges there must be; the more appeals judges there are, the higher the rate of appeal . . . ; the more appeals there are, the more difficult it is for the Supreme Court to maintain some minimum uniformity of federal decisional law, because its capacity to review decisions of the lower

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54. *Id.*

55. REPORT OF THE FEDERAL COURTS STUDY COMMITTEE, *supra* note 12, at 7.

56. The Committee concluded:

The independence secured to federal judges by Article III is compatible with responsible and efficient performance of judicial duties only if federal judges are carefully selected from a pool of competent and eager applicants and only if they are sufficiently few in number to feel a personal stake in the consequences of their actions. Neither condition can be satisfied if there are thousands of federal judges. . . . [A] sufficient number of highly qualified applicants could not be found unless salaries of federal judges were greatly increased; and a judge who felt like simply a tiny cog in a vast wheel that would turn at the same speed whatever the judge did would not approach the judicial task with the requisite sense that power must be exercised responsibly—especially when that judge, by reason of having life tenure, lacked the usual incentives to perform assigned tasks energetically and responsibly.

*Id.* at 7. *But see* Hon. Stephen Reinhardt, *Too Few Judges, Too Many Cases: A Plea to Save the Federal Courts*, A.B.A. J., Jan. 1993, at 52 (asserting that the number of federal appellate judges could be doubled without affecting quality).

federal courts is limited. Even the maintenance of the necessary minimum uniformity of law within a single circuit becomes problematic if there are a great many judges in that circuit, and while this problem can be alleviated by increasing the number of circuits, the result is to increase the number of intercircuit conflicts and hence burden on the Supreme Court. . . . If there were no appeals, expansion might be a tolerable if not ideal solution. There would be some dilution of quality and responsibility, but there would not be chaos. However, given appeals, continuous expansion of the number of judges at any level . . . will lead eventually to paralysis or incoherence, because of the judicial system's three tier pyramidal structure.<sup>57</sup>

If present trends continue, it will not take long to reach the point where the current structure of the federal courts cannot be maintained, and the character of the federal judicial system will change radically. A 1994 report prepared for the Judicial Conference estimates that more than 4,000 federal judges will be needed by the year 2020 if the federal caseload continues to increase at the same rate as it has for the past 50 years.<sup>58</sup> A federal judiciary of more than 4,000 judges, hearing more than one million cases annually, would call into question the concept of judicial federalism that forms the major justification for the existence of the federal courts. A recent report to the Judicial Conference makes this point well:

Beyond historical practice, the allocation of limited jurisdiction to the federal courts is justified both in theory and as a practical necessity. Unless a distinctive role for the federal court system is preserved, there is no sound justification for having two systems. If federal courts were to begin exercising, in the normal course, the broad range of jurisdiction traditionally allocated to the states, they would lose both their distinctive nature and, due to burgeoning dockets, their ability to resolve fairly and efficiently those cases of clear national import and interest that properly fall within the scope of federal concern. Under that unfortunate scenario, all courts—federal and state—might as well be consolidated into a single system to handle all judicial business.<sup>59</sup>

If we accept the premise that the distinctive role of the federal judiciary is incompatible with the idea of thousands of Article III federal judges, it becomes clear that the federal courts will never be able to accommodate a major share of the criminal litigation in the United States. The present federal criminal docket—though greatly ex-

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57. REPORT OF THE FEDERAL COURTS STUDY COMMITTEE, *supra* note 12, at 7-8. For a discussion of the alternatives to the present unified pyramidal structure, see *id.* at 10-13.

58. COMMITTEE ON LONG RANGE PLANNING, *supra* note 49, at 13 tbl. 6, 16 (Draft for Public Comment, Nov. 1994).

59. *Id.* at 19.

panded by the addition of new federal crimes and the provision of additional resources to the Department of Justice—accounts for no more than a small fraction of the criminal prosecutions in the United States. Even after the dramatic expansion of the federal criminal caseload in the 1980s and 1990s, the states are still handling more than ninety-five percent of all violent crime prosecutions.<sup>60</sup> The overwhelming proportion of the cases now handled in the state system, the magnitude of the criminal caseload, and the small size of the federal judiciary make it crystal clear that the federal government cannot take over the lion's share of criminal enforcement responsibility. In 1990 state and local authorities made 1.1 million drug arrests,<sup>61</sup> and in 1992 there were more than 13 million criminal cases filed in the state courts.<sup>62</sup> Obviously no more than a small fraction of these cases can be heard by the 649 federal judges on the federal district courts.<sup>63</sup> Doubling, tripling, or even quadrupling the federal judiciary would still leave the vast bulk of criminal cases in the state courts. Enlarging the federal courts sufficiently to take on the bulk of these cases would indeed change their character beyond recognition and be incompatible with their other constitutional functions.

### C. Decentralization and Federalism

The current increase in federal criminal jurisdiction is in fundamental tension with the values of decentralization promoted by federalism.<sup>64</sup> A decentralized federal system is efficient; it permits criminal

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60. H. Scott Wallace, *The Drive to Federalize Is the Road to Ruin: When Less Is More*, CRIM. JUST., Fall 1993, at 8 (quoting OFFICE OF THE ATTORNEY GENERAL, U.S. DEPT. OF JUSTICE, COMBATTING VIOLENT CRIME 4 (July 1992)).

61. *Id.* at 53 (citing BUREAU OF JUSTICE STATISTICS, DRUGS, CRIME, AND THE JUSTICE SYSTEM 136 (1992)). In comparison, federal authorities made 22,000 drug arrests during the same period. *Id.*

62. This number, which reflects only 47 states, was calculated from the filings reported in STATE JUSTICE INST. & NAT'L CTR. FOR STATE COURTS, STATE COURT CASELOAD STATISTICS, ANNUAL REPORT 1992, at 31 fig. 1.47 (1994). There were 1,188,569 criminal felony cases filed in the 35 states that provided data to the Institute. *Id.* at 40 fig. 1.58.

63. It should be noted, however, that state court judges currently have far heavier caseloads than do federal judges. In 1992 there were 75 criminal cases and 355 civil cases filed per judge in the federal system; in the state courts of general jurisdiction there were 417 criminal cases and 995 civil cases per judge. *Id.* at 44 fig. 1.61.

64. A vigorous debate regarding the contemporary importance of federalism is now underway among academics. Edward Rubin and Malcolm Feeley have argued with considerable force that to the extent American federalism diverges from simple decentralization it is a counterproductive legacy of history, a collective "neurosis" that should not be permitted to hamper the achievement of national policies. Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903, 908 (1994). Professors Rubin and Feeley nonetheless recognize that states presently serve as the "natu-

justice policy to be tailored to local conditions and policy preferences; and it furthers political accountability. The variety inherent in the federal system also permits desirable experimentation. Indeed, many of the most promising current trends in criminal enforcement began at the state and local levels, including specialized drug courts, community policing, boot camps, and sentencing guidelines. The values promoted by federalism, which have great force in the context of criminal enforcement, are threatened by the seemingly inexorable expansion of federal criminal law.

Many efficiency concerns favor state and local rather than federal criminal enforcement. Given the vastly larger size of the state judiciary, state courts are nearly always geographically closer, and hence more convenient, for victims, witnesses, jurors, and defendants. The states, which have long had large criminal dockets, typically have developed a comprehensive range of social service and outreach programs that are lacking in the federal courts. Finally, state corrections programs also have built-in advantages over their federal counterparts. Because state corrections institutions are located closer to offenders' home communities, they facilitate contact with family and reintegration into the community. Federal institutions, by contrast, draw their inmate populations from a nationwide base, and inmates may be housed hundreds or even thousands of miles from friends and family. Sustaining family contact and reintegrating an offender into his community are inherently more difficult in the federal system. It should be noted that corrections is an increasingly important aspect of the federal criminal justice system. Fueled by the expansion of the federal criminal caseload and the changes in federal sentencing, the population in the federal prison system has skyrocketed; it now exceeds the inmate population in forty-nine of the fifty states.

Decentralizing prosecutorial decision making also has substantial advantages. State criminal laws are enforced by elected state and local prosecutors who are intimately familiar with local conditions and politically accountable to their varied constituencies. In contrast, the enforcement responsibility for federal criminal law is divided between the Justice Department in Washington and the local United States Attorney, who is a presidential appointee. In general, federal prosecutors are responsible for a larger and more diverse geographic area

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ral and convenient means to achieve the managerial benefits that flow from decentralizing certain governmental functions." *Id.* at 951. Accordingly, this Article refers to the values of decentralization promoted by federalism.



than their state counterparts. Federal authorities are inevitably farther from the grass roots than their state and local counterparts.

There are also significant advantages to decentralizing legislative judgments regarding criminal justice policy. If state rather than federal law governs, local conditions and the policy preferences of a smaller community will govern such important matters as the definition of the conduct that should be criminal and the penalties that should be imposed. At present, there is considerable variation in opinion from state to state on the question of what conduct should be criminalized (as well as what conduct should constitute a defense).<sup>65</sup> Sentencing schemes also vary among the states, and state schemes vary from both the federal Sentencing Guidelines and the federal sentencing statutes.<sup>66</sup>

It has been suggested that federalism also promotes individual liberty by dividing power among the federal, state, and local governments. Perhaps the most obvious aspect of the division of power is that the United States has no single federal police force. The concentration of power in an integrated national police force might pose a greater threat to individual liberty than the highly fragmented power that is presently dispersed among federal, state, and local actors. In the current situation, for example, there is no single dossier for each individual.<sup>67</sup>

On the other hand, the dispersal of power to state and local officials has not always operated to promote individual liberty. Within the recent past, some state and local authorities were indifferent, if not hostile, to the rights of African-American defendants in the South. The appointment of federal prosecutors and judges might operate to

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65. For example, the definition of rape varies considerably from state to state, and many states are now adopting a variety of stalking laws. Some states criminalize forms of sexual conduct that are decriminalized or even constitutionally protected in other states. A few states, such as Montana, have eliminated the insanity defense, while others recognize different forms of the defense (e.g., M'Naghten Test, MODEL PENAL CODE § 4.02 (1985)). Such examples could be multiplied indefinitely.

66. For a general discussion of the variety of state guidelines and the differences between the various state models and the federal sentencing guidelines, see Richard S. Frase, *Sentencing Guidelines in the States: Lessons for State and Federal Reformers*, 6 FED. SENTENCING REP. 123 (1993), an overview of the articles in an issue analyzing the sentencing schemes in various states.

67. The importance of this fragmentation of information is decreasing as even state and local officials gain access to the Information Superhighway. For example, the Federal Bureau of Investigation now allows all duly authorized law enforcement agencies access to the National Crime Information Center.

buffer such defendants from local prejudices and political pressures.<sup>68</sup> The dispersal of criminal jurisdiction has also operated as a barrier to the adoption of a national code of criminal procedure (like those presently in operation in many other nations) that would provide a uniform, threshold level of procedural protection for all defendants throughout the United States.<sup>69</sup>

## **II. Too Few Criminal Prosecutions: Inequality Between Defendants Prosecuted for the Same Conduct in the State and Federal Systems**

An equally serious problem with the present state of affairs is that there are too few federal prosecutions to ensure the equal treatment of identically situated defendants. As noted above, the incursion of federal criminal law into areas already subject to state criminal laws has not displaced state enforcement; rather it has created an increasing area of dual criminal jurisdiction. Significant differences between state and federal law on critical subjects such as sentencing dictate that defendants who have performed precisely the same conduct receive very different treatment depending upon where they are prosecuted. The current federal criminal statutes reach far more conduct than can be prosecuted in the federal courts. While federal criminal enforcement is the norm in a few areas subject to dual jurisdiction, such as securities violations, in general, federal prosecutors bring only a few of the cases that fall under many of the statutes in areas of dual federal-state jurisdiction. As a result, those few defendants prosecuted in federal court receive significantly different—and usually higher—sentences than they would have if they, like many others, had been prosecuted for the same conduct in state court. The resulting inequality is completely at odds with the contemporary movement, exemplified by the federal Sentencing Guidelines, to ensure that similarly situated offenders receive the same sentence.

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68. Indeed, a national police force might also contribute to individual liberty if it adopted more selective employment criteria and operating procedures and achieved higher levels of training than small state and local police forces can afford.

69. See generally CRAIG M. BRADLEY, *THE FAILURE OF THE CRIMINAL PROCEDURE REVOLUTION* (1993) (arguing in favor of a national code of criminal procedure that would be easier for criminal justice officials to understand, internalize, and obey than Supreme Court decisions adjudicating particular cases). Professor Bradley argues that Congress can authorize the promulgation of such rules under section 5 of the Fourteenth Amendment. *Id.* at 146.

### A. Disparity Among Defendants

The expansion of federal criminal jurisdiction has led to serious inequalities among similarly situated defendants with regard to sentencing as well as significant procedural rights. Disparity has been fostered because the contemporary expansion of federal jurisdiction has not been accompanied by preemption of existing state criminal laws. Federal law has simply been layered over existing state law to produce dual jurisdiction. Despite the phenomenal expansion of dual federal-state jurisdiction, federal law differs from state law on significant matters of procedure, the definition of the relevant crimes and defenses, and, perhaps most importantly, the sentences applicable to various offenses.<sup>70</sup> Dual jurisdiction means that offenders are subject to a kind of cruel lottery, in which a small minority of the persons who commit a particular offense is selected for federal prosecution and subjected to much harsher sentences—and often to significantly less favorable procedural or substantive standards—than persons prosecuted for parallel state offenses. The structural disparity fostered by the new regime of dual jurisdiction is at odds with the premise of the federal Sentencing Guidelines.

Dual federal-state criminal jurisdiction is now the rule rather than the exception. Federal law reaches at least some instances of each of the following state offenses: theft,<sup>71</sup> fraud,<sup>72</sup> extortion,<sup>73</sup> bribery,<sup>74</sup> as-

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70. Of course, the precise content of state law varies between jurisdictions on many of the matters in question here. Despite this variance, some generalizations may be made. First, federal sentences are generally longer than state sentences for the same conduct. Frase, *supra* note 66, at 123 (noting that state guidelines generally have different balance on issues of sentencing severity and flexibility than federal guidelines). Second, the Federal Rules of Criminal Procedure provide a defendant with fewer procedural rights related to joinder, severance, and pretrial discovery than the rules in force in many states. *See, e.g.,* WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 17.1(b) (2d ed. 1992) (noting that Federal Rule of Criminal Procedure 8(a) permits prosecutor to join offenses of a similar character; most states do not provide for such joinder because of risk of conviction upon weight of accusations or accumulation of evidence); *id.* § 17.2(g) (Federal Rule of Criminal Procedure 14 allows severance only upon showing of prejudice by the defense, while some states grant defendant severance as a matter of right); *id.* § 20.3(h) (noting that federal rules, unlike rules in many states, do not require prosecutor to provide defendants with a list of the names and addresses of witnesses prosecution intends to call; some states also require that the prosecutor provide the names and addresses of others who have knowledge of relevant facts).

71. 18 U.S.C. § 659 (1988) (theft from interstate shipment); *cf.* 18 U.S.C. §§ 2312, 2313 (1988 & Supp. V 1993) (interstate transportation of stolen motor vehicles), §§ 2314, 2315 (1988 & Supp. V 1993) (interstate transportation of stolen property).

72. *E.g.,* 18 U.S.C. § 1341 (Supp. V 1993) (mail fraud), § 1343 (Supp. V 1993) (wire fraud), § 1344 (Supp. V 1993) (bank fraud).

sault,<sup>75</sup> domestic violence,<sup>76</sup> robbery,<sup>77</sup> murder,<sup>78</sup> weapons offenses,<sup>79</sup> and drug offenses.<sup>80</sup> In many instances, federal law overlaps almost completely with state law, as is the case with drug offenses.

The sentences available in a federal prosecution are generally higher than those available in state court—often ten or even twenty times higher. For example, in one drug case the recommended state sentence was eighteen months, while federal law required a mandatory minimum sentence of ten years, and the applicable federal sentencing guidelines range was 151 to 188 months for one defendant and 188 to 235 months for the other.<sup>81</sup> Another defendant subject to a five-year mandatory minimum in federal court would have been eligible for a sentence of zero to ninety days in state court as a first offender.<sup>82</sup> A defendant who was placed on two years probation in state

73. *E.g.*, 18 U.S.C. § 1951 (1985) (interference with commerce by extortion), §§ 891-94 (1988) (extortionate credit transactions).

74. *See, e.g.*, 18 U.S.C. § 201 (1988 & Supp. V 1993) (bribery of federal official), § 224 (1988) (sports bribery), § 666 (1988 & Supp. V 1993) (federal program bribery), § 1952 (1988 & Supp. V 1993) (interstate travel in aid of bribery).

75. 18 U.S.C. § 351 (1988) (assault on federally protected persons), § 1501 (1988 & Supp. V 1993) (assault on process server), § 1751 (1988) (assault on president and vice president).

76. 18 U.S.C.A. § 2261 (West Supp. 1995) (interstate domestic violence).

77. 18 U.S.C. § 1951 (1988) (interference with interstate commerce by threats of violence).

78. 18 U.S.C. § 1116 (1988 & Supp. V 1993) (murder of foreign officials, official guests, and internationally protected persons), § 1117 (1988) (conspiracy to commit murder); 18 U.S.C.S. § 1120 (Law. Co-op. 1994) (murder by escaped federal prisoner); 21 U.S.C. § 675 (1988) (murder of federal meat inspector). *See also* 18 U.S.C. § 1958 (1988 & Supp. V 1993) (use of interstate commerce facilities in commission of murder-for-hire).

79. 18 U.S.C. §§ 922, 924 (1988 & Supp. V 1993). Section 922 includes the Gun-Free School Zones Act of 1990 (codified at 18 U.S.C. § 922 (q) (Supp. V 1993)).

80. *E.g.*, 21 U.S.C. § 841 (1981) (manufacture, distribution, and possession with the intent to distribute), § 846 (drug conspiracy), § 848 (drug kingpin).

81. *United States v. Williams*, 746 F. Supp. 1076, 1078-79 (D. Utah 1990), *rev'd on other grounds*, 963 F.2d 1337 (10th Cir. 1992).

82. *United States v. Oakes*, 11 F.3d 897 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 1569 (1994). The defendants in *Oakes* and the cases cited *infra* were all subject to *both* federal and state prosecution for the same conduct. The increasing area of jurisdictional overlap also increases the number of individuals who are subject to prosecution in *both* the federal and the state systems. The Supreme Court has held that duplicative prosecutions of this nature do not violate the double jeopardy clause under the dual sovereignty doctrine. *Abbate v. United States*, 359 U.S. 187 (1959); *Bartkus v. Illinois*, 359 U.S. 121 (1959). The Supreme Court reaffirmed the dual sovereignty doctrine in 1985. *Heath v. Alabama*, 474 U.S. 82 (1985). The international community, in contrast, regards duplicative prosecutions as violative of fundamental human rights, even within a federal system. *See* International Covenant on Civil and Political Rights, art. 14, §§ 7, 50 (treaty provisions, including prohibition on double jeopardy, "shall extend to all parts of federal States without any limitations or exceptions"). The United States ratified the International Covenant in 1992, but

court was later sentenced to sixty-three months for the same conduct in federal court.<sup>83</sup> Similarly, a defendant who received a diversionary state disposition to a thirty-day inpatient drug rehabilitation program, followed by expungement of his conviction upon successful completion of the program and follow-up, was subject to forty-six to fifty-seven months of imprisonment under the applicable federal guidelines.<sup>84</sup> It is not unusual for codefendants whose conduct is identical to receive radically different sentences, depending upon whether they are prosecuted in state or federal court. For example, one defendant whose codefendant received no jail time in a state prosecution received a ten-year federal sentence.<sup>85</sup>

Generally, 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.<sup>86</sup> The *Manual* also contains some standards applicable to specific offenses, but, in general, these too are stated in very broad terms. For example, the *Manual* lists seven criteria for determining whether federal drug charges will be filed or whether the case will be referred to state authorities. These factors include: (1) the "degree of federal involvement"; (2) the "effectiveness of state or local prosecutors" (including the penalties available); (3) "the amount of the controlled substance involved"; (4) the "viola-

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with reservations. See Michael H. Posner, *Here and There: Human Rights Should Be a Common Concern*, INT'L HERALD TRIB., Feb. 18, 1993.

83. *United States v. Woodard*, 927 F.2d 433 (8th Cir.), cert. denied, 502 U.S. 887 (1991).

84. *United States v. Hollins*, 863 F. Supp. 563 (N.D. Ohio 1994). Over the government's objections, the district court departed downward to a sentence of twelve months of incarceration in a halfway house followed by two years of supervised release. The district judge departed downward on the basis of the combination of the defendant's extraordinary rehabilitation from drugs and the prejudice the defendant suffered because of the government's delay in instituting federal charges. *Id.* at 569-70.

85. *United States v. Palmer*, 3 F.3d 300, 305 n.3 (9th Cir. 1993), cert. denied, 114 S. Ct. 1120 (1994).

86. See U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL §§ 9-27.000 to 9-27.750B. The *Manual* instructs federal prosecutors to weigh "all relevant considerations" in determining whether to bring a federal prosecution, including "[f]ederal law enforcement priorities," the "nature and seriousness of the offense," the "deterrent effect of prosecution," the "person's culpability in connection with the offense," and the "probable sentence or other consequences." *Id.* § 9-27.230. The comments conclude that the weight to be given to these factors may vary from case to case and that the list is not intended to be all inclusive. *Id.* § 9-27.230 cmt. The standards themselves also state that "[a] United States Attorney may modify or depart from the principles set forth herein as necessary in the interests of fair and effective law enforcement within the district." *Id.* § 9-27.140.

tor's background"; and (5) the backlog of cases in federal court.<sup>87</sup> The *Manual* does not quantify the amount of a controlled substance, but does state that it is "only one of several factors which should be considered," and that purity and method of packaging should also be taken into account in considering quantities.<sup>88</sup> Other offenses are governed only by similarly broad and flexible standards. There are, however, a handful of offenses for which the *Manual* provides a centralized approval process to ensure uniformity of prosecutorial charging standards.<sup>89</sup> In the case of the remaining offenses, charging discretion and any regulation of that discretion occur in the United States Attorney's office for each district. While some offices have charging guidelines for some of these remaining offenses, in many cases there are no standards to guide individual prosecutors. When standards are adopted in individual districts, the standards may vary significantly among districts.

On occasion, federal prosecutors have publicly pursued a deliberate strategy of taking only a fraction of similar or identical cases, with the hope that the severe results in those federal cases will result in general deterrence. For example, in the Southern District of New York, then-United States Attorney Rudolph Giuliani initiated "federal day," one day chosen at random each week in which all street-level drug dealers apprehended by local authorities would be prosecuted in federal court.<sup>90</sup> Giuliani stated that "[t]he idea was to create a Russian-roulette effect." Prosecutors in the Eastern District of Pennsylvania issued a press release in 1992 describing a case that was intended to serve as an example that would persuade defendants to plead guilty in state court to avoid the possibility of federal charges. The defendant who was to serve as this example to others was a small-

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87. *Id.* § 9-101.200.

88. *Id.* § 9-101.200(A).

89. The RICO provisions of the *Manual* are the most significant provisions. *See id.* § 9-110.00 *et seq.*

90. Alexander Stille, *A Dynamic Prosecutor Captures the Headlines*, NAT'L L.J., June 17, 1985, at 48. The "federal day" program was initiated in 1983. *See* Stephen Labaton, *New Tactics in the War on Drugs Tilt Scales of Justice Off Balance*, N.Y. TIMES, Dec. 29, 1989, at A1. Mr. Giuliani referred frequently to this program in his later political campaigns, asserting that it kept drug dealers off balance because they never knew when they might be subject to the higher penalties associated with federal prosecutions. William Glaberson, *Giuliani's Powerful Image Under Campaign Scrutiny*, N.Y. TIMES, July 11, 1989, at A1. Mayor Ed Koch identified another effect of this program: drug dealers who were arrested by local authorities asked whether this was federal day and, if so, tried to escape. Josh Barbanell, *Koch Recommends Stiffer Penalties and More Prisons*, N.Y. TIMES, Feb. 15, 1985, at A1.

time drug dealer who had rejected a state plea offer of a four-year sentence; he was sentenced in federal court to life without parole.<sup>91</sup>

In each of these cases, federal law overlapped with state law and federal law provided for higher penalties. While many cases fell within the ambit of the federal statute in question, only a few of those cases were prosecuted in federal court. While in some instances an effort may have been made to identify particularly serious cases for federal prosecution, in other cases the selection was random or the criteria for selection were unrelated to the defendant's culpability.<sup>92</sup> For purposes of this Article, the resulting differences among defendants prosecuted in federal and state courts will be referred to as structural inequalities.

#### **B. Lack of Judicial Remedies for Inequalities Resulting from Intermittent Federal Prosecutions**

Under present law there is no basis to challenge these structural inequalities. The federal courts have uniformly rejected equal protection challenges to such disparate sentences<sup>93</sup> and have held that they have no jurisdiction to review federal prosecutors' charging decisions absent a claim of discrimination on the basis of suspect characteristics, such as race.<sup>94</sup> Judicial review is unavailable even if the prosecutor's decision to file in federal court was motivated by a desire to impose a harsher sentence and was inconsistent with the treatment of other offenders.<sup>95</sup>

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91. H. Scott Wallace, *The Drive to Federalize Is the Road to Ruin*, CRIM. JUST., Fall 1993, at 8 (quoting Jim Smith, *Petty Pusher Goes Out Big Time*, PHILA. DAILY NEWS, July 17, 1992, at 7).

92. For example, federal prosecutors frequently agree to take cases if their state counterparts are particularly overburdened. This cooperation would be entirely admirable if it did not have the effect of arbitrarily imposing far higher sentences on particular defendants for reasons wholly unrelated to their individual culpability.

93. See, e.g., *United States v. Oakes*, 11 F.3d 897 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 1569 (1994).

94. E.g., *United States v. Armstrong*, 1995 U.S. App. LEXIS 4040, at \*19 (9th Cir. Mar. 2, 1995) (en banc); *United States v. Smith*, 30 F.3d 568, 572 (4th Cir. 1994); *United States v. Jacobs*, 4 F.3d 603, 604-05 (8th Cir. 1993) (per curiam); *United States v. Palmer*, 3 F.3d 300, 305-06 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 1120 (1994). See also *United States v. Ucciferri*, 960 F.2d 953 (11th Cir. 1992) (per curiam) (stating that court had no discretion to review prosecutor's decision to bring "state" cases in federal courts to take advantage of less stringent procedural standards).

95. *United States v. Jacobs*, 4 F.3d 603, 604-05 (8th Cir. 1993) (per curiam); *United States v. Palmer*, 3 F.3d 300, 305-06 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 1120 (1994); *United States v. Oakes*, 11 F.3d 897, 899 (9th Cir. 1993) (dictum), *cert. denied*, 114 S. Ct. 1569 (1994).

One district court concluded that, in light of the enormous disparity in federal and state sentencing laws, due process requires that there be articulated or written standards for referral to federal authorities, but that decision was reversed on appeal,<sup>96</sup> and it has been rejected by the other circuits.<sup>97</sup>

### C. Structural Disparities Among Defendants Violate Federal Sentencing Policy

The prosecutorial policy of employing harsh sanctions in a few cases for deterrent effect stands in sharp contrast with federal sentencing policy. The Sentencing Reform Act of 1984 (the Act) provides that one of the factors to be considered in imposing federal sentences is "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct."<sup>98</sup> The Act directs the Federal Sentencing Commission to establish policies and practices that ameliorate such disparities.<sup>99</sup>

The legislative history stresses the importance of eliminating sentencing disparity:

Sentencing disparities that are not justified by differences among offenses or offenders are unfair both to offenders and to the public. A sentence that is unjustifiably high compared to sentences for similarly situated offenders is clearly unfair to the offender; a sentence that is unjustifiably low is just as plainly unfair to the public. Such sentences are unfair in more subtle ways as well. Sentences that are disproportionate to the seriousness of the offense create a disrespect for the law. Sentences that are too severe create unnecessary

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96. *United States v. Williams*, 746 F. Supp. 1076 (D. Utah 1990), *rev'd*, 963 F.2d 1337 (10th Cir. 1992).

97. *See, e.g.*, *United States v. Jacobs*, 4 F.3d 603, 604 (8th Cir. 1993) (per curiam) ("[defendant's] arguments border on the frivolous"); *United States v. Robinson*, 967 F.2d 287, 290 (9th Cir. 1992); *United States v. Allen*, 954 F.2d 1160, 1165-66 (6th Cir. 1992); *United States v. Carter*, 953 F.2d 1449, 1461-62 (5th Cir.), *cert. denied*, 112 S. Ct. 2980 (1992).

98. The Sentencing Reform Act of 1984, Pub. L. No. 98-473, § 212, 98 Stat. 1837, 1990 (codified at 18 U.S.C. § 3553(a)(6) (1988)).

99. The legislation directs the Commission to establish policies and practices that (B) provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices . . . .

*Id.* § 217, 98 Stat. 2018 (codified at 28 U.S.C. § 991(b)(1)(B) (1988)).



tensions among inmates and add to disciplinary problems in the prisons.<sup>100</sup>

Presumably, Congress must have been aware of the overlap of federal and state criminal jurisdiction when it enacted the current sentencing regime and aware that federal sentences would vary from those available under state law. The legislative history gives no indication, however, that Congress was made aware of the degree to which these factors could undermine its stated goal of ending unjustified sentencing disparities. Further, there is ample evidence that Congress had a second major goal in enacting sentencing reform: enhancing sentencing severity, particularly in the case of drug offenses and violent crimes.<sup>101</sup> While the goal of enhancing sentencing severity grew steadily more important during the time Congress had sentencing reform under consideration, it never displaced the goal of reducing sentencing disparity.<sup>102</sup> To the contrary, the passage of the Sentencing Reform Act would not have been possible without the sponsorship of both political conservatives (who sought harsher sentences) and political liberals such as Senator Kennedy, whose principal concern was the elimination of unjustified sentencing disparity.<sup>103</sup>

While there is an economic argument that the arbitrary selection of a few cases for harsh sentencing is the most efficient, *i.e.*, least expensive, means of promoting deterrence,<sup>104</sup> such a practice is incompatible with the federal Sentencing Guidelines regime. The current policy of removing only a few of the many identical cases for harsher treatment in the federal system—leaving the remainder in the state system where they will receive more lenient treatment—is the practical equivalent of selecting 1 case in 100 (or 1000) within the federal

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100. S. REP. NO. 225, 98th Cong., 1st Sess. 45-46 (1983), *reprinted at* 1984 U.S.C.A.N. 3182, 3182-3562. This report accompanied the proposed Comprehensive Crime Control Act of 1984, which served as the source of the pertinent portions of the legislation that was eventually enacted.

101. See Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223, 259, 266-69, 302-03 (1993).

102. *Id.* at 230-81.

103. Kenneth R. Feinberg, *Federal Criminal Sentencing Reform: Congress and the United States Sentencing Commission*, 28 WAKE FOREST L. REV. 291, 295-96 (1993) (commenting on the roles played by Democratic senators such as Kennedy, Biden, Hart, and Metzenbaum). For a detailed account of Senator Kennedy's role, see Stith & Koh, *supra* note 101, at 230-66. See also William W. Wilkins, Jr., et al., *Competing Sentencing Policies in a "War on Drugs Era"*, 28 WAKE FOREST L. REV. 305, 309-10 (1993).

104. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 230 (4th ed. 1992) (considering the economic efficiency of apprehending only a few offenders and giving a harsh sentence to each, as opposed to sentencing most offenders to a relatively mild sentence while others who are similarly situated receive a much harsher sentence).

system and increasing the sentence three-, four-, or tenfold in order to obtain increased deterrence. Such a cruel lottery would make a mockery of the enormous time and energy now being devoted in the federal system to equalizing the sentences for offenders whose conduct and criminal history are the same.

If we are on the right track with the Guidelines, and if it *is* important to eliminate unjustified sentencing disparity within the federal system, we can no longer afford to blind ourselves to the consequences of failing to use the same care in selecting the class of cases to which we apply the Guidelines as we use in applying the Guidelines to the cases that we select for federal prosecution.

**D. The Policy of Intermittent Federal Prosecutions Also Results in the Ad Hoc Denial of State Procedural Rights to Certain Defendants**

While sentencing is probably the most important factor that motivates prosecutors to bring federal charges when there is dual jurisdiction, other factors provide the prosecution with an advantage in particular cases. In one case, for example, the district court employed its supervisory authority to dismiss a case that had no federal ties, but had been transferred to federal court to avoid state constitutional restrictions on the use of informants, wiretaps, and search warrants.<sup>105</sup> The court of appeals reversed, concluding that while such systematic transfers to federal court were a source of concern, the federal courts may not interfere with the executive's discretionary power to control criminal prosecutions.<sup>106</sup> In addition, other provisions of the Federal Rules of Criminal Procedure also favor the prosecution more than the comparable state rules. For example, the federal discovery rules are far more restrictive than those in many states, such as Florida, and federal joinder rules are more permissive than those applicable in many states. These procedural differences sometimes motivate federal prosecutors to bring a case that would otherwise be pursued by state authorities. In effect, prosecutors may forum shop in order to gain a procedural advantage.

**III. New Principles to Limit Federal Criminal Jurisdiction**

In light of the arguments developed in Parts I and II, any principles to govern federal criminal jurisdiction must respect the limita-

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105. *United States v. Ucciferri*, 960 F.2d 953, 954 (11th Cir. 1992) (per curiam).

106. *Id.* at 954-55.

tions that flow from the small size of the federal courts without creating structural disparities. In order to meet these dual criteria, this Part proposes separating the components of federal criminal jurisdiction in order to distinguish between two questions: when federal jurisdiction over a class of activity is warranted, and if it is warranted, whether it is necessary to employ federal *judicial* resources. Disaggregating the elements of federal jurisdiction provides a means of reconciling the mismatch between the limited capacity of the federal courts and the breadth of federal interest in criminal justice matters. It also requires an exploration of means that advance federal goals without mandating prosecutions brought in the federal courts. While disaggregation of federal criminal jurisdiction and greater selectivity in employing federal judicial resources are necessary, they will not sufficiently tailor the caseload to the capacity of the federal courts. Prosecutorial discretion will still be necessary, but it should be exercised in a fashion that does not create the structural inequalities that result from the infrequent enforcement of federal statutes against a backdrop of general state enforcement. Discretion should be exercised with a greater emphasis on guidelines which define categories of cases that will be subject to general federal prosecution, rather than with the intermittent discretionary selection of individual cases.

#### A. Prior Approaches

Prior efforts to list the criteria for federal criminal jurisdiction have failed to match the caseload to the federal courts' capacity because these efforts have generally treated the need for federal resources as a sufficient basis for federal criminal jurisdiction (at least for some classes of cases). Some commentators treat the need for federal resources as a justification for extending federal criminal jurisdiction to broad categories of cases. For example, one commentator supports federal criminal jurisdiction when there would be economies of scale, when the conduct in question threatens to overwhelm local authorities, and when states are unable or unwilling to face up to certain problems.<sup>107</sup> Others reject any general reliance on the need for resources as a basis for federal criminal jurisdiction, but nonetheless base federal jurisdiction on the need for federal resources in some narrow class, or classes, of cases. This approach is taken in a draft long range plan prepared for the Judicial Conference in 1994, which

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107. Kathleen Sullivan, Remarks at Overlapping and Separate Spheres: A Three-Branch Roundtable on State and Federal Jurisdiction (Mar. 7, 1994) (transcript on file with author).

supports federal criminal jurisdiction based on the need for federal resources in "sophisticated criminal enterprises requiring federal resources or expertise to prosecute."<sup>108</sup>

Any theory that bases federal criminal jurisdiction on the need for federal resources is likely to produce far more cases than can fit comfortably within the small federal judicial system. There is, for example, tremendous expansive potential in the suggestion that federal jurisdiction is appropriate when criminal conduct threatens to overwhelm local authorities. If state authorities are inadequately financed, they may be overwhelmed by even garden-variety crime. Authorities in many states say they presently are overwhelmed by drug and violent crime caseloads.<sup>109</sup> Similarly, if federal intervention is warranted whenever the states have failed adequately to face up to some form of criminal activity, this criterion may be satisfied whenever state anticrime efforts are unsuccessful—particularly if it can be said that resource constraints hampered state enforcement efforts. In short, the federal courts do not have the capacity to accommodate all of the criminal cases in which there is a national interest and a need for federal resources.

Even a more limited acceptance of a resource-based theory of federal criminal jurisdiction is likely, in time, to generate a caseload that far exceeds the capacity of the federal judicial system. As noted above, the long range plan drafted for the Judicial Conference treats the need for federal resources as a sufficient basis for federal criminal jurisdiction in cases involving sophisticated criminal enterprises that require federal resources and expertise. While this specific recommendation may generate relatively few cases, it sets a precedent for basing the scope of federal jurisdiction on the need for federal resources. From this precedent, it is only a short step to reliance on the need for resources as a justification for the extension of federal jurisdiction to much broader categories of criminal activity. Congress appropriately may ask why the availability of federal jurisdiction should turn on whether a few large enterprises are involved, rather than a large number of individuals or smaller groups. There is no structural impediment that prevents the state courts from adjudicating cases in-

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108. COMMITTEE ON LONG RANGE PLANNING, *supra* note 49, at 21. Many aspects of this excellent draft report are fully consistent with the arguments advanced here.

109. See Hon. J. Anthony Kline, *Comment: The Politicalization of Crime*, in this Symposium Issue.

volving large, sophisticated criminal enterprises.<sup>110</sup> Moreover, it is certainly arguable that there is as great a need for federal resources when the scope of crime is great in the aggregate, even though many of the individual cases are small. This has been the justification for the creation of many new federal crimes dealing with violence and for the exercise of prosecutorial discretion in bringing federal prosecutions under these statutes. It would be naive to deny that there is a federal interest—and, indeed, a significant effect on commerce—as a result of violent street crime. For example, the tourist industry of the state of Florida has been hard hit as a result of highly publicized crimes of violence committed against domestic and international tourists.<sup>111</sup> The scope of federal interests and the genuine need for federal resources are enormous. Once the criteria for federal jurisdiction include the need for federal resources to supplement state resources, the number of cases that may be shifted to federal court will inevitably balloon. Both logic and political pressure likely will force the expansion of the category of cases in which the need for resources justifies federal jurisdiction.

The core problem with prior efforts to prescribe limits for federal criminal jurisdiction is that auxiliary federal jurisdiction long has been used not merely when the states are structurally incapable of prosecuting classes of crime—as, for example, when criminal activity crosses multiple state lines—but also when Congress deems federal regulation desirable and when federal resources are needed to supplement state resources. As long as the Supreme Court endorses a broad view of federal authority under the Commerce Clause,<sup>112</sup> Congress will have great latitude in determining when federal regulation is desirable and when federal resources should be employed to supplement

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110. Indeed, many states have their own organized crime statutes, many based upon the federal RICO statute. *See, e.g.*, COLO. REV. STAT. ANN. § 18-17-101 *et seq.* (West 1990); FLA. STAT. ANN. § 895.01 *et seq.* (West 1994); GA. CODE ANN. § 16-14-1 *et seq.* (1994); R.I. GEN. LAWS § 7-15-1 *et seq.* (1992); WIS. STAT. ANN. § 946.80 *et seq.* (West Supp. 1994).

111. *See, e.g.*, Anthony Faiola, *For Tourism, Question Is How Bad*, MIAMI HERALD, Jan. 17, 1994, at 23BM (many hotels and tour operators in South Florida had advance bookings drop as much as 50% after murder of German tourist in front of his pregnant wife).

112. A recent Supreme Court decision holds that Congress exceeded the scope of its jurisdiction under the Commerce Clause in enacting the Gun-Free School Zones Act. *United States v. Lopez*, 2 F.3d 1342 (5th Cir. 1993), *aff'd*, No. 93-1260, 1995 WL 238424 (U.S., Apr. 26, 1995). While this decision may be the harbinger of a narrower view of congressional authority, the majority's opinion places some stress on the fact that there were no congressional findings supporting the legislative judgment that the activity affected interstate commerce.

state resources in criminal enforcement. The key question, however, should not be when federal resources are needed, but rather when federal *judicial resources* are necessary to respond to some form of criminal activity.

**B. An Alternative: Differentiating the Criteria for Legislative, Judicial, and Executive Criminal Jurisdiction**

A unified focus on “federal criminal jurisdiction” is itself a stumbling block to analysis, precisely because the perceived need for federal resources and the scope of congressional authority so greatly exceed the capacity of the federal courts. The proper analysis should separate the question of when federal resources are needed—and when Congress has the authority and responsibility to enact laws to respond to criminal activity—from the quite distinct question of whether it is necessary to employ the federal courts as the forum to hear certain criminal cases. Federal legislative authority can be employed in many ways, and there are many federal resources that might aid state and local law enforcement.

Congress can employ its spending power to supplement state and local resources rather than enlarging either the number of federal prosecutors and investigators or the scope of their jurisdiction. Congress may authorize federal prosecutors and investigators to provide assistance to state authorities in the development of cases to be heard in the state courts.

Congress may also create federal crimes and establish penalties for those offenses without requiring the trial of those offenses to take place in the federal courts. Within the scope of its legislative authority, Congress may preempt state law, and this authority might be employed to regulate some matters of state practice and procedure in criminal cases if deemed necessary to implement federal interests.

Finally, Congress may create new federal offenses to be adjudicated in the federal courts. Once the use of the federal forum is seen as only one facet of federal criminal jurisdiction—that is, the federal government’s jurisdiction over crime—it becomes possible to consider restricting the use of the federal forum to cases where federal *judicial* resources are necessary, and to return to the question of how to ensure that intermittent enforcement does not perpetuate structural inequalities among defendants.

The questions to be considered, then, are when and how Congress should employ its legislative authority in dealing with criminal conduct or conduct that might be criminalized, and what distinct limits

it should place on the use of federal executive and judicial resources. In considering these questions, the dual objectives should be to match the caseload of the federal courts to their limited capacity and to eliminate the structural inequalities among defendants that are now so prevalent.

The analysis should follow the model already employed in the civil context, in which it is commonplace to consider separately the questions of whether federal standards are necessary to govern behavior, whether federal law should provide for a particular type of remedy for certain behavior (e.g., treble or punitive damages, or attorneys' fees), and whether to provide a federal forum. Because we disaggregate these elements in the civil context, federal law can sweep widely without *necessarily* imposing undue burdens on the federal judiciary. Similar disaggregation can yield the same benefits in the criminal context.

There are examples of such disaggregation in the criminal context already. In general, they have involved the use of the federal spending power to subsidize state and local law enforcement (much as federal funds subsidize many other functions performed by state and local government, including education and the provision of health services). In the early 1970s federal funds were provided for state and local law enforcement through the Law Enforcement Assistance Administration, and the 1994 legislation earmarked federal funds to support putting more local police on the streets, authorized grants to state and local prosecutors for community-based justice programs,<sup>113</sup> and authorized grants to states to construct, expand or operate prisons that house violent offenders.<sup>114</sup> Federal funding has been made available for a variety of model criminal justice programs at the state and local levels, as well as for studies to determine the effectiveness of innovative state and local criminal justice programs. In-kind federal support has also been provided to state and local law enforcement agencies. The FBI, for example, provides considerable technical

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113. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, §§ 31701-31702, 108 Stat. 1890 (1994) (grants to fund programs that require the cooperation of prosecutors, school officials, police, social service workers, and community members to reduce the incidents of crime by violent youthful offenders and to increase the speed of their prosecution).

114. *Id.* §§ 20101-20109 (authorizing appropriations of \$7,895,000,000 between the years 1995 and 2000 for this purpose).

assistance to state and local police.<sup>115</sup> The direct or indirect provision of federal funds allows Congress to act on the belief that there is a federal interest without imposing undue burdens on the federal courts.

The provision of federal aid raises the question of what, if any, conditions may or should be attached to the aid. For example, the receipt of federal highway funds was conditioned upon state acceptance of 55 mph speed limits. Similarly, the receipt of federal grants for state prisons that house violent offenders was conditioned upon the states' adoption of "laws which require that persons convicted of violent crimes serve not less than 85 percent of the sentence imposed," or upon other evidence of the severity of state sentences imposed upon violent offenders.<sup>116</sup>

Conditioning federal aid upon the acceptance of federal standards formally observes the bounds of federalism while, as a practical matter, moving the federal system toward uniform standards. Indeed, in some cases the federal aid may be so great, or the need for the aid so pressing, that it may be seen as an offer that the states cannot refuse, thus effectively achieving uniformity. While the achievement of uniformity greatly reduces the chances for disparity in the treatment of offenders solely because of the jurisdiction in which they were prosecuted, conditions that force uniformity are at odds with the notion, discussed above, that decentralization and variation from state to state is desirable in the criminal context.<sup>117</sup> However one resolves this matter, the point is that federal aims can be achieved—though, inevitably, at some cost of loss of variation from state to state—without also impairing the functioning of the federal courts. While this approach does not identify the line between the issues that should be left to the states and those that should be subject to a uniform national policy, it disentangles these issues from the separate question of the appropriate jurisdiction of the federal courts.

Congress also has another tool at its command to advance federal policies regarding criminal justice while not affecting the federal courts: it might provide in criminal—as in civil—cases that the state courts shall have jurisdiction. This would permit Congress to define

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115. For example, the FBI provides fingerprint identification, laboratory examination, police training, and the National Crime Information Center. 1994-95 U.S. GOVERNMENT MANUAL 388.

116. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 20102, 108 Stat. 1816 (1994).

117. See *supra* notes 64-69 and accompanying text.



the conduct in question, any defenses, and the applicable penalty—just as it does when it creates a civil cause of action—while imposing no burden on the federal courts.

Legislation giving the state courts jurisdiction over federal offenses would raise several constitutional issues. The first of these—whether there is any insuperable barrier to one sovereign enforcing the penal statutes of another sovereign—is rather easily disposed of in light of a series of decisions by the Supreme Court upholding the removal of state criminal prosecutions to federal court.<sup>118</sup> The second issue is whether it would be permissible for Congress to authorize the trial of federal offenses in non-Article III courts. A majority of the Supreme Court indicated its approval of such delegations in *Palmore v. United States*,<sup>119</sup> though the case involved the legislative courts in the District of Columbia, not state courts.<sup>120</sup> While the matter may not be entirely free from doubt, there is considerable support for the view that state courts may be given jurisdiction over federal crimes,<sup>121</sup> and there are historical precedents for granting the state courts at least concurrent jurisdiction. Several early federal statutes authorized the state courts to exercise concurrent jurisdiction over a variety of offenses.<sup>122</sup>

118. The leading case is *Tennessee v. Davis*, 100 U.S. 257 (1879). The implications of *Davis* and other removal decisions are discussed in Charles Warren, *Federal Criminal Laws and the State Courts*, 38 HARV. L. REV. 545, 592-98 (1925).

119. 411 U.S. 389, 397-410 (1973).

120. For an argument that *Palmore* is in error unless it is read as so limited, see Joan E. Hartman, Note, *Federal and Local Jurisdiction in the District of Columbia*, 92 YALE L.J. 292, 309-12 & nn.81-88 (1982).

121. FELIX FRANKFURTER & JAMES M. LANDIS, *THE BUSINESS OF THE SUPREME COURT* 293 (1928) (arguing that state courts should assume jurisdiction over federal offenses relating to liquor, narcotics, theft of interstate freight and automobiles, and minor fraudulent schemes employing the mails); David P. Currie, *The Constitution in the Supreme Court: The Powers of the Federal Courts*, 49 U. CHI. L. REV. 646, 702-05 & nn.344-350 (1982) (noting that Justice Bushrod Washington's view of nonexclusivity of federal question jurisdiction is consistent with the discretionary nature of the lower federal courts, and has generally prevailed); Felix Frankfurter, *Distribution of Judicial Power Between United States and State Courts*, 13 CORNELL L.Q. 499, 516 & n.94 (1928) (same); Jon O. Newman, *Restructuring Federal Jurisdiction: Proposals to Preserve the Federal Judicial System*, 56 U. CHI. L. REV. 761, 771-72 (1989) (arguing that state courts should assume jurisdiction over most mail and wire fraud prosecutions and most narcotics and gambling violations, especially those involving less than some stated threshold amount of drugs or money); Warren, *supra* note 118. But see Hartman, *supra* note 120.

122. This legislation is reviewed in Warren, *supra* note 118, at 548-54, 570-75, which also discusses state and federal decisions prior to *Tennessee v. Davis* holding that the state courts may not enforce federal penal laws. *Id.* at 577-84. This line of decisions culminated in *Prigg v. Pennsylvania*, 16 U.S. (1 Pet.) 539 (1842), which held that the state courts could not be compelled to enforce the fugitive slave laws. For an argument that the historic

The final issue is whether it would be permissible for Congress to *require* (not merely authorize) state courts to hear federal criminal cases. In *Testa v. Katt*,<sup>123</sup> the Supreme Court held that the Rhode Island courts could not refuse jurisdiction of a treble damage action under the Emergency Price Control Act on the ground that it was penal legislation. The Court unanimously held that "the fact that Rhode Island has an established policy against enforcement in its own courts of statutes of other states and the United States that it deems penal cannot be accepted as a 'valid excuse.'"<sup>124</sup> Federal law is supreme, and "the obligation of states to enforce these federal laws is not lessened by reason of the form in which they are cast or the remedy which they provide."<sup>125</sup> While *Testa* involved treble damages rather than a traditional criminal prosecution, its broad language and reasoning apply equally well to the latter.<sup>126</sup>

The text of Article III provides strong support for the view that Congress has constitutional authority to permit or require state courts to hear federal criminal cases. Article III left the question whether to create lower federal courts entirely to the discretion of Congress.<sup>127</sup> Though the Constitution did not ensure the creation of lower federal courts, it nonetheless reflects an expectation that there would be some federal criminal prosecutions. Article III confers upon Congress the power to "define and punish" piracy and other crimes committed on the high seas and crimes against the law of nations<sup>128</sup> and the authority to provide for the punishment of counterfeiting.<sup>129</sup> The Constitution also defines the crime of treason.<sup>130</sup> Thus, Congress had the authority to define the elements of these offenses and to set the penal-

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precedents were limited to fines and penalties, not true crimes, see Hartman, *supra* note 120, at 310-11 n.85.

123. 330 U.S. 386 (1947).

124. *Id.* at 392.

125. *Id.* at 391.

126. While the overall thrust of Justice O'Connor's opinion for the Court in *New York v. United States*, 112 S. Ct. 2408 (1992), suggests that there might be Tenth Amendment objections to a law requiring state judges to adjudicate federal criminal cases, her opinion distinguishes *Testa* as an example of the "well established power of Congress to pass laws enforceable in state courts." *Id.* at 2429.

127. Article III, section 1 provides that "[t]he judicial Power of the United States shall be vested in one supreme Court, and in such inferior courts as Congress may from time to time ordain and establish." U.S. CONST. art. III, § 1, cl. 1. See also U.S. CONST. art. I, § 8, cl. 9 (Congress shall have the power "[t]o constitute Tribunals inferior to the supreme Court").

128. U.S. CONST. art. I, § 8, cl. 10.

129. U.S. CONST. art. I, § 8, cl. 6.

130. U.S. CONST. art. III, § 3, cl. 1 (treason consists of "levying War against [the United States], or in adhering to their Enemies, giving them Aid and Comfort").

ties, even though these offenses might have been prosecuted in the state courts if no lower federal courts had been created.

The availability of a state forum for some federal offenses could shield the federal courts from disastrous overloads when Congress determines that federal resources are needed to combat widespread criminal activity or to implement federal policies on matters such as sentencing. Indeed, trial of federal offenses in the state courts may in fact be the *only* means of ensuring that some federal policies are carried out as they relate to common forms of criminal activity, such as drug violations, firearms offenses, and violent crime in general. Unless one assumes that the size of the federal courts really can expand indefinitely—and that Congress is willing to pay for that enlargement and the related costs—then it will never be possible to prosecute all such conduct in the federal courts. If Congress wishes to implement policies such as deterring violent crime by long and predictable sentences under a guidelines system, or even require mandatory minimum sentences, it *cannot* do so if only a handful of the cases can be accommodated in the federal courts, with the remainder subject to inconsistent state law. In order to implement congressional policy, the federal legislative judgment must apply to prosecutions brought in federal court as well as those brought in state court.

Providing for the trial of federal offenses in the state courts would raise a variety of procedural issues. Would federal or state procedural rules govern? Under the Supremacy Clause, the state courts would have to comply with federal constitutional mandates, even if this imposed requirements foreign to state law or practice, such as a unanimous jury verdict.<sup>131</sup> What if Congress chose to go a step further and provided for additional procedural safeguards for defendants in federal proceedings, or provided the prosecution with additional authority? Should federal law be regarded as supreme on such matters? The same arguments would arise if Congress were to require, for example, that state courts in which federal prosecutions were brought follow the Federal Rules of Evidence or the Federal Rules of Criminal Procedure.<sup>132</sup>

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131. See *Apodaca v. Oregon*, 406 U.S. 404 (1972) (Justice Powell, who provided the necessary fifth vote, concluded that states may accept nonunanimous verdicts, though Sixth Amendment would not permit them in federal proceedings).

132. Congress may also have the option of preempting state law on pertinent issues as it applied in *state* prosecutions. For example, if Congress's intention is to have all drug offenses of a certain nature subject to a mandatory minimum penalty, it might either make all such transactions federal offenses to which this penalty was applicable *or* make this penalty applicable in state as well as federal prosecutions for conduct of this nature.

Requiring state courts to hear federal offenses would also raise the issue of whether Congress may impose unfunded mandates on state and local authorities.<sup>133</sup> This objection would be strongest if the federal legislation required (rather than authorized) the state courts to hear the cases in question and also required the state to assume prosecutorial and correctional authority in the cases in question. Requiring state authorities to prosecute and provide correctional services for federal offenders would also likely run afoul of the Supreme Court's decision in *New York v. United States*.<sup>134</sup> But an objection—based upon either the Tenth Amendment or the limits implicit in Article I—might be raised even if Congress provided for federal funding of the prosecutorial and correctional functions, but still imposed a sizeable unfunded responsibility on the state courts.

While it would certainly be necessary to determine which procedural rules govern and who would be financially responsible for the prosecutorial, judicial, and executive functions, these issues should not obscure the central point: Congress should not treat the creation of a new federal crime to be tried in federal court as the only option when it legislates in response to criminal activity. To the contrary, the creation of new federal crimes to be tried in the federal courts should be the last option, and it should be limited to cases where federal *judicial* resources are essential. Indeed, given the heavy criminal caseloads under which the district courts presently labor, it would be appropriate (and perhaps even necessary) to recognize a presumption against the creation of new federal crimes that must be tried in the federal courts.<sup>135</sup>

A presumption against the creation of new federal crimes to be tried in the federal courts would respond to the structural mismatch between the breadth of the federal authority over criminal activity and the limited capacity of the federal judiciary. If the creation of federal crimes to be tried in the federal courts is the first or the primary option employed by Congress, an overload in the federal courts

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133. This issue has been raised most recently in cases challenging the provision in the Brady Bill that requires state law enforcement officials to search the criminal records of applicants for gun permits. *Mack v. United States*, 856 F. Supp. 1372 (D. Ariz. 1994); *McGee v. United States*, 863 F. Supp. 321 (S.D. Miss. 1994); *Koog v. United States*, 852 F. Supp. 1376 (W.D. Tex. 1994); *Printz v. United States*, 854 F. Supp. 1503 (D. Mont. 1994).

134. 112 S. Ct. 2408 (1992) (holding unconstitutional the "take title" provision of the Low-Level Radioactive Waste Act, requiring states to accept ownership of waste generated within their borders or to regulate according to congressional instructions).

135. The suggestion that there be a presumption against the creation of new federal crimes is advanced in *FEDERAL JUDICIAL CTR.*, *supra* note 17, at 47 (1994).

is inevitable given the prevalence of criminal activity and the political pressure for anticrime legislation. The predictable response to such an overload will be greater reliance on prosecutorial discretion to reduce the caseload. In fact, without disaggregation and a presumption against the trial of offenses in the federal courts, the current situation is virtually inevitable: the federal courts will be overloaded with too many criminal prosecutions, and ad hoc prosecutorial discretion will create unjustified sentencing disparities among defendants.

Even if the various legal objections to state court jurisdiction over federal offenses can be overcome, there are practical objections, the most serious of which is that the state courts are themselves overburdened with criminal (as well as civil) cases. Indeed, in general, the state judges already have far heavier caseloads<sup>136</sup> and fewer resources<sup>137</sup> than their federal counterparts. How then can shifting federal prosecutions to the overburdened state courts be a solution?

If there is a shift in federal prosecutions, it need not—and should not—be made without accompanying resources. On the other hand, if federal resources are to be provided, it is my thesis that they should not necessarily be provided exclusively in the federal courts. Federal funds may be better spent in state courts in support of purely state prosecutions, or in state courts in support of federal prosecutions of cases similar to those the state courts already hear. We should disaggregate these decisions about federalizing crime, as we are accustomed to doing in the civil context.

### C. Returning to the Issue of Structural Inequalities

Even if efforts are made to limit the number of federal crimes by disaggregating the concept of federal criminal jurisdiction and employing other aspects of federal authority to advance federal policies, it remains likely that the number of criminal cases that might be brought in the federal courts will exceed the capacity of those courts. There are already more than 3,000 federal crimes, and the pressure on Congress to expand that number will be considerable. Even if Congress conscientiously seeks to not exceed federal judicial capacity, it

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136. Indeed, the National Center for State Courts calculates that the average state court judge has a caseload 3 times that of his federal counterpart, and criminal filings in state courts of general jurisdiction are 84 times higher than those in the federal district courts. BRIAN J. OSTROM ET AL., STATE COURT CASE LOAD STATISTICS: ANNUAL REPORT 1991, at 40-44 (1993), cited in FEDERAL JUDICIAL CTR., *supra* note 17, at 23 n.60.

137. For example, the federal judicial budget amounts to \$3.2 million per judge, while the California judicial budget only \$497,000 per judge. See generally Hon. J. Anthony Kline, *Comment: The Politicization of Crime*, in this Symposium Issue.

will be nearly impossible to predict future caseloads with sufficient accuracy to fine tune jurisdiction to match judicial capacity.<sup>138</sup> Indeed, to a large degree, caseload is as much a function of the resources provided to federal prosecutors and investigators as it is a function of the scope of the jurisdictional provisions.<sup>139</sup> The traditional solution has been to modulate the caseload by means of prosecutorial discretion, exercised largely on a district-by-district and, indeed, a case-by-case basis. As noted above, this reduces the strain on the judiciary by creating structural inequalities among defendants. Because the problem of structural inequality cannot be avoided altogether by disaggregation and reduced reliance on the prosecution of criminal cases in the federal courts, some additional step will be needed to winnow the cases that fall under the legislation authorizing prosecutions in the federal court.

Prosecutorial discretion will still be necessary, but it must be exercised primarily on a class basis, rather than an ad hoc basis, to avoid structural inequality. As long as federal and state sentences for the same conduct are significantly different, structural inequalities among similarly situated defendants will occur unless uniform standards are applied to determine which categories of cases will be subject to state rather than federal law. Structural inequalities can be eliminated by general federal enforcement of all cases falling within a statutory provision, or by the promulgation and enforcement of clear standards identifying classes of cases that will be subject to general federal prosecution. If Congress has determined that federal policy requires that mandatory minimum penalties apply to certain offenses, though some or all of the states take a far more lenient approach, it is arbitrary to subject a few offenders to the federal mandatory minimum while most others who are similarly situated receive more lenient treatment in the state system. There is no arbitrariness, however, if there are consistently applied criteria that distinguish the cases selected for federal prosecution. These criteria would be equally valid if they were set by

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138. It may be difficult for Congress to assess how many cases would be generated by a given piece of legislation, even assuming full prosecution, and that number certainly would change over time. Moreover, the capacity of the federal courts is not fixed. Rather, it fluctuates depending not only on the number of judges in service, but also on many other factors including, for example, the degree to which alternative dispute resolution and other case management techniques are employed.

139. One of the reasons for the current overload in the federal courts is that the number of federal prosecutors has grown 125% since 1980, while the number of federal judges has grown by only 17%. COMMITTEE ON LONG RANGE PLANNING, *supra* note 49, at 8.

Congress in the definition of the offense or by administrative action. When no such criteria exist, the resulting arbitrariness certainly is contrary to the underlying policy of the Sentencing Reform Act and the resulting Guidelines, even if it does not violate either due process or equal protection.

The Department of Justice has recognized the potential of prosecutorial discretion to undercut the Sentencing Guidelines, but its response, to date, has not been successful. When the Guidelines went into effect, then-Attorney General Richard Thornburgh took the position that federal prosecutors were required to prosecute the most serious offense readily provable—without downward bargaining—that the evidence would support.<sup>140</sup> While the Department's policy has been moderated to a degree since the issuance of the Thornburgh memorandum,<sup>141</sup> it has never come to grips with the disparity between those who are subject to federal prosecution and those who receive different sentences for the same conduct under state law. This disparity is so great, and it involves so many individuals, that it dwarfs the problem of disparity among the cases within the federal system.

We need an administrative, as well as a legislative, determination of what classes of cases can be accommodated in the federal courts at any given time. For example, if provisions such as the current broad drug statutes remained in force, the Department of Justice should be required to publish standards for federal rather than state prosecution. The standards should be sufficiently definite and quantifiable to ensure that the current ad hoc decision making would not reappear in a new guise. This recommendation is not revolutionary. To the contrary, academic commentators have generally supported prosecutorial guidelines that are "specific enough to provide genuine guidance when applied to a particular set of facts."<sup>142</sup> The more difficult question, which is beyond the scope of this Article, is whether the resulting standards should be judicially enforceable.<sup>143</sup>

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140. Memorandum from Attorney General Richard Thornburgh to All U.S. Attorneys (Mar. 13, 1989), reprinted in 6 FED. SENTENCING REP. 347 (1994).

141. The Thornburgh memorandum and the evolution of federal charging policy under the Sentencing Guidelines are reviewed in Sara Sun Beale, *The New Reno Bluesheet: A Little More Candor Regarding Prosecutorial Discretion*, 6 FED. SENTENCING REP. 310 (1994).

142. James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1562-63 (1981). Accord Norman Abrams, *Internal Policy: Guiding the Exercise of Prosecutorial Discretion*, 19 UCLA L. REV. 1 (1971).

143. Judicial review is the traditional remedy for abuse of administrative authority, and there are many proponents of judicial review for prosecutorial charging decisions. See, e.g., Vorenberg, *supra* note 142, at 1568-71. On the other hand, the benefits of judicial review

It bears repeating that such an administrative effort is essential to ensure that the congressional policy reflected in the Sentencing Guidelines (and other sentencing legislation) is not frustrated. Indeed, one means of effectuating federal sentencing policy would be for Congress to enact legislation providing for the adoption of administrative criteria to determine the classes of cases deemed suitable for federal prosecution.<sup>144</sup>

### Conclusion

Disaggregating the elements of federal criminal prosecution, and considering separately when federal judicial resources are necessary, are the first steps toward ensuring that we no longer have too many criminal prosecutions in federal courts. Requiring the promulgation of general and enforceable criteria that further narrow the class of cases eligible for federal prosecution can aid in tailoring the number of cases to the capacity of the courts. Such criteria also respond to the problem of so few federal prosecutions that create structural inequalities among defendants who are identically situated in all respects except where they are prosecuted.

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must be weighed against the costs, which would be prohibitive. Should scarce judicial resources be allocated to reviewing prosecutorial discretion? For an argument that judicial review of charging discretion would generate a great deal of costly litigation, though few defendants would succeed, see Abrams, *supra* note 142, at 52. Perhaps the greatest cost of judicial review would be political: the opposition to judicial review may be so substantial that it would prevent the adoption of prosecutorial guidelines in the first place.

144. For a discussion of administrative regulations governing charging discretion, see 1 WORKING PAPERS OF THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS 58-60 (1970).