PREFACE

The Criminal Justice Section of the American Bar Association created this Task Force in response to widespread concern about the number of new federal crimes being created annually by Congress. Its initial objectives were to look systematically at whether there has been, in fact, an increase in federal crimes which duplicate state crimes, and, if so, to determine whether that development adversely affects the proper allocation of responsibility between the national and state governments for crime prevention and law enforcement.

The members of the Task Force were selected with the explicit goal of including persons with diverse political and philosophical backgrounds. It was important that the Task Force's conclusions and recommendations be the product of a consensus among respected persons whose views on criminal justice issues generally would vary widely.

The Chair of the Task Force is a former Attorney General of the United States. Its members include a former United States Senator, a former Congressman, a former Deputy Attorney General of the United States, a former Chief Executive of the Law Enforcement Assistance Administration of the United States Department of Justice; former State Attorneys General, present and former federal and state prosecutors, state and federal appellate judges, a police chief, private practitioners who specialize in criminal defense, and scholars. (Fuller biographies of the members of the Task Force appear in APPENDIX D.)

With the skillful guidance of Professor James Strazzella of Temple University Law School, who served as reporter for the Task Force and who is the principal author of its report, and the invaluable research assistance of Barbara Meierhoefer, Ph.D., the Task Force undertook to examine the United States Code, data available from public sources, the body of scholarly literature on the subject, the views of professionals in state and federal criminal justice systems, and the experience of the Task Force members themselves.

The Task Force concluded that the evidence demonstrated a recent dramatic increase in the number and variety of federal crimes. Although it may be impossible to determine exactly how many federal crimes could be prosecuted today, it is clear that of all federal crimes enacted since 1865, over forty percent have been created since 1970. The Report explains in more detail how the catalog of federal crimes grew from an initial handful to the several thousand which exist today.

The Task Force also concluded that much of the recent increase in federal criminal legislation significantly overlaps crimes traditionally prosecuted by the states. This area of increasing overlap lies at the core of the Task Force study.

The federalization phenomenon is inconsistent with the traditional notion that prevention of crime and law enforcement in this country are basically state functions. The Task Force was impressed with nearly unanimous expressions of concern from thoughtful commentators, including participants within the criminal justice system and scholars, about the impact of federalization. The Task Force was also impressed that new federal crimes duplicating state crimes became part of our law without requests for their enactment from state or federal law enforcement officials.

The Task Force was told explicitly by more than one source that many of these new federal laws are passed not because federal prosecution of these crimes is necessary but because federal crime legislation in general is thought to be politically popular. Put another way, it is not considered politically wise to vote against crime legislation, even if it is misguided, unnecessary, and even harmful.

As the size of the national government has grown, it is reasonable to expect that there would be some expansion of federal crimes, if, for no other reason, than to protect new federal programs. That is quite a different matter, however, from the indiscriminate federalization of local crime for no reason other than that it is serious.

In this Report, the Task Force explains the process it followed, the data it examined, and the consensus which emerged. It looked

systematically at whether new federal criminal laws, which were popular when enacted, are being enforced. It determined, based on obvious data, that in many instances they are not. While there are more people in federal prisons than ever before and they are serving longer sentences, that condition is not the result of increased federal prosecution of crimes formerly prosecuted by states. It is principally a function of increased resources devoted to federal law enforcement, particularly for drug offenses, and the impact of the sentencing guidelines.

The Task Force believes that the Congressional appetite for new crimes regardless of their merit is not only misguided and ineffectual, but has serious adverse consequences, some of which have already occurred and some of which can be confidently predicted.

The Task Force did not attempt to identify the limits of the power of the national government under the Commerce Clause to criminalize conduct which is already, or which could be, prosecuted by states. It noted, of course, the recent decision of the Supreme Court striking down a criminal statute which exceeded that power. The Court observed in that case that the Constitution withholds "from Congress a plenary police power that would authorize enactment of every type of legislation."[1] Even if the Commerce Clause would permit Congress to subject its citizens to federal prosecution for common-law-type crimes, the exercise of that power to its fullest extent would be, at best, wasteful, and, at worst, destructive of the relationship between state and federal law enforcement. As the distinguished Police Executive Research Forum wrote, federalization "diverts federal authorities from what they do best and puts more distance between law enforcers and local community residents — in direct conflict with community policing objectives."[2]

The Report identifies a trend and counsels against its continuation. It does not recommend a reduction or limitation on the national role in fighting crime, but rather a refocusing of that role. It is precisely because federal law enforcement is so necessary in dealing with indisputable federal interests that a legislative instruction to federal prosecutors to

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[1] Noted in the Report at p. 25.

[2] Quoted in the Report at p. 41.

utilize their time and resources to prosecute relabeled common law crimes ought to be restrained. Moreover, federal financial support of state law enforcement is crucial and ought not to be curtailed.

Finally, the Task Force attempts to articulate general principles which ought to guide the national legislature in determining whether to create new crimes.

It remains the case that federal efforts account for only five percent of all prosecutions nationwide. State law enforcement is still the critical component in dealing with the crime which threatens most people. The Task Force is firmly of the view that state governments are neither incapable nor unwilling to exercise their traditional responsibility to protect the lives and property of citizens, and that the Congress ought to reflect long and hard before it enacts legislation which puts federal police in competition with the states for the confidence of its citizenry and limited law enforcement resources.

Edwin Meese III
Chair, Task Force

William W. Taylor, III
Chair, Criminal Justice Section, 1996-97

REPORT

The fundamental view that local crime is, with rare exception, a matter for the states to attack has been strained in practice in recent years. Congressional activity making essentially local conduct a federal crime has accelerated greatly, notably in areas in which existing state law already criminalizes the same conduct. This troubling federalization trend has contributed to a patchwork of federal crimes often lacking a principled basis.

I. THE FEDERALIZATION TREND: THE GROWTH OF THE FEDERAL CRIMINAL JUSTICE SYSTEM AND CURRENT ACTIVITY

An Overview of the Growth of Federal Crimes

For years following the adoption of the Constitution in 1789, the states defined and prosecuted nearly all criminal conduct. The federal government confined its prosecutions to less than a score of offenses. As one scholar described these offenses, they generally:

> dealt with injury to or interference with the federal government itself or its programs. The federal offenses of the time included treason, bribery of federal officials, perjury in federal court, theft of government property, and revenue fraud. Except in those areas where federal jurisdiction was exclusive (the District of Columbia and the federal territories) federal law did not reach crimes against individuals. Crimes against individuals **C** such as murder, rape, arson, robbery, and fraud **C** were the exclusive concern of the states. State law defined these offenses, which were prosecuted by state or local officials in the state courts.[3]

[3] Sara Sun Beale, *Federalizing Crime: Assessing the Impact on the Federal Courts*, 543 ANNALS AM. ACAD. POL. & SOC. SCI. 39, 40 (1996). *See also* Beale, *Too Many and Yet Too Few: New Principles to Define the Proper Limits for Federal Criminal Jurisdiction*, 46 HASTINGS L.J. 979 (1995). Detailed accounts of

Crime was seen as a uniquely local concern and the power to prosecute rested almost exclusively in the states, whose law enforcement activities covered nearly all the activity believed worthy of criminal sanction.[4] Crime did not become a national issue in Presidential campaigns until 1928,[5] but today it is a resonating staple of federal as well as state electoral politics.[6]

The last third of the nineteenth century saw a significant increase in the assertion of federal jurisdiction, marked initially by a series of Congressional statutes dealing with the misuse of the mails and asserting federal jurisdiction in connection with interstate commerce. For the first time, federal crimes began to cover activity that dealt with subjects clearly also within the ambit of the states' police powers. The steady continuation of this trend into the twentieth century sparked significant debate about the constitutional limits of federal jurisdiction. The expansion of federal jurisdiction was generally premised on an assertion of Congressional power to regulate interstate commerce, and the expansion of federal law on this basis was closely contested in the Supreme Court.[7]

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the general growth in the amount of conduct criminalized by federal law can be found in the literature collected in the BIBLIOGRAPHY, APPENDIX A. For purposes of this Report, that general growth need only be briefly stated.

[4] *See* Kathleen F. Brickey, *The Commerce Clause and Federalized Crime: A Tale of Two Thieves,* 543 ANNALS AM. ACAD. POL. & SOC. SC. 27, 28 (1996); Brickey, *Criminal Mischief: The Federalization of American Criminal Law*, 46 HASTINGS L.J. 1135 (1995).

[5] JAMES D. CALDER, THE ORIGIN AND DEVELOPMENT OF FEDERAL CRIME CONTROL POLICY 25 (1983).

[6] *See, e.g.,* N.Y. TIMES, Sept. 25, 1998, at B1 (describing U.S. Senate candidates as trying to "out-tough each other on crime"); N.Y. TIMES, Aug. 27, 1998, at A12 (reporting on a debate between candidates for the U.S. Senate and describing the candidates' positions on death penalty issues).

[7] Champion v. Ames, 188 U.S. 321 (1903) (upholding, by a sharply divided Supreme Court vote, the constitutionality of a statute making it a crime to transport lottery tickets across state lines). For a sense of the debate on the proper extent of constitutional power under the Commerce Clause, *compare* John S. Baker, Jr., *Nationalizing Criminal Law: Does Organized Crime Make It Necessary or Proper?*, 16 RUTGERS L.J. 495 (1985), *with* Tom Stacy & Kim Dayton, *The*

In the twentieth century, increasing federal programs also correspondingly multiplied the criminal sanctions that were attached to these programs, but other factors such as Prohibition ushered in further federal criminal law-making. In the 1960s and 1970s, however, concern with organized crime, drugs, street violence, and other social ills precipitated a particularly significant rise in federal legislation tending to criminalize activity involving more local conduct, conduct previously left to state regulation. With concern about crime mounting in the 1980s and 1990s, the trend to federalize crime has continued dramatically, covering more conduct formerly left exclusively to state prosecution.[8]

The Current High Level of Congressional Activity

The Task Force's research reveals a startling fact about the explosive growth of federal criminal law: *More than 40% of the federal criminal provisions enacted since the Civil War have been enacted since 1970.*[9]

An indication of the legislative activity federalizing crime is seen in the following charts. The first chart indicates the annual legislative activity in the 132-year period between 1864 and 1996. The second chart

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Underfederalization of Crime, 6 CORNELL J.L. & PUB. POL'Y 247 (1997).

[8] *See* Sara Sun Beale, *Federalizing Crime: Assessing the Impact on the Federal Courts*, 543 ANNALS AM. ACAD POL. & SOC. SCI. 39, 41 (1996) (tracing the rise of federal legislation); *see also* Beale, *Too Many and Yet Too Few: New Principles to Define the Proper Limits for Federal Criminal Jurisdiction*, 46 HASTINGS L.J. 979 (1995); John S. Baker, Jr., *Nationalizing Criminal Law: Does Organized Crime Make It Necessary or Proper?*, 16 RUTGERS L.J. 495 (1985). The Senate report accompanying the 1995 federal budget asserted that the country was faced with a "law enforcement emergency." SEN. REP. NO. 103-309 (1994), at p. 29, as discussed in Kathleen F. Brickey, *The Commerce Clause and Federalized Crime: A Tale of Two Thieves*, 543 ANNALS AM. ACAD. POL. & SOC. SCI. 27, 28 (1996).

[9] Much, though not all, of this surge has occurred in the last two decades. Even excluding provisions enacted in the last Congress (see APPENDIX C), more than a quarter of the federal criminal provisions enacted since the Civil War have been enacted within a sixteen year period since 1980. Both this estimate and the 40% figure in the text are derived from a review of statutory provisions referred to in Chart 2 (contained in the text of this Report and showing the percentage of statutory sections enacted by time period).

shows the percentage of statutory sections enacted by time period. The charts demonstrate the dramatic increase in federal criminal statutes, particularly in the last two decades.

NUMBER OF STATUTORY SECTIONS ENACTED BY YEAR

Average Number of Statutory Sections Enacted Per Year=7.7 (shown as horizontal line). The 414 sections added in 1948 as part of the Title 18 recodification are excluded.

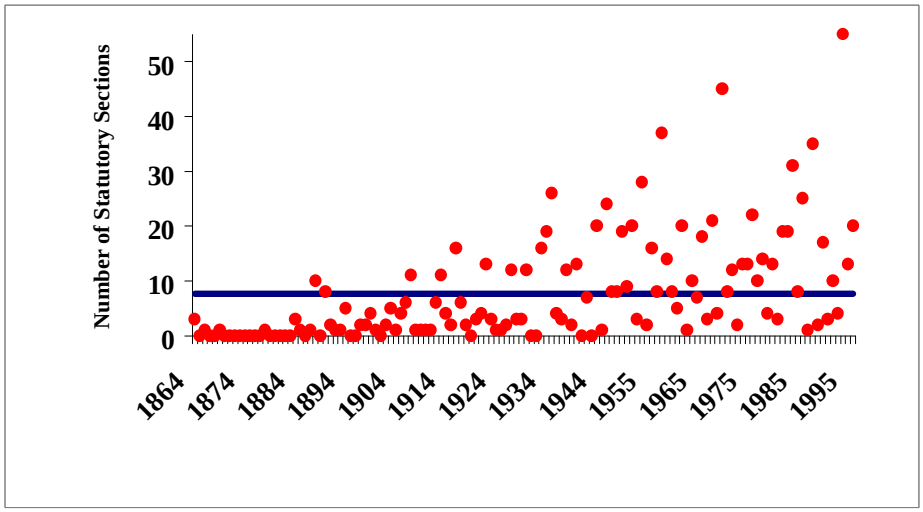
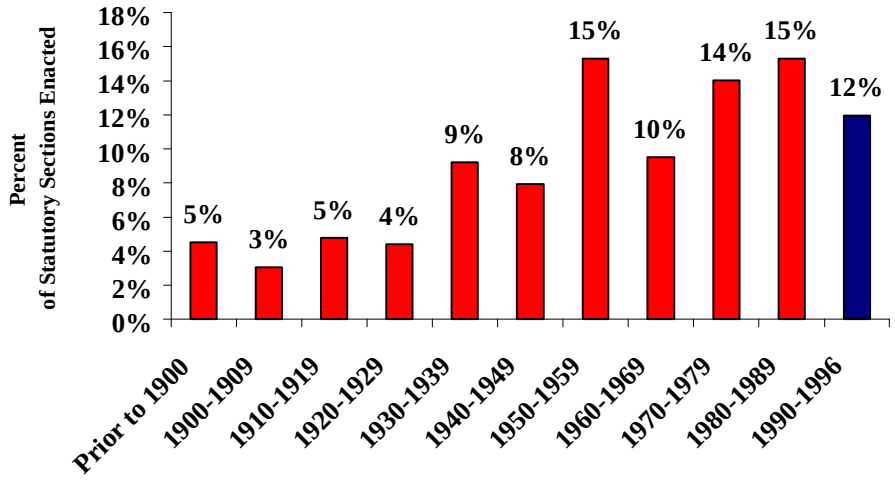


Chart 1.[10] TF on Federalization (ABA)

[10] The year 1948 has been excluded from this graph. In that year, Title 18 of the U.S. Code was recodified. Many of the previous statutory sections were blended together in the recodification, resulting in a disproportionate number of sections that were not entirely new. Adding 1948 to the graph by counting these "new" sections would, therefore, create a potentially misleading picture of new crimes. At the same time, it should be noted that because 1948 is not counted, the existing law does contain sections not counted in the graph.

The counts in Charts 1 and 2 were derived from the date of enactment of each section charted and described in APPENDIX C, without counting subsections. The count does not include enactments which were subsequently repealed, nor does it include amendments which might have substantially expanded or otherwise changed presently existing statutory provisions after initial enactment. If counted, these excluded statutory actions would further expand the amount of legislative activity reflected in the charts.

PERCENT OF STATUTORY SECTIONS ENACTED BY TIME PERIOD
Number excluding 1948 recodification=1,020



Notes:
(a) The "Prior to 1900" category includes 1864 - 1889.
(b) The 414 sections added or modified as part of the 1948 recodification are excluded from the 1940s.
(c) The "1990-1996" category includes only 7 years.

Chart 2. TF on Federalization (ABA)

So large is the present body of federal criminal law that there is no conveniently accessible, complete list of federal crimes.[11] Criminal

[11] An exact count of the present "number" of federal crimes contained in the statutory sections and the administrative regulations is difficult to achieve and the count is subject to varying interpretations. In part, the reason is not only that the criminal provisions are now so numerous and their location in the books so scattered, but also that federal criminal statutes are often complex. One statutory section can comprehend a variety of actions, potentially multiplying the number of federal "crimes" that could be enumerated. (For example, the language of 18 U.S.C.

sanctions are dispersed in places other than the statutory codes (for example, rules of court[12]) and therefore can not be located simply by reading statutes. A large number of sanctions are dispersed throughout the thousands of administrative "regulations" promulgated by various governmental agencies under Congressional statutory authorization. Nearly 10,000 regulations mention some sort of sanction, many clearly criminal in nature, while many others are designated "civil."[13]

Whatever the exact number of crimes that comprise today's "federal criminal law," it is clear that the amount of individual citizen behavior now potentially subject to federal criminal control has increased in astonishing proportions in the last few decades. The Task Force has collected and listed many of the significant federal criminal statutory provisions in APPENDIX C. Although our list is not intended to be exhaustive,[14] the annotated list conveys the sweep of current federal criminal law. It provided the Task Force with an insight into the breadth of activity now subject to potential federal control. It bears emphasis that, in our review of these and subsequently enacted statutory provisions, the Task Force recognizes that not all, or even most, of the federal statutory increase is due to crimes federalizing essentially local conduct. Nevertheless, that portion of the increase which does cover historically state-prosecuted areas (including essentially local conduct

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§ 2113 encompasses bank robbery, extortion, theft, assaults, killing hostages, and storing or selling anything of value knowing it to have been taken from a bank, etc.) Depending on how all this subdivisible and dispersed law is counted, the true number of federal crimes multiplies. While a figure of "approximately 3,000 federal crimes" is frequently cited, that helpful estimate is now surely outdated by the large number of new federal crimes enacted in the 16 years or so years intervening since its estimation. Especially considering both statutory and administrative regulations, the present number of federal crimes is unquestionably larger. *See* APPENDIX C, pp. 93-94.

[12] For example, under the Rules of Criminal Procedure, certain violations of federal grand jury rules may be punished as a contempt of court. FED. R. CRIM. P. 6(e).

[13] The vast percentage specify ways in which a general Congressional statutory prohibition (for example, perjury) is a crime in the context of the regulations, e.g., by setting out forms and providing for perjury in connection with various particular forms. A handful of regulations purport to criminalize conduct without connecting the prohibition to a Congressional statute.

[14] See the limitations of the statutory list, stated at the outset of Appendix C.

and sometimes street crime) is certainly significant, troubling, and gives rise to the concerns addressed in this Report.

All signs indicate that the federalization trend is growing, not slowing, in fact as well as perception. Highly publicized criminal incidents are frequently accompanied by calls for proposed Congressional responses, although, of course, most of these proposals do not become law. An estimated 1,000 bills dealing with criminal statutes were introduced in the most recent Congress.[15] These bills included, for example, proposals to enhance federal law regarding juvenile crime **C** an area long at the center of state criminal justice legislation and an area in which most states have recently toughened their laws. Some of these new federal proposals dismayed many who are concerned about the federalization trend, including the Chief Justice of the United States.[16] Many see this federal attention to juvenile crime as likely to produce adverse effects[17] or dangerous consequences,[18] and view it as an example

[15] The estimate is based on information provided through the Congressional Research Service approximating the number of bills introduced in the 105th Congress by the end of July 1998. While these bills sought to add to or alter the federal criminal statutes in one way or another, most were not considered major pieces of crime legislation. For information on statutes adopted in the last Congress, *see* APPENDIX C.

[16] William H. Rehnquist, *Address to the American Law Institute*, REMARKS AND ADDRESSES AT THE 75TH ANNUAL ALI MEETING, MAY 1998, at 15-19 (1998), also excerpted in *Chief Justice Raises Concerns on Federalism*, 30 THE THIRD BRANCH, June 1998, at 1.

[17] Consider, for example, the suggestions made to the Task Force by a leader of the ABA Criminal Justice Section's effort in the area of juvenile law. In essence, he notes the following: The federal system is not equipped to handle juvenile offenders. Unlike state systems, the federal system has no juvenile detention programs, no treatment options, no trained juvenile probation or parole officers, no prosecutors or defense attorneys who are specially trained to deal with children. Federal prosecutions waste valuable judicial time — cases are tried before judges who have neither the expertise nor resources for juvenile cases; there is no obvious benefit from trying these cases in federal court. There is no gain in public protection from using the federal system — only 250 or so juveniles each year are prosecuted in the federal system, so it is hardly a deterrence. Indeed, every federal prosecution of a juvenile could also have been brought in state court (despite the requirement in federal law that the Attorney General certify that the state system is inappropriate for this particular defendant — a provision that is used in cases of

of enhanced federal attention where the need is neither apparent nor demonstrated. A recently charged heinous crime in which several defendants are accused of dragging a victim to his death prompted widely publicized calls before a Senate committee to federalize such hate crimes **C** even though state officials had already charged the accused defendants with a capital offense in state court.[19] In the face of serious and offensive incidents, it is becoming more and more frequent for citizens and legislators to simply urge that Congress should make the conduct a federal crime.[20]

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drug sales and carjackings). The federal sentencing guidelines were not designed with children in mind, and so take no account of adolescent development. Finally, at a time when almost every state has significantly toughened its juvenile code (by requiring increased incarceration and increased transfer to adult criminal court), it is hard to imagine that any added value will come from federal prosecutions. March 20, 1998, Comments of Robert G. Schwartz, Co-Chair of the ABA Criminal Justice Section's Juvenile Justice Committee. *See also* Washington Report, *Getting Tougher on Kids*, 84 A.B.A. J. 95 (1998) (noting concerns of ABA).

Some of the juvenile federal jurisdiction relates to areas falling within federal territorial jurisdiction.

[18] In a letter to the Task Force (Feb. 25, 1998), the Director of the National Prison Project, American Civil Liberties Union Foundation, discussed pending juvenile legislation and expressed the view that it "is particularly dangerous that Congress is now considering another major federalization of crime control." She argues that "[b]efore the nation embarks on another major federalization of the criminal justice system there should be consensus about the circumstances under which the federal interest is paramount so that the displacement of state policy is appropriate" and that no such consensus exists with regard to juveniles.

[19] *See* July 8, 1998 testimony before the Senate Judiciary Committee on S. 1529, 105 Cong., the bill proposing "The Hate Crimes Prevention Act of 1998," 1998 Westlaw 12762068; PHILADELPHIA INQUIRER, July 9, 1998, at A15. *See also* 1998 WL 12762060 through 12762071 for other testimony on S. 1529, and 12763004 through 12763008 for July 22, 1998 testimony on the related House bill, H.R. 3081, 105 Cong., 1st Sess.

[20] *See, e.g., Mother Rages Against Indifference*, N.Y. TIMES, Aug. 24, 1998, at A10, describing an incident in which a person did not report another person's assault on a child (resulting in the child's death) and the fact that the state where the incident occurred (like most states) does not criminalize a failure to report crimes; a group protesting the status of the law is described as intending to seek a federal law criminalizing the failure to report certain crimes.

Growth in Segments of the Federal Criminal Justice System

As dramatic as it is, the increase in the sheer number of federal crimes **C** including the amount of national *legislative* activity subjecting a growing amount of essentially local conduct to federal jurisdiction **C** reveals only one facet of the issue. Beyond the increase in the number of federal laws, the last few decades have seen a significant growth in the size of the overall federal criminal justice system, with attendant costs. Caution about inappropriate federalization, therefore, also includes caution about the addition of federal investigative and prosecution personnel beyond what is needed for offenses of a truly federal nature.

Congress's decision to create a federal crime confers jurisdiction upon other federal entities and results in the involvement of others in different federal government branches **C** prosecutors, investigators, administrative agencies, courts, and prison authorities **C** as well as federal public defenders. Federal Executive departments (including, but not limited to, the Department of Justice) assume broad supervisory responsibility and power over newly created crimes. This activates powerful federal investigatory agencies (such as the FBI, Treasury Department agencies, or Postal Inspectors) to investigate citizen activity for possible federal criminal violations. The scope of federal prosecutors' interest widens, resulting in power to act in a broader range of citizen conduct and intervene in more local conduct. The priorities of the Department of Justice may be changed or diluted, requiring consideration of a different set of goals and programs beyond those entailed in concentrating on traditional federal crimes.

Another important effect of federal criminal legislation is felt by the federal courts, which become forums for new classes of cases, many of which would otherwise be tried only in state courts. Convictions lead to federal imprisonment, burdening the federal prison system with all the attendant consequences of such expansion.

Empirical Data on the Growth of the Federal Criminal Justice System. Empirical data verifies a growing federal presence in the criminal justice system. Although part of this growth may be explained by greater societal attention to crime, the increase in federal expenditures is disproportionately greater than comparable increases in state criminal

justice costs, indicating that at least some part of the federal growth is attributable to an expanding federal role. For example, between 1982 and 1993, overall federal justice system expenditures increased at twice the rate of comparable state and local expenditures, increasing 317% as compared to 163%.[21] The number of federal justice system personnel increased by 96% from 1982 to 1993, while state personnel increased at a significantly lesser rate, 42%.[22] Over a twelve year period, the number of federal prison inmates rose by 177%, as compared to a lower increase in state prison inmates, 134%.[23] Putting aside personnel at the Department of Justice headquarters in Washington, the regional U.S. Attorneys' Offices (which litigate the bulk of federal criminal cases) have grown in just the past 30 years from approximately 3,000 prosecutors to about 8,000.[24]

Reasons for Continuing Legislative Federalization

A striking phenomenon emerges from the Task Force's consideration of the numerous studies examining the federalization trend (BIBLIOGRAPHY, APPENDIX A). Writer after writer has noticed the absence of any underlying principle governing Congressional choice to criminalize conduct under federal law that is already criminalized by state law. What accounts for this continuing federalization in the face of such concerns and the warnings about its dangers?

New crimes are often enacted in patchwork response to newsworthy events, rather than as part of a cohesive code developed in response to an identifiable federal need. Observers have recognized that

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[21] See Chart 8, APPENDIX B, SECTION 1.

[22] See Chart 9, APPENDIX B, SECTION 1.

[23] See Chart 10, APPENDIX B, SECTION 1. For a sampling of the major types of crimes for which federal prisoners are actually jailed and a related discussion of that data, see Franklin E. Zimring & Gordon Hawkins, *Toward a Principled Basis for Federal Criminal Legislation*, 543 ANNALS AM. ACAD. POL. & SOC. SCI. 15, 18-19 (1996).

[24] *See* Sara Sun Beale, *Federalizing Crime: Assessing the Impact on the Federal Courts*, 543 ANNALS AM. ACAD POL. & SOC. SCI. 39, 45 (1996), citing statistics from THE CRIMINAL CASELOAD: THE NATURE OF CHANGE (Manuscript, Administrative Office of U.S. Courts: 1994).

a crime being considered for federalization is often "regarded as appropriately federal because it is serious and not because of any structural incapacity to deal with the problem on the part of state and local government."[25] There is widespread recognition that a major reason for the federalization trend **C** even when federal prosecution of these crimes may not be necessary or effective **C** is that federal crime legislation is politically popular. For example, police executives noted in communications to the Task Force that despite recognized problems with federalization,

> the trend has not declined, in part because federalization is politically popular. Because relatively little hard research on effective crime control has been conducted or disseminated to lay people, they are easily convinced that making an offense a federal crime means we are taking a tougher stance against such actions. Most citizens believe that by federalizing crimes, we will somehow rid our communities of violence. Herein lies the greatest danger in federalization: creating the illusion of greater crime control, while undermining an already over-burdened criminal justice system.[26]

Others note that particularly notorious conduct receiving widespread media attention frequently prompts Congressional criminalization[27] and

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[25] Franklin E. Zimring & Gordon Hawkins, *Toward a Principled Basis for Federal Criminal Legislation*, 543 ANNALS AM. ACAD. POL. & SOC. SCI. 15, 20-21 (1996). *See also* Chief Justice Rehnquist's observation about recently enacted federal statutes that have expanded federal jurisdiction: "the question of whether the states are doing an adequate job" in the area under consideration "was never seriously asked." William H. Rehnquist, *Address to the American Law Institute*, REMARKS AND ADDRESSES AT THE 75TH ANNUAL ALI MEETING, MAY 1998, at 18 (1998).

[26] "*Position on Federalism*," Police Executive Research Forum (transmitted to the Task Force, December 1997).

[27] *See, e.g.*, JAMES D. CALDER, THE ORIGIN AND DEVELOPMENT OF FEDERAL CRIME CONTROL POLICY 20-24, 198-203 (1983) (describing events that led to enactment of legislation in the late 1920s and early 1930s); Kathleen F. Brickey, *The Commerce Clause and Federalized Crime: A Tale of Two Thieves*, 543 ANNALS AM. ACAD POL. & SOC. SCI. 27, 30 (1996) (recounting Congressional enactment of carjacking statute following a widely publicized incident successfully prosecuted as state robbery and homicide); Constance Johnson, U.S. NEWS & WORLD REPORT,

attribute the passage of much of this legislation to its popularity among constituents.[28]

The observations that the recent federalization is too frequently driven by political popularity, and not federal need, accord with the experience of Task Force members.

There is no question about the overall need for reasonable measures to deal with violent crime: The safety of citizens is a core interest of government, an important matter for meaningful governmental attention. Crime breeds genuine concern among our citizens, with violent street crime generating particular alarm. Crime also tends to generate legislative response. Public desire for safety fuels a corresponding desire in legislators to deal with citizen concern for protection. Some of these legislative proposals may stem from a

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vol. 116, March 28, 1994, p.35 (noting Congressional federal kidnapping response to the Lindbergh baby kidnapping, as well as the federal bank robbery statute enactment in the wake of a streak of notorious bank robberies); Franklin E. Zimring & Gordon Hawkins, *Toward a Principled Basis for Federal Criminal Legislation*, 543 ANNALS AM. ACAD. POL. & SOC. SCI. 15 (1996) (arguing that federal criminal jurisprudence lacks discernable principles and noting backdrop of intense publicity against which the carjacking statute was enacted).

[28] The recurring view communicated to the Task Force is basically that expressed by a President of the National Conference of State Legislatures: "[T]he expansion of federal criminal jurisdiction and resources is totally the result of political popularity of crime legislation." The federalization is, for example, attributed by those in the law enforcement field to a desire for policy makers to be "tough on crime" (*Position on Federalism*, Police Executive Research Forum, transmitted to the Task Force December 1997) and to political expediency, following "the first rule of politics: get re-elected," rather than "a ‹demonstrated need›. . . ." (Correspondence to Task Force from an Ohio county prosecutor). *See also* THE REAL WAR ON CRIME: REPORT OF THE NATIONAL CRIMINAL JUSTICE COMMISSION 68-71, 79-80 (1996); Franklin E. Zimring & Gordon Hawkins, *Toward a Principled Basis for Federal Criminal Legislation*, 543 ANNALS AM. ACAD. POL. & SOC. SCI. 15, 20-21 (1996) (noting that crime arouses citizen fear and arguing that in practice the argument for creation of a federal crime typically "stresses the considerable resources of the federal government and the need to proceed on all fronts against the troublesome and uncontrolled threats. The problem is regarded as federal because it is serious and not because of any structural incapacity to deal with the problem on the part of state and local government.").

genuine, if often misguided, perception that federal law enforcement efforts are necessary or appropriate to deal with a particular law enforcement problem. However, no matter what the party, "[p]oliticians often use crime issues to 'enhance their popularity and electability.'"[29] Indeed, some of the recent pieces of federal legislation have been characterized as "feel-good, do-something" federal criminal bills[30] and "window dressing,"[31] recognized as only "symbolic gestures to appease the public rather than actual attempts to reduce crime."[32]

II. THE REALITIES OF FEDERAL PROSECUTION AS IT AFFECTS LOCAL CRIME

For much of our national history, the deeply rooted principle that the general police power resides in the states **C** and that federal law enforcement should be narrowly limited **C** was recognized in practice as well as in principle. At least until recently, the constitutional vision that the federal government should play a narrowly circumscribed role in defining and investigating criminal conduct was reflected in cautious limitations on the types of behavior that federal lawmakers addressed through criminal law. The Task Force's work leads it to the clear conviction that there has been a significant growth in federal crime legislation (much of it recent) and that a sizeable portion of it deals with localized matters earlier left to the states. A complex layer is being

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[29] NANCY E. MARION, A HISTORY OF FEDERAL CRIME CONTROL INITIATIVES 13 (1994) (citing Erika S. Fairchild & Vincent J. Webb, *Crime, Justice and Politics in the United States Today*, in FAIRCHILD & WEBB, eds., THE POLITICS OF CRIME AND CRIMINAL JUSTICE 8 (1985), and RALPH BAKER & FRED A. MEYER JR., THE CRIMINAL JUSTICE GAME 46 (1980)).

[30] *See* William N. Eskridge, Jr. & Philip P. Frickey, *The Supreme Court 1993 Term — Foreword: The Law as Equilibrium*, 108 HARV. L. REV. 26, 71 (1994).

[31] Sara Sun Beale, *What's Law Got To Do With It? The Political, Social Psychological and Other Non-Legal Factors Influencing the Development of (Federal) Criminal Law*, 1 BUFF. CRIM. L. REV. 23, 30 (1997), citing Fox Butterfield, *"Three Strikes" Rarely Invoked in Courtrooms*, N.Y. TIMES, Sept. 10, 1996, at A1.

[32] NANCY E. MARION, A HISTORY OF FEDERAL CRIME CONTROL INITIATIVES 244 (1994).

added to the overall criminal justice scheme, dramatically superimposing federal crimes on essentially localized conduct already criminalized by the states.

As a result of these conclusions, the Task Force sought to determine whether the trend could somehow be justified as having a demonstrable, significant impact on public safety, the argued basis for much of the federalization. We conclude that persuasive evidence is lacking.

The Limited Impact of Federal Criminal Law on Local Crime

The important point that emerges from a review of the effects of the recent legislation is this: *Increased federalization is rarely, if ever, likely to have any appreciable effect on the categories of violent crime that most concern Americans, because in practice federal law enforcement can only reach a small percent of such activity.*

Due to limited resources **C** investigative personnel, federal prosecutors, and court facilities **C** federal criminal law can realistically respond to only a relatively small number of local crimes at any given time. The actual use and particular application of the expansive body of federal law is necessarily constrained by resources. The selection of which crimes to investigate and prosecute therefore requires a decision-making process which reflects highly selective prioritizing by investigative agencies and federal prosecutors.[33]

The present relatively infrequent federal prosecution of local conduct is likely to remain the norm absent a massive (and unlikely) infusion of federal money into the federal criminal justice system. "It is," police executives have noted, "unrealistic to expect that federal authorities will have the resources and inclination to investigate and

[33] It is difficult to measure the impact of federalization on actual investigations, except by identifying the growing number of federal law enforcement personnel. Many investigations are never disclosed and most are not statistically recorded in any way that leads to meaningful study. Many investigations (undertaken at potentially substantial cost to both the federal government and the individual investigated) do not result in criminal charges.

prosecute traditionally state and local offenses."[34] In a related vein, state judges have expressed the view that indiscriminate federalization of crimes

> creates an illusion by enacting new criminal law without providing the resources required for the federal government to enforce that law; and . . . disrupts funding of state criminal processes by favoring police and corrections with federal funds while disregarding the need this creates for commensurate resources for courts, prosecutors and defense attorneys . . . .[35]

Before reaching these conclusions about the limited value of federalization, the Task Force studied the actual prosecutions of federal crimes.

The Frequency of Prosecution of Selected Federalized Crimes

To assess the extent to which federalization of criminal law has the potential to impact crime in general and local crime in particular, the Task Force first examined available data to assess the comparative frequency of federal and state prosecutions. The key point is that federal prosecutions comprise less than 5% of all the prosecutions in the nation. The other 95% are state and local prosecutions.[36]

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[34] *Position on Federalism*, Police Executive Research Forum (transmitted to the Task Force, December 1997).

[35] *Id.* (opposing provisions of the federal Violent Crime Control and Law Enforcement Act of 1994 which would federalize traditional areas of ordinary street crime traditionally prosecuted only in state courts). *See also* Resolution XVI, Conference of Chief Justices, August 3, 1995 (opposing federal enactment of laws dealing with homicides and other violent state felonies if firearms are involved); Resolution IV, Conference of Chief Justices, July 17, 1983 (opposing federal enactment of laws authorizing federal prosecution of persons who had two prior state convictions for armed robbery or burglary felonies).

[36] In 1994, there were a reported 872,218 state felony convictions, compared to 39,624 federal felony convictions (accounting for 4% of all felony convictions). Bureau of Justice Statistics, *Felony Sentences in the United States, 1994*, Bulletin NCJ-1651-49 (Washington, D.C., DOJ, July 1997), p.2.

We then did a statistical analysis of the frequency of the use of some selected federal criminal statutes, primarily street crimes, plus a few other traditionally local offenses for comparative purposes.[37] This analysis, coupled with the relative low number of federal prosecutions in general, produced some interesting and useful insights. Even the most frequently prosecuted federal offense, domestic drug trafficking, which constituted 28% of all federal filings in fiscal year 1997, accounts only for less than an estimated 2% of all prosecutions (federal and state) in the nation. Drug cases of all types now occupy one-third of the federal court caseload, yet the overall percentage of federal prosecutions of all drug arrests is still very small: Of the million-plus drug arrests in the country, approximately 1.5% were federally prosecuted in FY97.[38]

Perhaps of greater significance, several recently enacted federal statutes, championed by many because they would have a claimed impact on crime, have hardly been used at all. Two of the most publicized recent violent federalizations, drive-by shooting and interstate domestic violence, were not cited in a single prosecution in fiscal year 1997. Both federal statutes have been in effect since 1994. As the accompanying table and charts show, many other recently enacted federal criminal statutes have been used rarely or not at all.

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[37] A full description of the process for selecting these statutes and data sources appears in APPENDIX B, SECTION 2.

[38] The U.S. Department of Justice reported a total of 1,506,200 arrests for drug abuse violations in 1996. See SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ON LINE, albany.edu/sourcebook/1995/tost_4.html, Table D.1. The federal courts, however, handled only 22,276 drug crimes. Administrative Office of U.S. Courts, *Judicial Business of the United States Courts, Report of the Director, 1997*, Table D-4, p. 214. These figures would indicate that less than 2% (approximately 1.5%) of the number of 1996 arrests are handled in federal court.

See also Franklin E. Zimring & Gordon Hawkins, *Toward a Principled Basis for Federal Criminal Legislation*, 543 ANNALS AM. ACAD. POL. & SOC. SCI. 15, 18-19 (1996) (discussing the large percentage that drug cases represent in federal prosecutions, even among robbery, weapons and other street crimes).

FY 1997 FEDERAL FILINGS/SENTENCINGS

Activity	#Filings	#Sentencings
All Federal Criminal Statutes	59,242	47,677
Selected Street or Domestic Violence Crime Statutes		
Domestic Drug Trafficking	16,629	16,082
Use or carrying of firearm during a crime of violence or drug trafficking crime	1,830	1,305
Simple Possession of Drugs	1,104	686
Carjacking	164	117
Transfer of a firearm across state lines	58	8
Drive-by shootings	0	1
Interstate domestic violence	0	5
Endangering lives by the manufacture of drugs	4	1
Failure to report child abuse	0	0
Murder by escaped prisoners	0	0
Selected Non-violent Local Crime Statutes		
Obstruction of state or local law enforcement	2	5
Animal Enterprise Terrorism	3	1
Theft of Livestock	1	0
Odometer Tampering	0	0

Chart 3. Task Force on Federalization of Criminal Law (ABA)

Filings **Sentencings**

Charts 4 & 5. TF on Federalization of Criminal Law (ABA)

This rare use of many federalization statutes calls into question the belief that federalization can have a meaningful impact on street safety and local crime. But the presence of these federalized crimes on the books does present a possible opportunity for both selective prosecution with its inherent disparity and for shifting prosecutorial priorities that, without open political debate, can alter the traditionally limited federal presence in local matters.

A comparison of the type of cases handled from 1947 through 1997 reflects changing priorities of the crimes selected for federal prosecution. Federal theft and forgery cases have declined; federal fraud cases have increased. The largest increase has been in the number of federal drug cases (some of which are essentially local in nature). Federal dispositions for crimes of violence has remained fairly constant for at least the last 30 years. The following chart shows the changing federal criminal caseload.

Change in the Federal Criminal Caseload Over 50 Year Period

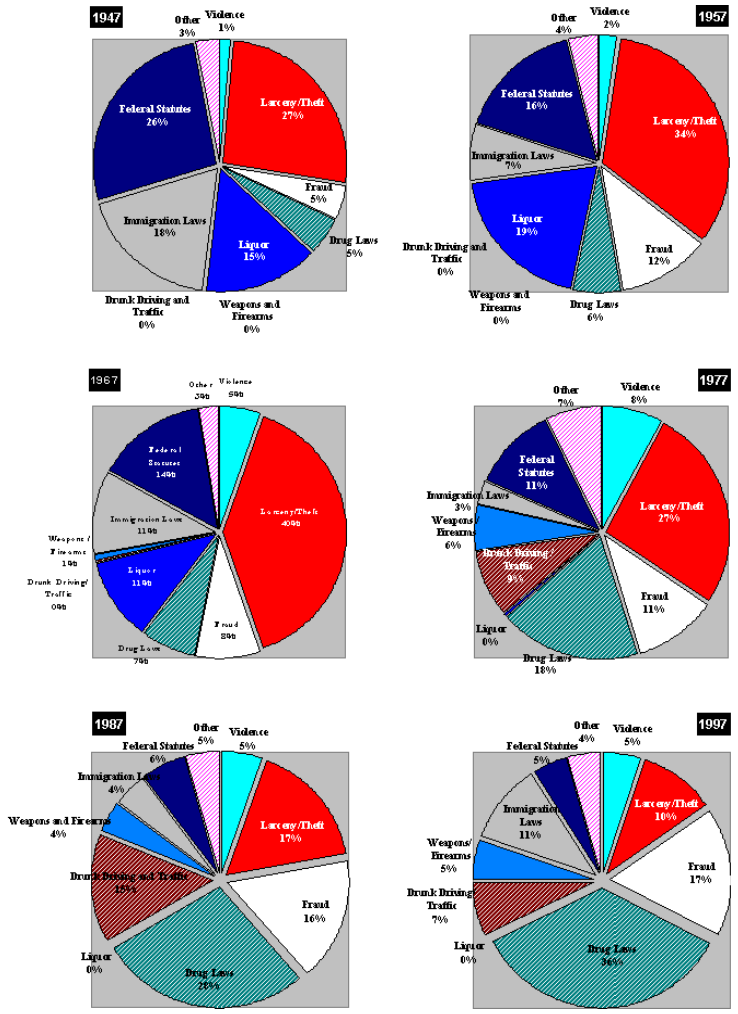

Chart 6.[39] TF on Federalization of Criminal Law (ABA)

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[39] The graphs in this chart are based on the *Annual Reports of the Director of the Administrative Office of the U.S. Courts*, Table D-4, for the years 1947, 1957, 1967, 1977, 1987, 1997. (See APPENDIX B, SECTION 3, for additional source information and for the tables on which these graphs are based.) The "Federal Statutes" category is a category used by the Administrative Office of the United States Courts in its reports to group criminal statutes that have no direct state or local counterpart. The category addresses crimes such as agriculture, antitrust, civil rights, food and drug, migratory bird, motor carriers, national defense, postal law,

Considering the Significance of Low Prosecution Rates. At first glance, the point that federalized crimes are actually prosecuted in relatively low numbers may appear to cut in two different directions: If only a limited number of federal local or street crime cases will be brought, federalization is in some ways limited in effect. But a trend such as this, having little effect on crime control, can simultaneously produce a major detrimental impact on basic values and result in troubling practical consequences. If this is so, the federalization trend should be avoided. As a result, the Task Force next examined whether there are harmful effects from inappropriate federalization, even if such crimes are prosecuted in low numbers.

III. THE DUAL AMERICAN CRIMINAL JUSTICE SYSTEM & THE ADVERSE COSTS OF INAPPROPRIATE FEDERALIZATION

In an increasingly mobile America **C** one in which the ease of national communications can blur public perception of boundaries and governmental distinctions **C** it is vital to remember that the American criminal justice system was set up to operate within distinct spheres of government. By deliberate constitutional design, the various justice systems are not uniform or monolithic. Inappropriate federalization strains the fabric of the federal-state system. There are powerful reasons for the fundamental limitations on federal criminal law, reasons that are rooted in the constitutional makeup of the nation and in practical experience.

The Constitutional Framework

Constitutional law recognizes that "preventing and dealing with crime is much more the business of the States than it is of the Federal Government . . . ."[40] In practice, most criminal conduct in America has always been, and still is, defined by state legislatures, investigated by state agents, prosecuted by state prosecutors, tried in state courts, and

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and others such as criminal acts committed by or against federal employees.

[40] Patterson v. New York, 432 U.S. 197, 201 (1977).

punished in state prisons. This accords with the historical American principle that the general police power lies with the states and not with the federal government, although there clearly is an appropriate sphere for federal criminal legislation.

The concept that the general police power resides with the states is a basic consequence of the deliberate constitutional design setting up a dual federal/state system but assigning only limited powers to the federal government, a limitation that applies to federal criminal legislation. As the Supreme Court recently reminded, the Constitution withholds "from Congress a plenary police power that would authorize enactment of every type of legislation. See Art. I, § 8."[41] The Constitution sets up a dual sovereignty system and, the Court has underscored, confers upon Congress "not all governmental powers, but only discrete, enumerated ones,"[42] leaving to the states "all those other subjects which can be separately provided for . . . . "[43] As the Supreme Court observed, the great innovation envisioned in the dual system

> was that "our citizens would have two political capacities, one state and one federal, each protected from incursion by the other" **C** "a legal system unprecedented in form and design, establishing two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it."[44]

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[41] United States v. Lopez, 514 U.S. 549, 566 (1995).

[42] Printz v. United States, 521 U. S. 98, ___, 117 S. Ct. 2365, 2376 (1997).

[43] "[I]t is to be remembered," James Madison assured his fellow citizens, "that the general government is not to be charged with the whole power of making and administering laws. Its jurisdiction is limited to certain enumerated objects, which concern all the members of the republic, but which are not to be attained by the separate provisions of any. The subordinate governments, which can extend their care to all those other subjects which can be separately provided for, will retain their due authority and activity." THE FEDERALIST No. 14, at 102 (James Madison) (Clinton Rossiter ed., 1961).

[44] Printz v. United States, 521 U. S. 98, ___, 117 S. Ct. 2365, 2377 (1997), quoting U.S. Term Limits, Inc. v. Thornton, 514 U.S. 799, 838 (1995) (Kennedy, J., concurring).

Inappropriate federalization can undermine the strength of the states, which are an independent, intrinsic component of the American governmental system. The dual system envisioned by the Constitution produces a complex and delicate set of attributes in American criminal law, and a disruption of the delicate balance creates significant dangers. A constitutional strain is not only significant in theory; there are also important, practical, adverse consequences to inappropriate federalization. Federalization, one writer has noted, is not "cost-free" even if it appears to be.[45]

Adverse Consequences in Practice

Impact on the States and Their Courts. Inappropriate federalization undermines the critical role of the states and their courts, which are constitutionally given the primary role of dealing with crime and which, after all, carry the overwhelming criminal case workload. This can lead to a notable diminution of the stature of the state courts in the perception of citizens. There is a discernable perception that federal law enforcement often gravitates toward prosecuting only highly visible incidents of local crime, leaving the vast percentage of less glamorous prosecutions to the states. The unfortunate premise **C** sometimes express, sometimes implicit **C** is that the states are not capable of adequately handling important matters, a premise belied by the everyday disposition of tens of thousands of cases in the state systems. The premise also flies in the face of the fact that, federalization notwithstanding, the vast majority of criminal prosecutions will continue to be tried in state courts. Although federalization relieves the state courts of hearing some cases, the reduction is actually small, as discussed elsewhere in this Report.

Concentration of Policing Power. The Constitution's separation of American government into federal and state spheres, the Supreme Court has observed, is considered:

> one of the Constitution's structural protections of liberty. "Just as the separation and independence of the coordinate branches of the

[45] *See* John B. Oakley, *The Myth of Cost-Free Jurisdictional Reallocation*, 543 ANNALS AM. ACAD. POL. & SOC. SCI. 52 (1996).

> Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front."[46] To quote Madison . . . : "a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself."[47]

Historically, centralization of criminal law enforcement power in the federal government has been perceived as creating potentially dangerous consequences and has therefore been avoided. There has always been an innate American distrust for the concentration of broad police power in a national police force, and citizens have long resisted the evolution of such a broadly powerful national police force, as distinguished from specialized national police agencies. (One indication of this concern is the general prohibition against using the military to execute the laws.[48]) Enactment of each new federal crime bestows new federal investigative power on federal agencies, broadening their power to intrude into individual lives. Expansion of federal jurisdiction also creates the opportunity for greater collection and maintenance of data at the federal level in an era when various databases are computerized and linked. Increased and centralized federal power to investigate is, in effect, subject to limited oversight beyond that imposed by the federal Executive Branch itself. Expanding, unreviewed federal power, when no strong case can be made for its existence, is contrary to the American wisdom against concentrating policing power in any one governmental entity.

Disparate Results for the Same Conduct. A long-recognized feature of our dual governmental system is that criminalized behavior

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[46] Printz v. United States, 521 U.S. 98, ___, 117 S. Ct. 2365, 2378 (1997), quoting Gregory v. Ashcroft, 501 U.S. 452, 458 (1991).

[47] *Id.*, quoting THE FEDERALIST No. 51, at 323 (James Madison) (Clinton Rossiter ed., 1961).

[48] 18 U.S.C. § 1385 (1994) (prohibiting use of Army or Air Force to act as a posse comitatus or to otherwise execute the law without express constitutional or Congressional authorization).

may violate the law of more than one sovereign. The result is that any one of these jurisdictions may choose to prosecute conduct, or that several jurisdictions might possibly punish for essentially the same conduct. For example, a crime might be committed in such a way that the law of two different states might be violated. More to the point here, behavior might violate both the law of a state and the federal government, leading to concurrent jurisdiction to prosecute the conduct in several forums. Many bank robberies, for example, will constitute both the state crime of robbery and the robbery of a federally insured bank; theft of a motor vehicle will usually violate both state theft-based law and federal interstate transportation of stolen vehicle law. Because the conduct offends two different sovereigns **C** the individual state and the federal government **C** the Supreme Court has consistently held that, although the offenses involve the same conduct, they are not the "same offense" for constitutional purposes, with the result that the federal Double Jeopardy Clause does not prohibit either two separate prosecutions or two separate punishments.[49] Some state laws, or occasionally a federal statute, will offer protection from some double prosecution or punishment in such situations,[50] but these restrictions are neither universal nor all-encompassing. In practice, the amount of double prosecution/punishment is likely small, and so, rather than double punishment, the more salient feature of overlapping dual prosecution is that it affords the opportunity for selective prosecution of the same

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[49] The U.S. Department of Justice has devised an internal policy setting out for federal prosecutors the limited circumstances in which a dual federal prosecution should be brought following a state prosecution. The dual federal-state "*Petite* Policy" (found in the DOJ's U.S. ATTORNEYS' MANUAL) deals with federal prosecutions subsequent to a state prosecution; the reverse situation is generally within the discretionary decision-making power of state officials. The DOJ policy is discussed in Harry Litman and Mark Greenberg, *Dual Prosecutions: A Model for Concurrent Federal Jurisdiction*, 543 ANNALS AM. ACAD. POL. & SOC. SCI. 72 (1996), which also notes relevant Supreme Court cases on the double jeopardy issue.

[50] *See, e.g.*, the authorities discussing such state laws, collected in NORMAN ABRAMS & SARA SUN BEALE, FEDERAL CRIMINAL LAW AND ITS ENFORCEMENT 743 (1993); George C. Thomas III, *A Blameworthy Act Approach to Double Jeopardy Same Offense Problems*, 83 CAL. L. REV. 1027, 1057 (1995); 18 U.S.C. § 2117 (1994) (dealing with breaking or entering carrier facilities, and providing that a "judgment of conviction or acquittal on the merits under the laws of any State shall be a bar to any prosecution under this section for the same act or acts").

conduct in different ways.

A citizen prosecuted for a state crime is subject to a set of consequences appreciably different than one prosecuted for a federal crime. For a particular defendant, these consequences are sometimes better, sometimes worse, but they are nevertheless disparate. Although every defendant will receive a minimum set of federal constitutional protections, additional procedures and rules of evidence will differ significantly between state and federal systems. For example, the agency which investigates the conduct will usually vary, involving either state, local, or county police on the one hand, or a federal investigating agency on the other. The selection, supervision, confining power, practices, and accountability of these officials will differ between state and federal. Prosecutors who decide which crimes and which persons to prosecute **C** prosecutors differently selected, differently accountable, and differently restrained by state or federal law and internal policies **C** will also vary. The proximity of the trial court to defendants' and witnesses' homes, the nature of court procedures and evidentiary rules, and the availability of state protections beyond the minimum offered by the federal Constitution will also differ. Which judge tries the case and which appellate judges review the trial proceedings will likewise be different, with judges selected by different methods.

Of particular importance is the fact that sentencing options (including the length of sentence, as well as the location and nature of confinement) will often be greatly disparate in the different systems, as will be the opportunity for parole and the conditions of probation. A graphic picture of the varying sentence consequences is depicted by a comparison of the different state and federal penalties for offense categories.

Average Estimated Time to be Served in State and Federal Prison By Type of Offense
Source: U.S. Department of Justice, Bureau of Justice Statistics, *Felony Sentences in the United States, 1995* (Bulletin NCJ-165149, July 1997) p. 9.

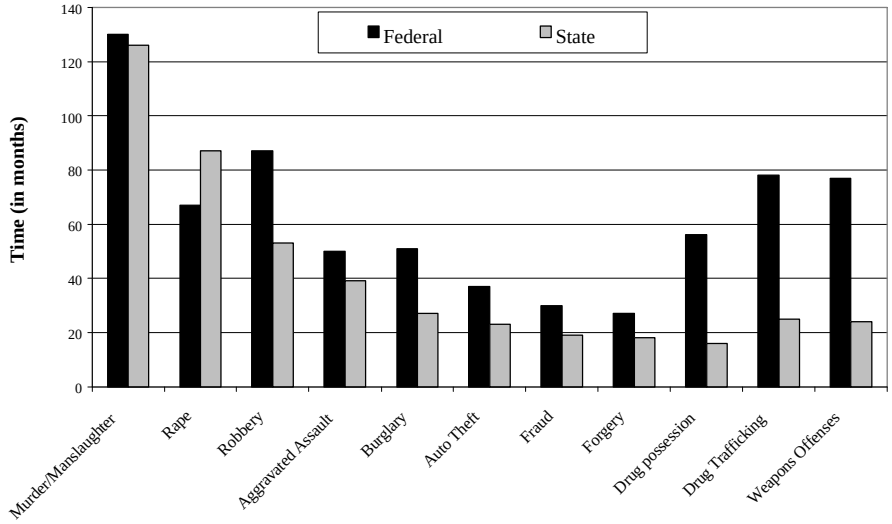

Chart 7.[51] TF on Federalization of Criminal Law (ABA)

A certain amount of disparity is inherent in any system that relies on human decision makers. Police, prosecutors, judges, juries, and defense counsel can all have a substantially disparate impact on the outcomes of individual cases. Whenever possible, however, we should seek to avoid introducing new sources of disparity without carefully considering the benefits and costs. In the case of federalization of the criminal law, this principle has too often been ignored.

[51] Many of the generic crime categories in this chart may cover a wide range of behaviors deserving of different sentences. However, others (e.g., drug possession) are more circumscribed as to the type of offenses they include.

Diminution of a Principled Basis for Selecting a Case as a Federal or Local Crime With Its Different Consequences. As a consequence of federalization, essentially local conduct **C** for example, a street corner assault **C** may be prosecutable differently without any persuasive reason why it should trigger one set of consequences rather than another for essentially similar conduct. The federal legislative decision that makes possible these varying results is often premised on the idea that some particular object involved usually travels in interstate commerce in the manufacturing and distribution process. If, for example, the assault involves a simple knife, it will typically be a state crime only, but if a gun is used instead, in some circumstances the incident may be treatable as a federal crime because of modern federal law.[52] Similarly, a street corner robbery will often be only a state crime, but if a car is the object of the robbery, the crime might be both state robbery and federal carjacking.[53] Likewise, drug activity comprises a large category of activity that now violates both state and federal law.

In most such cases, state interest in pursuing the offending conduct is not lacking.

The power to criminally prosecute and punish citizens' behavior is one of the most important and awesome powers of government. As one leading voice of American criminal law put it, penal law is not only "the law on which people place their ultimate reliance for protection against all the deepest injuries that human conduct can inflict on individuals and institutions" but, "by the same token, penal law governs the strongest force that we permit official agencies to bring to bear on individuals."[54] A dual system that affords the opportunity to prosecute essentially the same conduct as a federal crime rather than a state crime, with starkly differing consequences, should be as rational and principled as possible, and cogent reasons should justify federal criminalization. Such reasons have been absent in many instances of recent federalization of local crime.

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[52] *See* 18 U.S.C.A. App. § 1202 (West Supp.).

[53] *See* 18 U.S.C.A. § 2119 (West Supp.).

[54] Herbert Wechsler, *The Challenge of a Model Penal Code*, 65 HARV. L. REV. 1097, 1098 (1952).

In practice, the different consequences inherent in the choice between overlapping local federal or state crimes are triggered by a prosecutorial decision, not necessarily by the essential nature of the conduct. Federal prosecutors sometimes institute federal charges involving the same conduct which is already the object of similar state charges, and state charges may then be dropped.[55] In any event, greater overlap between federal and state criminal statutes creates greater potential for increased federal police powers, varying prosecutorial standards and decisions, divergent trial options, and significantly different sentences for essentially the same conduct. Some disparity between consequences inevitably results from the dual system and may be tolerated if carefully considered, principled, and limited in amount; an expansive amount of unprincipled overlap in which very large amounts of conduct are susceptible to selection for prosecution as either federal or state crime is intolerable.

Increased Power at the Federal Prosecutorial Level. Congress's decision to make conduct a federal crime confers on federal prosecutors the authority to decide whether to prosecute particular conduct, moving more power to the federal level. All prosecutors exercise critical discretion in choosing what crimes and which people to prosecute, a discretion largely beyond judicial control. Broadening prosecutorial jurisdiction authorizes more decision-making on the part of federal prosecutors.

From jurisdiction to jurisdiction, the manner in which prosecutors are chosen varies. Some state prosecutors are appointed by governors but, more typically, state citizens have a direct say in the selection of prosecutors by electing local (usually county-wide) prosecutors who are subject to electoral monitoring and the limits set by state legislators, as well as (when appropriate) by the state courts. In contrast, federal prosecutors are part of the Department of Justice, generally under the ultimate direction of the Attorney General who is appointed by the President, with Senate confirmation. While some federal prosecutions are directly brought by attorneys based at the main Department of Justice

[55] *See, e.g.*, United States v. Lopez, 514 U.S. 549, 551 (1995) (dealing with the constitutionality of the federal Gun-Free School Zones Act under the affecting commerce power) (state prosecution dropped after federal charges filed).

office in Washington, D.C., the vast majority of federal prosecutions are brought by U.S. Attorneys, who are Presidentially appointed to cover specific regions of the country. Ninety-four in number, the various U.S. Attorneys operate under the ultimate direction of the Department of Justice and its policies, but there is considerable discretion granted to each of these U.S. Attorneys (and their 8,000 or so Assistants) about which federal crimes will be prosecuted, under what circumstances each federal statute will be used, and which defendants will be targeted. Some federal prosecution practices will vary among U.S. Attorneys' offices.[56]

Given the parallel systems of state and federal prosecution that can cover essentially the same conduct, new federal crimes dealing with local conduct place additional (and essentially unreviewable) power in the hands of federal prosecutors, prompting questions about diverse treatment, sentences, and other issues related to the basis for selecting one defendant for federal prosecution while others are prosecuted by the state. In the absence of a distinct federal interest, the decision to prosecute can lack a guiding federal principle. A federal prosecutor is under no legal requirement to state why any particular defendant has been selected to be prosecuted in the federal system and receive a significant federal sentence, and why the many other similar defendants are left to state prosecution. Restraint is essentially left to self-imposed prosecutorial discretion.

In practice, the federal prosecution option is employed in different ways. In some instances, federal and state law enforcement authorities can work cooperatively to attack local crime problems through a coordinated effort that involves both federal and state prosecutions. This permits law enforcement to make use of the particular tools available in federal investigations and prosecutions, including immunity, nationwide subpoena power and increased sentences, while at the same time by-passing rights conferred by local law, such as rights to separate trials for multiple defendants, to transcripts of prior trials and discovery, to evidentiary limitations, to different sentences, and to possible parole

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[56] *See, e.g.*, NORMAN ABRAMS & SARA SUN BEALE, FEDERAL CRIMINAL LAW AND ITS ENFORCEMENT 91-105 (1993) (collecting some of the pertinent prosecutorial policy statements and describing some of the prosecutorial coordinating devices).

rights.[57] Similarly, in plea negotiations, local prosecutors can use possible federal prosecution, with its likely harsher punishments, as a threat.[58]

These practices may be viewed as helpful to public safety (by enabling the conviction and incarceration of dangerous individuals), or as raising troubling possibilities, including the possibility of disparate treatment. Some have argued that a wide body of overlapping federal law does not create a problem as long as there is wisely exercised prosecutorial discretion in deciding to invoke federal law against some defendants.[59] Indeed, one significant feature of a broadening body of

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[57] See the testimony of a state county prosecutor regarding the proposed "Hate Crimes Prevention Act." 1998 Westlaw 12762066 (July 8, 1998 testimony before Senate Judiciary Committee regarding S. 1529, 105 Cong., 1st Sess.) and describing such a federal prosecution as having the effect of avoiding such local rights. The prosecutor also noted that avoidance of multiple trials prevented the witnesses from having to testify in several trials. *See also* N.Y. TIMES, Oct. 8, 1998, at B4 (attributing federal prosecution of two young defendants for an interstate kidnapping and subsequent homicide to federal prosecutor's decision based, in part, on fact that state law would have permitted sentencing considerations such as defendants' ages and education that could have reduced sentence, compared to the more severe federal sentence).

[58] *See* Testimony of William J. Stunts, July 8, 1998, before Senate Judiciary Committee regarding S. 1529, 105 Cong., 1st Sess., the proposed "Hate Crimes Prevention Act." 1998 Westlaw 12762070. Professor Stunts notes that this potential is particularly common in drug cases. A frequently cited example of an executed threat of this nature is recounted in Dennis E. Curtis, *The Effect of Federalization on the Defense Function*, 543 ANNALS AM. ACAD. POL. & SOC. SCI. 85 (1996). A state drug defendant was offered a guilty plea which would have led to a 4-8 year sentence. When the defendant declined and wanted a trial, a federal drug prosecution was brought, leading to a mandatory life sentence. *Id.* at 96, citing Jim Smith, *Petty Pusher Goes Out Big Time*, PHILADELPHIA DAILY NEWS, July 17, 1992.

[59] For discussions of the exercise of prosecutorial discretion in the context of the federalization problem, *see, e.g.*, G. Robert Blakey, *Federal Criminal Law: The Need, Not for Revised Constitutional Theory or New Congressional Statutes, but the Exercise of Responsible Prosecutive Discretion*, 46 HASTINGS L.J. 1175 (1995); Jamie S. Gorelick & Harry Litman, *Prosecutorial Discretion and the Federalization Debate*, 46 HASTINGS L.J. 967 (1995); Harry Litman & Mark D. Greenberg, *Federal Power and Federalism: A Theory of Commerce-Clause Based Regulation of Traditionally State Crimes*, 47 CASE W. RES. L. REV. 921 (1997); Litman &

federal law is that it allows federal prosecutors (as well as investigative agencies) to pick from a wider set of target activity and defendants, choosing to concentrate from time to time on particular conduct and subjecting to federal investigation and prosecution those thought to be most dangerous. On the other hand, others note that this approach has obvious potential for disparate results in a system in which prosecutorial discretion is basically unreviewable, especially in the current absence of articulated standards for the selection of crimes and defendants from among a very long (and lengthening) list of candidates.

Whatever the law enforcement merits of such an approach, the members of the Task Force agree that it presents serious concerns for a federal system in which state and local law enforcement is intended to be the first line of protection for public safety.

Adverse Impact on the Federal Judicial System. Inappropriate federalization also has an adverse effect on federal courts. The disparity between the increase in the number of federal judges, when compared to the far greater increase in federal criminal justice personnel, indicates some of the impact that increased federal legislation can have in numerical terms: Federal justice personnel almost doubled between 1982 and 1993, but the number of authorized federal judgeships in the district courts increased by only 26%.[60] More importantly, an increase in the volume of federal criminal cases, driven primarily by additional cases that could as well be tried in state courts, diminishes the separate and distinctive role played by federal courts.

This is an era of increasingly complex (and correspondingly more lengthy) federal cases, many involving already traditional federal criminal law prosecutions and many entailing increasingly complicated federal civil suits. All of these cases compete for scarce court attention. Thrusting additional crimes into federal court places demands on an

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Greenberg, *Dual Prosecutions: A Model for Concurrent Federal Jurisdiction*, 543 ANNALS AM. ACAD. POL. & SOC. SCI. 72 (1996).

[60] See Chart 11, APPENDIX B, SECTION 1. The resource difference is more acute when the overall growth in personnel is compared to the number of sitting judges, which, because of unfilled vacancies, increased by only 14% over the same time period.

already strained federal court system and threatens the quality of essential federal justice. Additional federal crimes mean not only federal trials, but also additional ancillary proceedings, sentencings, post-sentence matters, and appeals. As a result, there is a danger that scarce court resources will have to be shared with those needed to adjudicate offenses for which there is little, if any, need for a federal forum, instead of being devoted primarily to offenses with a clear need for adjudication in a federal court.

For a number of reasons (including laws requiring the prompt disposition of criminal indictments), federal criminal cases generally are given priority over civil cases (whether between an individual and the government, or between individuals).[61] Civil litigants therefore suffer because of the priority that must be given to any increase in federal prosecutions. The Judicial Conference of the United States, representing the views of federal judges, notes that the federalization trend "will negatively impact on the ability of the federal courts to hear federal criminal prosecutions, as well as carry out vital civil responsibilities in a timely manner."[62] And, emphasizing the traditional balance that has previously existed between state and federal jurisdiction, the Chief Justice of the United States has more than once expressed concern about some federal legislative responses to the growing crime apprehension that lead to unwise expansion of the federal courts' role in the administration of criminal justice.[63]

A significant increase in federal court caseloads, driven in part by increasing numbers of criminal cases, poses a serious threat to the proper

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[61] *See* Sara Sun Beale, *Federalizing Crime: Assessing the Impact on the Federal Courts*, 543 ANNALS AM. ACAD POL. & SOC. SCI. 39, 50 (1996).

[62] *September 1992 Report of the Proceedings of the Judicial Conference of the United States*, p. 57; *see also March 1993 Report of the Proceedings of the Judicial Conference of the United States*, p.13; *September 1990 Report of the Proceedings of the Judicial Conference of the United States*, pp. 70, 72; LONG RANGE PLAN FOR THE FEDERAL COURTS (1995).

[63] *See, e.g.*, 1997 YEAR-END REPORT ON THE FEDERAL JUDICIARY; 1993 YEAR-END REPORT ON THE FEDERAL JUDICIARY; William H. Rehnquist, *Address to the American Law Institute*, REMARKS AND ADDRESSES AT THE 75TH ANNUAL ALI MEETING, MAY 1998, at 15-19 (1998), excerpted in *Chief Justice Raises Concerns on Federalism*, 30 THE THIRD BRANCH, June 1998, at 1.

functioning of the federal courts.[64] On the one hand, rising caseloads lead to a disquieting choice of either greatly increasing the number of judgeships, with adverse short and long term consequences at both the trial and appeal level, or maintaining the current size of the federal judiciary and accepting unsatisfactory shortcuts in the disposition of cases. Adding a significant number of judges, especially in the courts of appeals, threatens the coherence of circuit law, risks reduction in the quality of appointments as the degree of individual scrutiny given to the selection and confirmation of large numbers of candidates declines, and impairs the close working relationships essential to the deliberations within multi-judge courts. On the other hand, processing increased caseload volume without significant increases in judgeships risks unacceptable short-cuts, such as the severe restriction or virtual elimination of oral arguments, a marked increase in the percentage of appeals disposed of without a published opinion, and greater reliance on expanded central staffs. A likely consequence of permitting essentially state and local offenses to swell federal court caseloads will be some combination of both sets of adverse consequences **C** the number of federal judgeships will grow to an unacceptable size and the federal courts will function far less efficiently and far less effectively.

It would be a tragic irony if ill-considered placement of state offenses in federal courts led to such an erosion of the quality of federal criminal justice that the historic reasons for having a distinct system of federal courts no longer justified their existence. The federal courts should play the distinctive and complementary role envisioned for them in the Constitution's federal scheme, and not simply duplicate the functions of the state courts.

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[64] *See, e.g., September 1992 Report of the Proceedings of the Judicial Conference of the United States*; Jon O. Newman, *Restructuring Federal Jurisdiction: Proposals to Preserve the Federal Judicial System,* 56 U. CHI. L. REV. 761, 761-66 (1989). *See also* the Federal Bar Association views offered in considering stress on the federal courts: "[C]rimes that adequately are addressed in state courts do not belong in federal courts." *Comments of the Federal Bar Association on the Tentative Draft Report of the Commission on Structural Alternatives for the Federal Courts of Appeals, October 1998,* at 4 (Nov. 5, 1998) (urging Congress's attention to the substantial impact on federal court caseloads caused by Congressional actions in regard to the federalization of state crimes).

Nearly all of those who have examined the impact of federalization have concluded that the federal courts are being overburdened with cases traditionally handled in state courts. However, a few scholars have argued the contrary position: that the federal courts are now bearing less than their proportionate share of criminal jurisdiction, and accordingly that federal prosecutions for traditional state crimes can be increased.[65] This view is based on a marshaling of statistical evidence measuring (among other factors) the percentage of all prisoners held in federal and state prisons, federal criminal filings as compared to total population, and filings per judge in the federal and the state systems. Assuming that this data is correct, it fails to take account of the true toll the current criminal caseload is placing on the federal courts and the serious future consequences. For example, in 1997, while criminal cases constituted 16% of the *filings* in federal court, they took up a far greater share of court *time* (even excluding time to hear contested motions). Criminal cases accounted for 39% of the trials, and 62% of those trials lasting 20 days or more.[66] In recent years, more than half of the trial docket in many districts has been devoted to criminal cases.[67] Furthermore, comparisons with earlier statistics can be misleading,

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[65] *See* Tom Stacy & Kim Dayton, *The Underfederalization of Crime*, 6 CORNELL J.L. & PUB. POL'Y 247 (1997).

Several pieces of the BIBLIOGRAPHY literature offer interesting insights concerning federal judge case load, in addition to the literature cited in this section of the Report. *See, e.g.*, Franklin E. Zimring & Gordon Hawkins, *Toward a Principled Basis for Federal Criminal Legislation*, 543 ANNALS AM. ACAD. POL. & SOC. SCI. 15 (1996); Rory K. Little, *Myths and Principles of Federalization*, 46 HASTINGS L.J. 1029 (1995).

[66] Administrative Office of the U. S. Courts, *Judicial Business of the United States Courts: 1997 Report of the Director*, Table T-2 (U.S. District Court — Length of Civil and Criminal Trials Resulting in a Verdict or Judgment by District, for the Twelve-Month Period ending September 30, 1997) (table excludes hearings on contested motions).

[67] By 1992, 38 of the 94 federal judicial districts devoted more than 50% of their trial time to criminal cases. Sara Sun Beale, *Reporter's Draft for the Working Group on Principles to Use When Considering the Federalization of Criminal Law*, 46 HASTINGS L.J. 1277, 1285 (1995) (citing Administrative Office of the U.S. Courts, *The Criminal Caseload: The Nature of Change* 1 (1994)). In 1994 it was estimated that criminal cases took up 48% of federal judges' time. *Id.* at 1285 (citing Statement of Kathleen Sullivan)).

because changes in both the kinds of federal prosecutions being brought and the applicable procedures require more judicial resources for each case. This is most apparent in the sentencing process, due to the adoption of the federal Sentencing Guidelines, but it is also true at the pretrial and trial stage, where motions practice in criminal cases has expanded significantly, requiring longer responses and more frequent (and longer) pre- and post-trial hearings. The present imbalance in the allocation of prosecutorial and judicial resources underscores the fact that the federal judiciary can not reasonably take on an ever-increasing number of cases. Between 1980 and 1994, for example, the number of federal prosecutors grew by 125%, while the number of federal judges in the district and appellate courts grew by the far lesser rate of 17%.[68]

Although the number of federal prosecutions has not increased in proportion to the growth in the population of the United States, the federal courts cannot and should not grow indefinitely. This is most apparent in the case of the Supreme Court which, due to its size and the nature of its decision-making process, cannot greatly increase the number of cases it decides on the merits. The same point is relatively true of all the federal courts. As noted earlier, it would be equally unwise to indefinitely expand the size of the federal judiciary in proportion to the size of the population, because it would fundamentally alter the character of the federal courts.[69] It would, of course, be possible simply to spread the same resources more thinly over an ever-increasing docket, as many states have been forced to do, laboring under crushing caseloads. There is, however, nso rational justification for treating any overburdened court as the model for other courts.

Adverse Implications for the Federal Prison System. A significant portion of the expansion of the federal prison system can be attributed to increased sentence lengths for existing crimes, but the increased number of federalized crimes may also have an impact on

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[68] Administrative Office of the U.S. Courts, *The Criminal Caseload: The Nature of Change* 1 (1994) (which also notes that the number of prosecutors per judicial officer had doubled in the previous ten years).

[69] These issues have been more fully addressed in the REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 35-38 (1990) and in the LONG RANGE PLAN FOR THE FEDERAL COURTS (adopted by the Judicial Conference December 1995).

federal prisons. Even if the number of persons prosecuted under these federalizing statutes is relatively small (as discussed elsewhere in this Report), among its other costs, federalization still tends to increase the number of prisoners and to strain the capacity of the federal prison system. The point is not that persons who commit the crimes discussed in this Report ought to be free; it is whether they ought to be in federal prisons.

Adverse Implications for Local Law Enforcement Efforts. Members of the Task Force and others who have examined the subject have warned of another adverse result of federalization as lines of responsibility between state and federal agencies blur. Some caution that the increasing presence of the federal government in the criminal law field can often (though not always) lead to counterproductive competition and friction. Law enforcement in ferreting out crime is competitive, as Justice Jackson (a former Attorney General) once observed.[70] This competition may sometimes manifest itself between federal and state officials, notably in our nation's large metropolitan areas. Most state prosecutors are elected; all federal prosecutors are appointed. Many in each group have aspirations for higher office. The potential for competition to detect and prosecute crime increases in direct proportion to the number of overlapping federal statutes which criminalize conduct that has traditionally been prosecuted locally. The overlap can create "turf wars between local district attorneys and U.S. Attorneys, as each tries to claim jurisdiction over cases that catch the public eye. These turf wars do not add to the system's ability to fight crime; they simply waste time and energy."[71]

More widely, others caution that the blurring of responsibility for the same conduct can lead to an unhealthy, diminishing local presence, and may have the ironic and unfortunate effect of discouraging or confusing local law enforcement efforts. In light of federal assumption

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[70] Johnson v. United States, 333 U.S. 10, 14 (1948) (Jackson, J., writing for a majority of the Court).

[71] Professor William J. Stunts, testifying about the potential of the proposed "Hate Crimes Prevention Act," including its likely effect of federalizing all rape cases. 1998 Westlaw 12762070 (July 8, 1998 testimony before Senate Judiciary Committee regarding S. 1529, 105 Cong., 1st Sess.).

of jurisdiction, some state entities may hesitate in pursuing the conduct in question. Such a hesitation or withdrawal by local law enforcement would undermine the primary role played by state law enforcement.

While federal support of local agencies can have a salutary effect, inappropriate federalization creating abundant concurrent jurisdiction can raise problems for law enforcement officials. The Police Executive Research Forum identifies the problems often associated with unwarranted federalization as including:

> uncertainty about investigative authority, omission of local expertise, additional burdens on the federal system with commensurate resources, promotion of disparate sentencing, and creation of expectations that will further disillusion victims and the electorate if federal laws cannot be enforced or are not applied. Federalization may also undermine efforts to better coordinate local, state, and federal enforcement efforts. Federalization also diverts federal authorities from what they do best and puts more distance between law enforcers and local community residents **C** in direct conflict with community policing objectives.[72]

Additional reasons argue for the principled allocation of roles to federal and state law enforcement. "One is that it is far more efficient for each jurisdiction to know for what it is responsible and for what it can held accountable. The second is that, with a principled division of responsibility, each set of agencies can build specialized capabilities, at least if the allocation of jurisdiction is functional rather than simply geographic."[73]

The Conference of Chief Justices (reflecting the views of the nation's state judges) has on several occasions decried much of the recent federalization as resulting in "the needless disruption of effective state

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[72] "*Position on Federalism*," Police Executive Research Forum (transmitted to the Task Force December 1997).

[73] Philip B. Heymann & Mark H. Moore, *The Federal Role in Dealing With Violent Street Crime: Principles, Questions, and Cautions*, 543 ANNALS AM. ACAD. POL. & SOC. SCI. 103, 108 (1996).

and local enforcement efforts."[74] Similarly, the National Governors Association has expressed concern that "some attempts to expand federal criminal law into traditional state function would have little effect in eliminating crime, but could undermine state and local anticrime efforts."[75] Variations of this common view were echoed by other state officials corresponding with the Task Force. For example, state judicial officials see the indiscriminate federalization of crimes as "contravening principles of federalism and further flawed because it: (1) assumes without foundation that states have been unresponsive and ineffective in addressing crime; [and] (2) fails to enact plausible solutions for violence, drugs, weapons or gangs . . . ."[76]

Citizen Perception and Diffused Citizen Power. A lessening of citizens' perception about their power to have an impact on critical crime issues should be avoided. Confusion of state and federal authority can leave citizens uncertain about who bears the responsibility for dealing with crime, while at the same time dissipating accountability for one governmental authority or the other to seriously confront the problem. On the whole, state law is easier to modify (and so more easily accommodates new local conditions) than is national legislation. Public

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[74] Resolution IX, Conference of Chief Justices, Feb. 10, 1994 (transmitted to the Task Force December 1997). In correspondence with the Task Force, the Conference president noted that the "federalization of criminal law is a mounting concern of the state judiciary . . . . Congress has for more than a decade shown a strong tendency to denigrate the state role in addressing crime and to inject federal agencies into the realm of state criminal law. Some of these initiatives have been ameliorated, but the threat to the fundamentals of American federalism is clear." Letter of Chief Justice Thomas Phillips, December 11, 1997.

[75] National Governors Association Policy HR-19, "Federalism and Criminal Justice" (revised 1996; transmitted to the Task Force January 1998). The Governors Association policy emphasizes that, "[t]raditionally, state and local governments are on the front lines of crime control. Virtually all planning of criminal justice activities, as well as the prosecution and incarceration of violent criminals, occurs at the state level." The policy perceives that the "federal government has served largely in a supporting role in this effort, providing research, data, analysis, material, and human resource assistance for state and local governments" and states that the "nation's Governors recognize and welcome the federal government's unique capabilities and resources in the fight against crime."

[76] *Id.*

accountability in the state and local segments of government is higher. As a result, the movement of the crime debate to the federal level may leave local citizens with the belief that they have less power to influence the debate about the response to crime and therefore less control over crime's immediate impact upon them.

Allocation of Resources. Inappropriate federalization scatters, rather than focuses, the resources needed to combat crime. In practice, efforts to combat crime compete for resources. The application of limited federal resources to one problem can deplete their use where they might be utilized better. Inappropriate use of federal investigators on local problems, for example, deprives federal authorities of time to address truly federal problems which only they investigate. Likewise, overburdening federal courts with essentially local cases lessens their ability to take up cases in which there is a distinctly federal stake, while at the same time undermining a vibrant system of state criminal justice. As federal judges have put it, "Congress should be encouraged to conserve the federal courts as a distinctive judicial forum of limited jurisdiction in our system of federalism. . . . [C]riminal jurisdiction should be assigned to the federal courts only to further clearly defined and justified national interests, leaving to the state courts the responsibility for adjudicating all other matters."[77]

All these adverse consequences strongly argue against inappropriate federalization of crime, particularly given the lack of actual gain it realistically can produce in combating crime.

IV. CONCLUSIONS

The current federalization trend presents a troubling picture with far-reaching consequences. It reflects a phenomenon capable of altering and undermining the careful decentralization of criminal law authority that has worked well for all of our constitutional history. It also raises questions about what kind of American criminal justice system will evolve if the trend continues.

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[77] LONG RANGE PLAN FOR THE FEDERAL COURTS 23 (1995).

The dual federal-state system of criminal law enforcement is constitutionally established. It is important in principle and should be maintained in practice. Each governmental system constantly makes, interprets, and embodies decisions about what citizen conduct should merit criminal investigation and possible sanctions. These varied systems, in turn, produce long-valued experimentation and thereby increase the likelihood of improvements in all systems.

A federal crime applies uniformly throughout all the states, yet local values concerning what conduct should be subjected to criminal sanctions (as distinguished from subjecting that conduct only to non-criminal law suits or other forms of condemnation) vary from state to state.[78] Local crimes involve local values and should be handled by state law. Each state's criminal justice system embodies a series of state decisions about what conduct should be subjected to governmental control and criminal sanctions (prison or fine) and about what socially unacceptable conduct should be left outside those criminal prohibitions (left perhaps to private social pressures, to moral restraints, or perhaps to non-criminal suits between individuals or between governmental agencies and individuals). Community views also differ from state to state on related issues: the appropriate limits on police investigative practices, acceptable prosecutorial discretion, the locale of trials, suitable court procedures and rules of evidence, the exact penal consequences that should accompany conviction, and the wisest allocation of limited resources to confront the important problem of crime. In the participatory democracy of our large nation, with varying local values, citizen views about such matters are more likely to be felt and acted upon through representatives at the local level, rather than at the federal level where most of those in power are more removed from the affected local values and more preoccupied with issues of national and international concern.

The diminution of local autonomy inherent in the imposition of national standards, without regard to local community values and without regard to any noticeable benefits, requires cautious legislative assessment. The appropriate balance affords room for truly national

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[78] *See generally* Neil H. Cogan, *The Rules of Everyday Life*, 543 ANNALS AM. ACAD. POL. & SOC. SCI. 97 (1996).

interests to be protected by federal law while reserving most criminal law enforcement to the states.

In concluding, we emphasize three points about the problem of inappropriate federalization. First, federal legislative power to create new crimes should be used with great caution. Second, in areas involving essentially local crime, the adverse consequences of inappropriate federalization should be recognized and avoided. Finally, Congress should consider several steps to limit federalization of local crime.

The Use of Federal Criminal Legislative Power

Congressional power to make conduct a federal crime is constitutionally limited. The power is more clear in some circumstances than in others.[79] Without attempting to describe in this Report the exact limits of Congressional power, it is useful to note the bases upon which Congress typically premises federal criminal legislation:[80]

! *Crimes interfering with the core functions of the federal*

[79] *See* U.S. CONST. art. I, § 8 (expressly allocating Congressional power to "provide for the Punishment of counterfeiting the Securities and current Coin of the United States" and to "define and punish Piracies and Felonies committed on the high Seas, and Offense against the Law of Nations"); U.S. CONST. art. III, § 3 (defining treason against the United States, granting Congress the power to declare the punishment for treason, and affording certain related protections).

[80] Professor Louis B. Schwartz, one of the earliest scholars to recognize the deficiencies of the federal criminal law and a leader in the effort to make it rational, helpfully defines the jurisdictional premises in *Reform of the Federal Criminal Laws: Issues, Tactics, and Prospects*, 41 LAW & CONTEMP. PROBS. 1, 16 (1977): "The problems of federal penal jurisdiction may be analyzed under four main headings: (1) the core of the federal government's power to preserve itself and carry out federal functions (therein are treason, espionage, tax and customs violations, etc.); (2) the territorial scope within which federal legislative power is plenary (federal enclaves, American vessels on the high seas) and where the federal penal code would be, in principle, as comprehensive as that of an ordinary state; (3) the question of "assimilated crimes" C state-defined offenses which Congress adopts by reference for application in federal enclaves; and (4) the question of the extent to which Congress should, by using its constitutional power (for example, over interstate commerce or the mails), make federal crimes out of behavior that is already penalized by state law." (Footnote omitted.)

government. Treason, controlling national borders, and protecting government currency are examples;

! *Legislation essentially based on a federal relationship to the site of the crime.* In such matters, the federal government basically operates as its own state, in general acting to control behavior in certain areas where only the federal government can effectively legislate (such as dealing with certain crimes on the high seas) or out of concern for certain federal premises (Congressional assimilation of state law to apply standards for certain federal lands and American Indian reservations located within state boundaries); and

! *Criminalization of conduct on a Commerce Clause basis.* Drive-by shootings and carjackings are recent examples of Congress's assertion of jurisdiction on this basis.

Of these jurisdictional bases, the earliest federal crimes reflected a Congressional attention to protecting core federal functions; in contrast, more recently a legislative basis is often asserted on the last-mentioned interstate commerce power.[81] In the process, the recent legislation frequently makes federal crimes out of local crime (sometimes violent street crime) that has been long penalized by state law **C** crime which is predominately local in most of its manifestations but the type of crime which most alarms citizens. Of course, simply because there is a Commerce Clause basis for asserting jurisdiction does not mean that in a particular case the conduct actually prosecuted has much, if any, real connection to, or impact upon, interstate commerce. There is general agreement that the federal government can and must act in those areas that are within its exclusive control and unique sphere. On the other hand, there is considerable disagreement about how far Congress should go in criminalizing matters that touch on interstate commerce, in part because this creates a problematic overlap with local interests and threatens other values discussed in this Report.

What criminal activity falling within Congress's power should be

[81] U.S. CONST. art. I, § 8 grants Congress the power to "regulate Commerce with foreign Nations and among the several States, and with the Indian Tribes . . . ."

made a federal crime? Some commonly agreed upon answers are detailed in the studies collected in the BIBLIOGRAPHY. From these common grounds the jurisdictional spectrum stretches out to areas of lesser agreement. The Task Force has not set out to define these areas with precision, not only because others have done so,[82] but because we are concerned with one part of this issue: those areas of essentially local conduct traditionally left to state control but now being made the subject of expanding federalization. Nevertheless, brief reference should be made as to the scope of the jurisdictional spectrum.

It is of some value to first underscore what is not generally problematic. We take it as clear that the concerns exhibited in this Report generally are not present when Congress addresses crime that intrudes upon federal functions, harming entities or personnel acting in a federal capacity, or when it addresses offenses committed on sites where the federal government has territorial responsibility, or when it addresses matters of international crime. Without serious debate, all agree that the federal government can, for example, appropriately criminalize counterfeiting and federal tax offenses. Likewise, the appropriateness of federal territorial oversight is not problematic for our purposes (crimes on federal lands, for example). Nor is the Task Force's concern generally with federal law addressing truly national and international interests. Only the federal government can vindicate truly national interests, and it certainly has the vital role to play in adequately addressing problems of transnational crimes (e.g., international terrorism), especially because of the nature of related investigations and prosecutions. In an era of evolving international activity, this complicated arena is likely to require more and more federal attention.

More disagreement surrounds the appropriate role of federal criminalization in the multistate activity area, frequently described as interstate commerce jurisdiction. The accelerating federalization which

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[82] *See, e.g.*, LONG RANGE PLAN FOR THE FEDERAL COURTS (1995) ; Franklin E. Zimring & Gordon Hawkins, *Toward a Principled Basis for Federal Criminal Legislation*, 543 ANNALS AM. ACAD. POL. & SOC. SCI. 15, 22-23, 25 (1996) (arguing for a distinct federal interest); Rory K. Little, *Myths and Principles of Federalization*, 46 HASTINGS L.J. 1029 (1995); Adam H. Kurland, *First Principles of American Federalism and the Nature of Criminal Jurisdiction*, 45 EMORY L.J. 1 (1996).

concerns the Task Force largely tracks Congressional reliance on an expansive definition of the Commerce Clause power.

Most students of the problem agree that truly interstate activity implicates national interests, sometimes requiring the resources of federal investigative agencies and justifying federal prosecution. There is, however, a highly debatable issue as to what conduct should be targeted for federal prosecution in the interstate commerce category. Conduct that involves a substantial and truly multistate activity presents a generally acceptable basis for federal legislation. Nevertheless, this is an area for substantial legislative caution because legislating on this basis without hard inquiry into the actual nature of the conduct and the need for federal criminalization (in addition to state criminalization) can give rise to tenuous federalization with all its adverse consequences. The respond to citizen concern can produce a contrived or tenuous interstate basis that is not really distinctly federal in nature. Such responses can intrude into areas of traditional state control and be counterproductive, producing a federal crime not likely to have any demonstrable impact and one which will risk detrimental consequences. The overwhelming opposition widely expressed by front-line police, state governors, district attorneys, state and federal judges, as well as groups concerned primarily with citizen liberties, is strong testimony to the great caution needed in the face of proposals for new federal crimes.

Others would include still other areas as candidates for federalization because they deem them areas in which state enforcement is ineffectual. For example, some would include situations in which investigative resources and certain skills are beyond the usual capacity of local police **C** situations such as complex financial investigations or activity calling for complicated surveillance capability. Still others would include situations that require prosecution of certain local officials (political officials or local police, for example) where local pressures, it is argued, may otherwise make needed prosecution politically difficult and unlikely. Others would include certain types of organized criminal activity where federal resources might supplement local law enforcement.

No matter what the theoretical extent of Congressional power, there is overwhelming agreement within the Task Force on one principle concerning the creation of a federal crime: *To create a* federal *crime, a*

strong federal interest in the matter should be clearly shown, that is, a distinctly federal interest beyond the mere conclusion that the conduct should be made criminal by some *appropriate governmental entity*. Federal law enforcement for criminal activity that is essentially local in character generally should not be undertaken, at least not without clearly considered Congressional articulation of principles which has so far been absent. The near unanimity of concern and agreement among those who have studied the problem should be a powerful danger signal to the public, to the press, and to legislators.

Recognizing the Adverse Consequences of Inappropriate Federalization

As noted earlier and underscored here, the Task Force recognizes that there is a surface inconsistency between its identification of the risks of undue federalization of criminal law and our data showing the infrequency with which some recently enacted federal criminal laws have been used. If the recent laws are rarely used, some might wonder why there is any appreciable concern about those particular crimes. There are several answers to this: First, added federal criminal laws, even if not widely used initially, may well be used more frequently in the future. To take two notable examples, federal drug laws and the federal RICO statute were rarely used when first enacted, but eventually became widely used because of shifting federal Executive Branch priorities or other reasons.[83] Second, even though some recent federal criminal laws have been rarely used, the total federal legislative framework now authorizes broad use of federal investigative and prosecutive activity with all the attendant risks identified in this Report. Even if the recent statutes continue to be used rarely, those with responsibility for setting funding levels for federal law enforcement and for determining priorities for use of appropriated funds would still have a heavy obligation to consider carefully the risks of inappropriate uses of federal law enforcement authority.

The Task Force believes that inappropriately federalized crime causes serious problems to the administration of justice in this country. Even when prosecuted only occasionally, inappropriately federalized

[83] *See, e.g.*, Chart 6 in text and APPENDIX B, SECTION 3.

crimes threaten fundamental allocations of responsibility between state and federal authorities. While a single unsuitable proposal, intended as a well-meaning antidote for criminal ills, may be thought to do little damage, it is therefore important to keep in mind the detrimental long-term effects of unwarranted federal intrusions.

- It generally undermines the state-federal fabric and disrupts the important constitutional balance of federal and state systems.
- It can have a detrimental impact on the state courts, state prosecutors, attorneys, and state investigating agents who bear the overwhelming share of responsibility for criminal law enforcement.
- It has the potential to relegate the less glamorous prosecutions to the state system, undermine citizen perception, dissipate citizen power, and diminish citizen confidence in both state and local law enforcement mechanisms.
- It creates an unhealthy concentration of policing power at the federal level.
- It can cause an adverse impact on the federal judicial system.
- It creates inappropriately disparate results for similarly situated defendants, depending on whether their essentially similar conduct is selected for federal or state prosecution.
- It increases unreviewable federal prosecutorial discretion.
- It contributes, to some degree, to costly and unneeded consequences for the federal prison system.
- It accumulates a large body of law that requires continually increasing and unprofitable Congressional attention in monitoring federal criminal statutes and agencies.
- It diverts Congressional attention from a needed focus on that criminal activity which, in practice, only federal prosecutions can address.
- Overall, it represents an unwise allocation of scarce resources needed to meet the genuine issues of crime.

In light of these considerations, the Task Force believes that Congress should seriously consider the following recommendations for limiting inappropriate federalization.

Specific Recommendations for Limiting Inappropriate Federalization of Local Crimes

In formulating our recommendations for the issues identified in this Report, we recognize that the excessive federalization of criminal law cannot be countered effectively by a neatly packaged blueprint for action. On the contrary, what is required has more to do with how the Congress and the public *think* about these issues **C** more to do with a careful approach rather than any specific proposal for mechanical action or line-drawing. If the legitimate concern to deal effectively with criminals is met only by a generalized response of passing more federal criminal laws and funding more federal law enforcement resources, then the serious risks we have identified will only increase. That is why the Task Force's most fundamental plea is for all who are concerned with effective law enforcement **C** legislators and members of the public alike **C** to think carefully about the risks of excessive federalization of the criminal law and to have these risks clearly in mind when considering any proposal to enact new federal criminal laws and to add more resources and personnel to federal law enforcement agencies.

Because inappropriate federalization produces insubstantial gains at the expense of important values, it is important to legislate, investigate and prosecute federal criminal law only in circumstances where limited legislative time and law enforcement efforts can most realistically deal with the serious problem of crime and do so without intruding on long-standing values. Congress should not bring into play the federal government's investigative power, prosecutorial discretion, judicial authority, and sentencing sanctions unless there is a strong reason for making wrongful conduct a federal crime **C** unless there is a distinct federal interest of some sort involved.

The opportunity to limit the excessive federalization of local crimes rests entirely with Congress. It is conceivable that at some point the Supreme Court might adopt a more narrow construction of the Commerce Clause that would inhibit Congress's authority to federalize local crimes (a matter on which the Task Force expresses no view). For now, the extent to which new federal laws will federalize local crimes and the extent to which added federal funds will permit increased federal prosecution of such local crimes as are already covered by federal statutes rests entirely with Congress.

There are several steps Congress should consider in order to limit the federalization of local crime.

(1) *Recognizing How Best to Fight Crime Within the Federal System*. The first step is a frank recognition that the understandable pressure to respond to constituent concerns about public safety can be met by taking constructive steps that aid law enforcement without incurring the risks inherent in excessive federalization of criminal law. While recognizing the pressure placed upon members of Congress, there must also be recognition that a refusal to endorse a new federal crime is not a sign that a legislator is "soft on crime." On the contrary, it means that the legislator wants to strengthen law enforcement within the traditional federal structure of this nation by leaving local crime to local authorities. The press, the public, and Congress itself must recognize these important truths.

(2) *Focused Consideration of the True Federal Interests in Crime Control and the Risks of Federalization of Local Crime*. Congress can avoid inappropriate federalization by recognizing its limited constitutional authority to criminalize conduct and by exercising restraint in passing new criminal laws dealing with essentially local conduct. Congress should insist on focused debate about what criminal conduct should and should not be federalized. This is especially true given the scarcity of funds to meet all needs. In the usually piecemeal debates over what to do about crime, it is critical in allocating federal resources that Congressional attention focus on areas that most appropriately fit long-understood federal values and those most likely to produce practical, demonstrable benefits in dealing with crime.

If the goal is to meet the dangers of local crimes, it is important for Congress to recognize that federalization has limited crime control effect on local crime and significant negative effect on important federal and local interests. A telling fact for Congressional consideration is that, despite the existing federal capacity to prosecute certain local crimes, only a small portion of crimes committed across America are prosecuted by the federal government. This particularly holds true for the local conduct which is the focus of this Report and which now all too frequently qualifies as both federal and state crime.

If the increasing federalization were to have a demonstrable practical impact on crime, it would be expected that there would be a significant number of prosecutions, prosecutions that might act as a deterrent or have an incapacitating effect on criminals. This does not seem to be the case. The new waves of federal statutes often stand only as symbolic book prohibitions with few actual prosecutions. This means that whatever the reasons for any recent crime reduction, the reduction can not realistically be attributed to the creation of more localized federal crimes. There is no persuasive evidence that federalization of local crime makes the streets safer for American citizens.

Where a clear federal interest is demonstrated, especially to meet a public safety need not being adequately dealt with by the states, the federal interest should be vindicated **C** if needed, by new laws and new resources. Otherwise, the federal response should be limited to aiding state and local law enforcement, not duplicating their efforts.

(3) *Institutional Mechanisms to Foster Restraint on Further Federalization*. Congress should consider mechanisms to assist its analysis of proposed crime legislation and proposed federal law enforcement funding to provide the systematic, coherent analysis that is needed. One possible mechanism, for example, might require that the costs to the federal/state system of any new federal crime law be the subject of concrete, Congressionally supervised analysis before passage **C** perhaps by an impact statement of the sort provided by Congressional Budget Office assessment or by Congressional Research Service analysis. Such an analysis would provide Congress with objective data upon which to base legislative decisions. It could discern federal/state comparative costs, as well as the real need and the extent of benefits, and the risk of adverse impacts of the legislation. The use of such analysis in the highly charged debate about crime could be particularly useful in light of the reasons that account for most of the legislation at issue in this Report.

Beyond an impartial, technical staff analysis, Congress might consider institutionalizing an impartial public policy analysis by its own members, perhaps through the mechanism of a joint Congressional committee on federalism. Such a committee could assess proposed crime legislation and other proposals with significant impact on federal/state jurisdictional relationships. In any event, the federalization aspect of

proposed crimes calls for close, on-going scrutiny in those standing Congressional committees with criminal law jurisdiction, as well as those with oversight responsibilities.

A federalization assessment, by Congressional staff and by a select joint committee, could usefully be made both as to proposed new federal crime bills and proposed new funding for federal law enforcement personnel.

(4) *Sunset Provisions*. When, after careful analysis, new federal criminal laws are thought warranted, the new legislation should include a fairly short "sunset provision," perhaps no more than five years. Congress has found the sunset safeguard acceptable in other contexts and it would seem particularly valuable in this arena. Use of this safeguard will afford future Congresses an opportunity to assess claims made prior to enactment about what a particular statute might accomplish in dealing with crime. The use of a sunset provision might also be of value where the claimed need for federal legislation has to do with a perceived state deficiency in dealing with certain crimes; in due time, that deficit may be cured at the state level.

(5) *Responding to Public Safety Concerns with Federal Support for State and Local Crime Control Efforts*. Congress can significantly respond to public safety concerns without enacting new *federal* statutes or adding new funds for *federal* law enforcement. Virtually all of the criminal behavior that most concerns citizens is already a state crime. Congressional allocations of funds to state systems in support of state criminal justice efforts have, in modern times, been one of the alternative techniques used by the federal government in assisting with crime problems without duplicating efforts. That approach to combating crime is believed by many to be an appropriate technique which avoids many of the undermining effects of legislating a federal crime in areas properly left to the states.[84] Federal funding for crime control can take the form

[84] *See* Philip B. Heymann & Mark H. Moore, *The Federal Role in Dealing With Violent Street Crime: Principles, Questions, and Cautions*, 543 ANNALS AM. ACAD. POL. & SOC. SCI. 103 (1996), for a discussion of the differing implications of a federal financial role supporting state law enforcement, compared to a direct federal operational role involving the prosecution of essentially local street crime as a federal

of block grants, of specifically targeted program funds, or a combination of the two.

The understandable public pressure to "do something" about crime can, in most circumstances, be more effectively met by providing resources **C** financial and technical **C** to state and local law enforcement agencies than by adding federal statutes and federal personnel. Such state-aiding responses can combat crime without risk of impairing the proper functioning of our federal system.

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The expanding coverage of federal criminal law, much of it enacted in the absence of a demonstrated and distinctive federal justification, is moving the nation rapidly toward two broadly overlapping, parallel, and essentially redundant sets of criminal prohibitions, each filled with differing consequences for the same conduct. Such a system has little to commend it and much to condemn it.

The principles of federalism and practical realities provide no justification for the duplication inherent in two criminal justice systems if they perform basically the same function in the same kinds of cases. There are no persuasive reasons why both federal and state police agencies should be authorized to investigate the same kind of offenses, federal and state prosecutors should be directed to prosecute the same kinds of offenses, and federal and state judges should be empowered to try essentially the same kind of criminal conduct. When the consequences of these parallel legal systems can be so different, increases in the scope of federal criminal law and the areas of concurrent jurisdiction over local crime make it increasingly difficult, if not impossible, to treat equally all persons who engaged in the same conduct and these increases multiply the difficulty of adequately regulating the discretion of federal prosecutors. Moreover, it makes little sense to invest scarce resources indiscriminately in a separate system of slender federal prosecutions rather than investing those resources in already existing state systems which bear the major burden in investigating and prosecuting crime.

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offense.

In the important debate about how to curb crime, it is crucial that the American justice system not be harmed in the process. The nation has long justifiably relied on a careful distribution of powers to the national government and to state governments. In the end, the ultimate safeguard for maintaining this valued constitutional system must be the principled recognition by Congress of the long-range damage to real crime control and to the nation's structure caused by inappropriate federalization.

APPENDICES

APPENDIX A

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