

2005

The Many Faces of Overcriminalization: From Morals and Mattress Tags to Overfederalization

Sara Sun Beale

Follow this and additional works at: <http://digitalcommons.wcl.american.edu/aulr>



Part of the [Law Commons](#)

Recommended Citation

Beale, Sara Sun. "The Many Faces of Overcriminalization: From Morals and Mattress Tags to Overfederalization." *American University Law Review* 54, no.3 (2005): 747-780.

This Article is brought to you for free and open access by the Washington College of Law Journals & Law Reviews at Digital Commons @ American University Washington College of Law. It has been accepted for inclusion in American University Law Review by an authorized administrator of Digital Commons @ American University Washington College of Law. For more information, please contact fbrown@wcl.american.edu.

The Many Faces of Overcriminalization: From Morals and Mattress Tags to Overfederalization

ESSAYS

THE MANY FACES OF OVERCRIMINALIZATION: FROM MORALS AND MATTRESS TAGS TO OVERFEDERALIZATION

SARA SUN BEALE*

TABLE OF CONTENTS

Introduction	748
I. Setting the Stage: The States Retain Laws Regulating Morals, and the Federal Government Criminalizes Virtually Everything ...	750
A. State Morals Legislation: Old Laws That Stay on the Books	750
B. Federal Criminal Law: Many New Laws and Many More Prosecutions.....	753
II. Why It Matters: The Vices of Morals Legislation and Too Many Federal Criminal Laws	756
A. Amanda Smisek, Kobe Bryant, James Yee, and Morals Charges	756
B. James McFarland, Andre Curtis, and Federalizing Everyday Crime.....	760
C. The Common Vices of Both Morals Legislation and Overbroad Federal Criminal Law.....	766
1. Other values and rights threatened by morals offenses	767

* I would like to thank Megan Walsh >06, Chris Kocher >06, and Tom McCudden >05 for their research assistance, and Sarah Welling and other participants in the University of Kentucky=s faculty workshop for their helpful comments on an early draft of this Essay.

2. Other values and rights threatened by overfederalization	768
3. Why politics leads to retaining morals offenses and adding new federal crimes	773
D. The Proper Scope of the Federal System: Breadth Versus Depth and the Disparity Critique	775
E. What Does This Have To Do With Mattress Tags?	778
Conclusion	781

INTRODUCTION

This Symposium offers a welcome opportunity to consider an important topic with many facets. As suggested by my title, the term overcriminalization is broad enough to cover laws imposing penal sanctions on conduct that should be solely a matter of individual morality.¹ It also includes legislation that criminalizes relatively trivial conduct, such as removing the tag on a mattress,² which should be dealt with by civil provisions, or perhaps left to the good sense of the individual. Many argue that a good deal of so-called regulatory or “white collar crime” should fall outside the ambit of the criminal law, to be dealt with by other bodies of specialized civil law, such as corporate governance, environmental, or election finance law.³ Another facet of overcriminalization is the enormous expansion of federal criminal law to cover subjects that were previously the exclusive province of state law.⁴ My purpose in this Essay is to explore

1. See Sanford H. Kadish, *The Crisis of Overcriminalization*, 374 ANNALS AM. ACAD. POL. & SOC. SCI. 157, 159-65 (1967) (articulating the view that policing of morals stifles the legitimacy of the law because such laws are largely unenforced, selectively utilized to punish other unrelated conduct, and involve diversion of scarce police resources).

2. As Stuart Green explains, consumers actually face no liability for removing tags. The regulations pertain to sellers. See Stuart P. Green, *Why It's a Crime To Tear the Tag Off a Mattress: Overcriminalization and the Moral Content of Regulatory Offenses*, 46 EMORY L.J. 1533, 1610 (1997).

3. For particularly helpful discussions, see Stuart P. Green, *Moral Ambiguity in White Collar Criminal Law*, 18 NOTRE DAME J.L. ETHICS & PUB. POL'Y 501, 502 (2004) (arguing that crimes such as bribery, extortion, fraud, and other regulatory crimes are unlike traditional crimes which are unequivocally immoral); Green, *supra* note 1; Sanford H. Kadish, *Some Observations on the Use of Criminal Sanctions in Enforcing Economic Regulations*, 30 U. CHI. L. REV. 423, 425 (1963) (questioning the use of criminal sanctions in the larger scheme of economic policy formulation); PAUL ROSENZWEIG, THE HERITAGE LEGAL FOUNDATION LEGAL MEMORANDUM, THE OVER-CRIMINALIZATION OF SOCIAL AND ECONOMIC CONDUCT (Apr. 17, 2003) (critiquing the shift in justification for criminal punishment from moral to utilitarian, resulting in non-traditional punishment for acts that are not morally wrong or are merely negligent), available at <http://www.heritage.org/Research/LegalIssues/lm7.cfm>. But see Kip Schlegel, David Eitle & Steven Gunkel, *Are White-Collar Crimes Overcriminalized? Some Evidence on the Use of Criminal Sanctions Against Securities Violators*, 28 W. ST. U. L. REV. 117, 140 (2000-2001) (undertaking a study of securities violations from 1984 to 1991 to conclude that there is no empirical support for the position that business regulatory offenses are overcriminalized).

4. For a discussion of the problems of overfederalization, see John S. Baker, Jr., *State Police Powers and the Federalization of Local Crime*, 72 TEMP. L. REV. 673, 712 (1999)

some common features connecting the different forms of overcriminalization, as well as some of the distinct aspects of each. I will also touch on the related but distinct crisis of our country's unprecedented and unjustifiably high rate of incarceration.

Although morals legislation and the extension of federal criminal law into areas traditionally reserved to the states, such as street crime, might seem to bear little relationship to one another, I will argue that they reveal many of the same vices of overcriminalization. I will argue that the common features of overcriminalization include the following: (1) excessive unchecked discretion in enforcement authorities, (2) inevitable disparity among similarly situated persons, (3) potential for abuse by enforcement authorities, (4) potential to undermine other significant values and evade significant procedural protections, and (5) misdirection of scarce resources (opportunity costs). Part I of this Essay sets the stage, describing the existing state morals laws and the breathtakingly broad scope of contemporary federal criminal law. Part II explores the harmful consequences—what I call the vices—of vestigial morals legislation and the expanded body of federal criminal law, beginning with descriptions of particular state and federal prosecutions, and then broadening the analysis to the broader themes reflected in these cases. Part II then turns to a discussion of the proper scope of federal criminal law in light of the vices of overcriminalization, and concludes with a series of questions about the application of the analysis advanced in this Essay to regulatory offenses.

(examining the expansion of federal criminal law from the perspective of the states); Sara Sun Beale, *Too Many and Yet Too Few: New Principles to Define the Proper Limits for Federal Criminal Jurisdiction*, 46 HASTINGS L.J. 979, 997-98 (1995) (arguing that increase in federal prosecutions overloads the federal courts and inevitably results in unjustified sentencing disparities between offenders in federal and state courts); Kathleen F. Brickey, *Criminal Mischief: The Federalization of American Criminal Law*, 46 HASTINGS L.J. 1135, 1136 (1995) (espousing the view that the continued expansion of federal criminal law cannot be reconciled with principals of federalism); Stephen Chippendale, Note, *More Harm Than Good: Assessing Federalization of Criminal Law*, 79 MINN. L. REV. 455, 467 (1994) (assessing the growth of federal criminal law, and arguing that such growth increases costs without decreasing crime and harms the function of the federal courts); Susan R. Klein, *Independent-Norm Federalism in Criminal Law*, 90 CAL. L. REV. 1541, 1591 (2002) (distinguishing issues raised by two forms of federalization: decentralization federalism and independent norm federalism); James A. Strazzella, *The Federalization of Criminal Law: Task Force on the Federalization of Criminal Law*, 1998 A.B.A. SEC. CRIM. JUST. L. REP. (providing comprehensive report on federalization of crime as well as extensive bibliography). *But see* Tom Stacy & Kim Dayton, *The Underfederalization of Crime*, 6 CORNELL J.L. & PUB. POL'Y 247, 250 (1997) (arguing that the share of federal criminal law is actually empirically decreasing, and that crimes such as street crime should be subject to expanding federal prescription).

I. SETTING THE STAGE: THE STATES RETAIN LAWS REGULATING
MORALS, AND THE FEDERAL GOVERNMENT CRIMINALIZES
VIRTUALLY EVERYTHING

A. *State Morals Legislation: Old Laws That Stay on the Books*

One form of overcriminalization is the retention of crimes beyond the time that they serve an important social purpose, particularly when the laws deal with conduct that is common and innocuous. Laws restricting behavior on Sundays,⁵ and prohibiting swearing⁶ and spitting on the street⁷

5. The so-called "blue laws" have their origins in the Christian tradition of religious worship on Sundays. Although the earliest versions of the blue laws required religious observances on Sunday, these provisions were replaced with laws that prohibited various activities to preserve Sundays as a day of rest. Many states retain a variety of restrictions on Sunday activities. See, e.g., ALA. CODE § 13A-12-1 (2005) (prohibiting child, apprentice, or servant labor on Sunday; making illegal shooting, hunting, gaming, card playing, or racing; and forbidding the opening of stores, excluding pharmacies); ALA. CODE § 13A-12-2 (2005) (prohibiting the opening of public markets and the trading or selling of goods and merchandise, including livestock and cattle); MASS. GEN. LAWS ANN. ch. 136 § 57 (West 2005) (prohibiting hunting on Sundays); N.Y. GEN. BUS. LAW § 9 (McKinney 2005) (restricting the sale of various items at particular times of day on Sunday). For a general discussion of blue laws, see ALEXIS MCCROSSEN, HOLY DAY, HOLIDAY: THE AMERICAN SUNDAY 1-7 (2000) (exploring the complex history of work and laws pertaining to Sunday, including the transition from a day of work to the day of rest, the importance of religion, and the conflicts between leisure, rest, and religion); Albert J. King, *Sunday Law in the Nineteenth Century*, 64 ALB. L. REV. 675, 676-88 (2000) (recounting the slackening of Sunday law prohibitions, including Sunday work laws, travel restrictions, and recreation bans resulting from the steady erosion of the religious justification for such laws by the courts); Marc A. Stadtmauer, Essay, *Remember the Sabbath? The New York Blue Laws and the Future of the Establishment Clause*, 12 CARDOZO ARTS & ENT. L.J. 213, 214 (1994) (discussing the history of New York blue laws and arguing that the few remaining New York blue laws, such as Sunday closing laws, do not survive constitutional scrutiny).

The Supreme Court has generally rebuffed Establishment Clause challenges to the blue laws, finding them to be valid exercises of the power to protect the public health and morals, and reflecting the states' legitimate concern with the health, safety, recreation, and general well-being of their citizens. E.g., *McGowan v. Maryland*, 366 U.S. 420 (1961); see Suzanne B. Goldberg, *Morals-Based Justifications for Lawmaking: Before and After Lawrence v. Texas*, 88 MINN. L. REV. 1233, 1278-80 (2004) (utilizing the Sunday morals laws to argue that lawmakers should always be required to ground their legislation in hard facts rather than moral justifications).

6. A surprising number of jurisdictions retain criminal prohibitions against spitting, swearing, and other similar activities. Some of the provisions regarding cursing or swearing appear as part of provisions aimed at disturbing the peace. See, e.g., D.C. CODE ANN. § 22-1307 (2005) (making it unlawful, inter alia, for anyone to curse, swear, or make use of any profane language or indecent or obscene words, or engage in any disorderly conduct in a wide variety of public places).

Other provisions prohibiting swearing or profanity in public are much more clearly morals legislation. Some states prohibit swearing or profanity in any public place. See, e.g., MISS. CODE ANN. § 97-29-47 (2004) (prohibiting profane swearing or cursing, or use of vulgar or indecent language, in any public place in the presence of two or more persons); VA. CODE ANN. § 18.2-388 (Michie 2004) (prescribing profane cursing or swearing in public); W. VA. CODE ST. R. § 61-8-15 (2004) (regulating profane cursing or swearing in public). Other states have bans that, on their face, apply to behavior wherever it occurs. For example, a Michigan provision states that "[a]ny person who has arrived at the age of discretion, who shall profanely curse or damn or swear by the name of God, Jesus Christ or

exemplify this problem. A significant number of states retain criminal laws dealing with these kinds of conduct.⁸ Because of the evolution of the social conventions regarding sexual morality, criminal laws that regulated traditional morality now pose many of the same issues. The regulation of morals was originally a major component of American criminal law,⁹ but over the past half century these provisions have been eliminated in many states. The dominant view today, championed by the drafters of the Model Penal Code, is that sexual chastity and fidelity within marriage should be treated as matters of private morality, not enforced by laws criminalizing fornication, cohabitation, and adultery.¹⁰

Despite the contemporary view that sexual morality should not be regulated by the criminal law, a surprisingly large number of states have

the Holy Ghost, shall be guilty of a misdemeanor.” MICH. COMP. LAWS ANN. § 750.103 (West 2004). Oklahoma defines and punishes both blasphemy and profane swearing as misdemeanors. OKLA. STAT. tit. 21, §§ 901-905 (2004). There, blasphemy is defined as “wantonly uttering or publishing words, casting contumelious reproach or profane ridicule upon God, Jesus Christ, the Holy Ghost, the Holy Scriptures or the Christian or any other religion.” tit. 21, § 901. Oklahoma state law contains a defense for cases where it appears beyond reasonable doubt that the words complained of were used in the course of serious discussion, and with intent to make known or recommend opinions entertained by the accused. tit. 21, § 902. *See also* R.I. GEN. LAWS § 11-11-5 (2004) (enacting a general prohibition on profane swearing and cursing). It seems obvious that many of these statutes could be challenged on First Amendment grounds, which might provoke controversies like those currently being litigated regarding public displays of the Ten Commandments. *See* Christal Hoo, *Thou Shalt Not Publicly Display the Ten Commandments: A Call for a Reevaluation of Current Establishment Clause Jurisprudence*, 109 PA. ST. L. REV. 683, 694 (2004) (exploring alternative approaches to Establishment Clause jurisprudence as applied to the display of the Ten Commandments in federal courthouses).

7. Although many states prohibit spitting on sidewalks and other public places, these provisions may be thought of as public health provisions rather than morals offenses. *See, e.g.*, GA. CODE ANN. § 16-12-120 (2004) (prohibiting spitting on public transportation); LA. REV. STAT. ANN. § 40:1121 (West 2004) (sanctioning spitting in or on certain public places); MASS. GEN. LAWS ANN. ch. 270, § 14 (West 2005); N.H. REV. STAT. ANN. § 147:18 (2004); VA. CODE ANN. § 18.2-322 (Michie 2004); *cf.* Wendy K. Mariner, *Public Health and Law: Past and Future Vision*, 28 J. HEALTH POL., POL’Y & L. 525, 527 n.9 (2003) (referring to successful public health educational campaigns seeking to discourage public spitting on the streets).

8. *See supra* notes 6-7 (listing statutes outlawing profanity and expectoration).

9. For a general historical discussion, see LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* (1993). A discussion of morals elements is interwoven throughout, but Lawrence’s discussion of the early colonial period and various anti-vice movements is particularly pertinent. *See id.* at 32-36, 54, and 125-48.

10. *See* MODEL PENAL CODE § 213.2 cmt. 2 (Official Draft and Revised Comments 1980). The commentary to the Model Penal Code, in the course of discussing the rationale for including no provisions on consensual sodomy, states:

The criminal law cannot encompass all behavior that the average citizen may regard as immoral or deviate . . . Verbal cruelty, lying, racial and religious biases in private relationships, and the kiss that betrays a marriage are but a few of the examples of reprehensible conduct no sensible legislator would make into a crime.

Id. at 370. In support of this position, the comments cite the practical consideration that “[e]conomic resources are finite” and should be reserved for more serious offenses, particularly given the difficulty of investigating and proving consensual offenses, as well as the broader objection to the exercise of the state’s coercive power to maintain the majority’s notion of morality or acceptable behavior. *Id.* at 370-71.

not repealed laws regulating sexual morality. Approximately one fourth of the states, and the District of Columbia, retain laws making fornication and cohabitation a crime,¹¹ and about half of the states, and the military, make adultery a crime.¹² Other state laws regulate the commercialization of sex, prohibiting prostitution and related activities.¹³ The Supreme Court's recent decision in *Lawrence v. Texas*¹⁴ raises the issue of whether some or

11. See Melanie C. Falco, Comment, *The Road Not Taken: Using the Eighth Amendment to Strike Down Criminal Punishment For Engaging in Consensual Sexual Acts*, 82 N.C. L. REV. 723, 738 (2004) (listing Idaho (IDAHO CODE § 18-6603 (Michie 2003)), Illinois (ILL. COMP. STAT. ANN. 5/11-8 (2003)), Massachusetts (MASS. GEN. LAWS ANN. ch. 272 § 18 (West 2003)), Mississippi (MISS. CODE ANN. § 97-29-1 (2003)), North Carolina (N.C. GEN. STAT. § 14-184 (2003)), North Dakota (N.D. CENT. CODE § 12.1-20-08 (2003)), South Carolina (S.C. CODE ANN. § 16-15-60 (Law. Co-op. 2003)), Utah (UTAH CODE ANN. § 76-7-104 (2003)), Virginia (VA. CODE ANN. § 18.2-344 (Michie 2003)), and West Virginia (W. VA. CODE § 61-8-3 (2003)) along with the District of Columbia (D.C. CODE ANN. § 22-1602 (2001)) as states that still make fornication illegal).

12. See *id.* (identifying statutes from Florida (FLA. STAT. ANN. § 798.02 (West 2000)) and Michigan (MICH. COMP. LAWS ANN. § 750.335 (West 2003)) that make cohabitation a crime); *id.* at 744 (listing statutes from Alabama (ALA. CODE 13A-13-2 (2002)), Arizona (ARIZ. REV. STAT. 13-1408 (2003)), Colorado (COLO. REV. STAT. 18-6-501 (2002)), Florida (FLA. STAT. ANN. 798.01 (West 2003)), Georgia (GA. CODE ANN. 16-6-19 (2003)), Idaho (IDAHO CODE 18-6601 (Michie 2003)), Illinois (720 ILL. COMP. STAT. ANN. 5/11-7 (West 2002)), Kansas (KAN. STAT. ANN. 21-3507 (2001)), Massachusetts (MASS. ANN. LAWS ch. 272, 14 (Law. Co-op. 2003)), Michigan (MICH. COMP. LAWS ANN. 750.30 (West 2003)), Minnesota (MINN. STAT. ANN. 609.36 (West 2003)), Mississippi (MISS. CODE ANN. 97-29-1 (2003)), New Hampshire (N.H. REV. STAT. ANN. 645.3 (2003)), New York (N.Y. Penal Law 255.17 (McKinney 2002)), North Carolina (N.C. GEN. STAT. 14-184 (2001)), North Dakota (N.D. CENT. CODE 12.1-20-09 (2003)), Oklahoma (OKLA. STAT. ANN. tit. 21, 871 (West 2002)), Rhode Island (R.I. GEN. LAWS 11-6-2 (2002)), South Carolina (S.C. CODE ANN. 16-15-60 (Law. Co-op. 2003)), Utah (UTAH CODE ANN. 76-7-103 (2003)), Virginia (VA. CODE ANN. 18.2-365 (Michie 2003)), West Virginia (W. VA. CODE ANN. 61-8-3 (Michie 2003)), Wisconsin (WIS. STAT. ANN. 944.16 (West Supp. 2002)) and the District of Columbia (D.C. CODE ANN. 22-201 (2001)) that make adultery a crime, and providing source material on the military law definition of adultery as an offense). See also Traci Sheallbetter Stratton, Note, *No More Messing Around: Substantive Due Process Challenges to State Laws Prohibiting Fornication*, 73 WASH. L. REV. 767, 767 n.2 (1998) (confirming the above list of states that make adultery a crime).

13. All U.S. states criminalize exchanging sex for money (with limited exceptions in Nevada), and many states also criminalize adjunct activities such as pimping, keeping a place of prostitution, or paying for sex. See Sylvia A. Law, *Commercial Sex: Beyond Decriminalization*, 73 S. CAL. L. REV. 523, 530 (2000), citing JOHN F. DECKER, PROSTITUTION: REGULATION AND CONTROL 81 (1979). Decker notes that prostitution was not a crime at common law, and accordingly statutory definitions vary. For examples of state laws, see, e.g., CONN. GEN. STAT. ANN. § 53a-82 (2005) ("A person is guilty of prostitution when such person engages or agrees or offers to engage in sexual conduct with another person in return for a fee."); 720 ILL. COMP. STAT. 5/11-14(a) (2004) ("Any person who performs, offers or agrees to perform any act of sexual penetration . . . for any money, property, token, object, or article or anything of value, or any touching or fondling of the sex organs of one person by another person, for any money, property, token, object, or article or anything of value, for the purpose of sexual arousal or gratification commits an act of prostitution."); N.C. GEN. STAT. § 14-203 (2004) ("The term 'prostitution' shall be construed to include the offering or receiving of the body for sexual intercourse for hire, and shall also be construed to include the offering or receiving of the body for indiscriminate sexual intercourse without hire.").

14. 539 U.S. 558 (2003) (holding that a Texas statute making it a crime for two persons of the same sex to engage in certain intimate sexual conduct was unconstitutional as applied

all of these statutes violate the constitutional right to liberty. Because courts have not yet ruled on the applicability of *Lawrence* to these provisions, I assume their continued validity for purposes of this discussion.

B. Federal Criminal Law: Many New Laws and Many More Prosecutions

In one sense, federal criminal law poses quite a contrast to state morals legislation, which is clearly on the decline. It is extremely difficult to say how many federal crimes there are; the best current estimate is over 4,000.¹⁵ Whatever the precise number, the number of federal crimes and the number of federal prosecutions have skyrocketed.¹⁶ Different measures have been suggested to gauge the growth in offenses. A blue ribbon ABA task force found that more than forty percent of federal criminal provisions passed after the Civil War had been enacted in the twenty-eight year period between 1970 and 1998.¹⁷ A detailed study commissioned by the Federalist Society concluded that there had been a thirty percent increase in federal offenses carrying criminal penalties between 1980 and 2004.¹⁸

As a result of the recent legislation, the bulk of federal criminal provisions now deal with conduct also subject to the states' general police powers. As I have explained elsewhere:

Dual federal-state criminal jurisdiction is now the rule rather than the exception. Federal law reaches at least some instances of each of the following state offenses: theft, fraud, extortion, bribery, assault, domestic violence, robbery, murder, weapons offenses, and drug offenses. In many instances, federal law overlaps almost completely

to adult males who had engaged in a consensual act of sodomy in the privacy of a home).

15. See JOHN S. BAKER, MEASURING THE EXPLOSIVE GROWTH OF FEDERAL CRIME LEGISLATION 3 (2004), available at http://www.fed-soc.org/Publications/practice_groupnewsletters/criminallaw/crimreportfinal.pdf. One of the problems is that multiple crimes are typically stated in the same section, and it can be very difficult to determine how many different offenses are actually created by a single section. See *id.* at 7-8. Another problem is finding all of the relevant sections. Although many criminal statutes are gathered in Title 18 of the U.S. Code, the remainder are scattered throughout the other fifty titles, which encompass more than 27,000 pages. Ronald Gainer, *Federal Criminal Code Reform: Past and Future*, 2 BUFF. CRIM. L. REV. 46, 53 (1998). Many of these statutory provisions incorporate by reference administrative regulations (and may punish as crimes, for example, willful violations). According to American Bar Association, there are almost 10,000 such administrative regulations that may be subject to criminal enforcement. Strazzella, *supra* note 4, at 10.

16. See BAKER, *supra* note 15, at 3 (aggregating studies from 1970 forward indicating the "explosive growth" of federal crime prosecution).

17. Strazzella, *supra* note 4, at 7. The Task Force Report contains an extensive bibliography of articles, books, and reports dealing with the federalization of crime. *Id.* at 59-77

18. BAKER, *supra* note 15, at 3.

with state law, as is the case with drug offenses.¹⁹

This movement toward concurrent federal and state jurisdiction over most offenses is a sharp break from the traditional view of the federal system. The traditional view derives both from the historical fact that federal jurisdiction was extremely limited for most of the nation's history²⁰ and from the structure of the constitutional system. Unlike the states, whose plenary powers include police powers that extend to all forms of criminal activity, the federal government has no general authority over crime.²¹ All federal criminal legislation must be founded on one or more of the powers delegated to the federal government, such as the postal power,²² the power to collect taxes,²³ and the power to regulate immigration.²⁴ Although the federal government's role in combating crime evolved as Congress employed its delegated powers and enacted criminal sanctions as one means of effectuating those powers,²⁵ it remained the general rule that garden variety crime was the province of the states, not the federal government.²⁶ The unprecedented expansion of the federal criminal code in recent years is difficult to square with the traditional view of the respective federal and state roles. As the ABA noted, "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."²⁷

Moreover, both the number of federal defendants and the number of federal criminal cases have increased dramatically. As shown in the table below,²⁸ between 1980 and 2003 the number of cases and defendants in the federal system had more than doubled, with the number of criminal cases increasing 240% and the number of criminal defendants increasing 230%.

19. Beale, *supra* note 4, at 997-98 (citations omitted).

20. For a general account of the historical development of federal criminal law, see Sara Sun Beale, *Federal Criminal Jurisdiction*, in 2 *ENCYCLOPEDIA OF CRIME AND JUSTICE* 694 (2d ed. 2002).

21. The Constitution explicitly authorizes federal jurisdiction over only a handful of crimes: counterfeiting, crimes against the law of nations, treason, and crimes committed on the high seas (such as piracy). U.S. CONST. art. I, § 8, cl. 6 (counterfeiting); U.S. CONST. art. I, § 8, cl. 10 (piracies and felonies on the high seas and offenses against the law of nations); U.S. CONST. art. III, § 3, cl. 2 (treason). These offenses concern matters, such as foreign relations, over which the federal government has exclusive authority.

22. U.S. CONST. art. I, § 8, cl. 1, 7 ("The Congress shall have Power . . . To establish Post Offices and post Roads . . .").

23. *Id.* at art. I, § 8, cl. 1 ("The Congress shall have Power . . . To lay and collect Taxes . . .").

24. *Id.* at art. I, § 8, cl. 1, 4 ("The Congress shall have Power . . . To establish a uniform Rule of Naturalization . . .").

25. See Beale, *supra* note 20, at 695-98 (tracing the progression of federal criminal law expansion post-Civil War and post-prohibition).

26. See *United States v. Lopez*, 514 U.S. 549, 564 (1995) (noting the historical exclusivity of states' criminal law enforcement).

27. Strazzella, *supra* note 4, at 5.

28. Source of data: Judicial Facts and Figures, Table 3.1, available at <http://www.uscourts.gov/judicialfactsfigures/table3.01.pdf>.

Fiscal Year	Criminal Cases	Criminal Defendants
1980	29,387	39,914
1990	48,035	65,855
2000	62,745	83,963
2003	70,642	92,714

The increase in drug and firearms cases has been especially steep. Drug cases have grown from 3,130 in 1980 to 11,520 in 2003, and firearms cases have increased from 931 prosecutions in 1980 to 3,620 in 2003.²⁹

Federal criminal law is a rapidly growing hodgepodge. It retains the traditional crimes that protect governmental functions, personnel and property, such as tax fraud, theft of government property, and interference with government functions and programs by bribing a federal official or obstructing justice. But it also contains what some have called the *crime du jour*—legislation drafted in response to whatever crime is the focal point in the media—even if that offense is already defined and punished harshly and effectively under state law. For example, a high profile carjacking in a suburb near Washington, D.C.,³⁰ led to the rapid enactment of a federal carjacking statute.³¹ The passage of the federal law was not a response to any gap in either state law or the state enforcement system: the perpetrators of the publicized offense were apprehended, convicted, and sentenced to life imprisonment for murder.³² Other new federal laws have

29. Judicial Facts and Figures, Table 3.02, available at <http://www.uscourts.gov/judicialfactsfigures/table3.02.pdf>.

30. The victim was Dr. Pamela Basu, whose twenty-month-old baby was in her car when gunmen ordered her out. When she attempted to save her child she became tangled in the seatbelt and was dragged for more than a mile. Realizing that Dr. Basu was still connected to the car, her assailants tried to dislodge her body by sideswiping a fence, and they threw the baby onto the road. Although the child was unhurt, Basu died of internal injuries. F. Georgann Wing, *Putting the Brakes on Carjacking or Accelerating It? The Anti Car Theft Act of 1992*, 28 U. RICH. L. REV. 385, 390-91 & n.43 (1994).

31. 18 U.S.C. § 2119 (2005) (“Whoever takes a motor vehicle . . . from the person or presence of another by force and violence or by intimidation, or attempts to do so . . .”). Similar legislation has been enacted in other states as well. See, e.g., FLA. STAT. ch. 812.133 (1994); IND. CODE ANN. § 35-42-5-2 (Burns 1994); MISS. CODE ANN. § 97-3-117 (1994).

32. Wing, *supra* note 31, at 390-91. Although both defendants in the Basu case were convicted of murder under Maryland law, the Maryland legislature also enacted carjacking legislation in response to the Basu case. See *The Maryland Survey: 1998-1999*, 59 MD. L. REV. 908, 908 n.5 (describing the legislative history of emergency legislation codified as MD CODE, Criminal Law, § 3-405).

dealt with a wide variety of conduct, including the failure to pay child support,³³ disruptive conduct by animal rights activists,³⁴ creating, selling or possessing depictions of cruelty to animals,³⁵ and female genital mutilation.³⁶

These new federal criminal laws do not preempt state criminal laws. Rather, they create a scheme of dual or concurrent federal and state jurisdiction.

II. WHY IT MATTERS: THE VICES OF MORALS LEGISLATION AND TOO MANY FEDERAL CRIMINAL LAWS

In order to make the point that both of these forms of overcriminalization create serious problems, and that they create many of the same kinds of problems, I will begin by describing a few individual cases, some involving morals legislation, and others federal crimes.

A. *Amanda Smisek, Kobe Bryant, James Yee, and Morals Charges*

The morals offenses are by no means a dead letter. First, surprising as it might seem, prosecutions for violations of the remaining laws are infrequent, but they do occur. Although there have been no prosecutions in most states in recent years,³⁷ that does not mean that individual prosecutors may not adopt a more aggressive policy, as some have done in recent years. For example, in the mid-1990s a prosecutor in Idaho charged Amanda Smisek and her boyfriend with criminal fornication; Ms. Smisek, a high school junior whose grades were As and Bs, was convicted six days before she gave birth.³⁸ The same prosecutor charged seven other pregnant girls and their boyfriends with criminal fornication.³⁹ A few years earlier, women in Connecticut and Wisconsin were charged with criminal adultery.⁴⁰ In the Wisconsin case, the charges carried a maximum penalty of two years in jail and a \$10,000 fine; the woman was the first person charged under the statute since 1888.⁴¹ More recently, military prosecutors

33. 18 U.S.C. §§ 228, 3563(B)(21) (2005).

34. *Id.* § 43.

35. *Id.* § 48.

36. *Id.* § 116.

37. Cathryn Donohoe, *Adultery: It's Not Just a Sin, it's a Crime*, WASH. TIMES, June 29, 1990, at E1 (quoting an expert on Virginia family law who could recall no prosecution for adultery in that state).

38. Heidi Meinzer, *Idaho's Throwback to Elizabethan England: Criminalizing a Civil Proceeding*, 34 FAM. L.Q. 165, 165 (2000).

39. *Id.*

40. See Donohoe, *supra* note 37, at E1 (describing charges leading to the arrest of housewife Dawn Jakubowski of Norwich, Connecticut, and Donna Carroll of Ashland, Wisconsin).

41. *Id.* The district attorney agreed to dismiss the case in exchange for the wife's agreement to do community service and take parental counseling. *Id.*

charged both Air Force pilot Lt. Kelly Flinn, the first woman to fly a B-52, and Capt. James Yee, a Muslim chaplain at the Guantanamo Bay prison, with adultery as well as other more serious charges.⁴²

Although the scope of prosecutorial discretion is wide in every jurisdiction, the existence of rarely-used statutes invites (if not demands) selective enforcement and unequal treatment of similarly situated defendants. There is no realistic possibility that all of the individuals who might fall within the scope of the statute will be prosecuted. Statutes that are applied only rarely give prosecutors the extraordinary ability to single out and punish one defendant, or perhaps a handful of defendants, for conduct that is widespread.⁴³ The prosecutor may do so for virtually any reason. She might seek to enforce her own view of sexual morality or proper social behavior, or she might have some other goal. The Idaho prosecutor appears to have been concerned with the public fisc: the majority of the girls were arrested after they applied for public assistance,⁴⁴ and the prosecutor referred to the first girl he charged as a “disgruntled, irresponsible teenager who [brings] something into this world that is going to cost taxpayers a lot of money.”⁴⁵ Both the Wisconsin and Connecticut cases involved one additional element: a vengeful spouse who pressed charges in the course of the breakup of her marriage.⁴⁶

The use of these statutes is so rare that it brings to mind Justice Potter Stewart’s memorable criticism of the death penalty as “so wantonly and so

42. See John Mintz, *Army Drops Chaplain’s Court-Martial*, WASH. POST, Mar. 20, 2004, at A2 (noting that when Yee was detained officials said they were preparing charges of espionage, sedition, and other charges that could have resulted in the death penalty, though the charges actually filed were for mishandling classified papers, downloading pornography, and having an adulterous affair with a female officer). Eventually the government dismissed its court-martial proceedings, dropping these charges and sending Yee to an administrative proceeding in which he will be offered non judicial punishment. *Id.* Flinn was charged with adultery, insubordination, and lying; her case ended with her accepting a general discharge rather than being court-martialed. *Id.* Flinn, who was not married, reportedly had an affair with a married civilian man. Richard Cohen, *Snooping on Soldiers*, WASH. POST, May 1, 1997, at A23. It should be noted that under military law adultery is not a standalone offense; rather, it is punishable only when it is shown to have been prejudicial to good order and discipline. 10 U.S.C. § 934 (2005). However, such charges are apparently far from rare. The Air Force alone reportedly conducted sixty-seven courts martial for adultery in 1997. Cohen, *supra*.

43. See, e.g., IDAHO CODE § 18-6603 (Michie 2004) (requiring proof of only two elements by prosecutors: nonmarital status and intercourse for a fornication offense—a very easy burden to satisfy).

44. Meinzer, *supra* note 38, at 166.

45. *Id.* at 171 (quoting Gem County prosecutor Douglas Varie). The sentence included elements that could improve the mother’s parenting skills as well as her job prospects. Amanda Smisek was given a suspended sentence of one month’s juvenile detention and three years probation contingent on her staying in school, keeping her waitressing job, and attending parenting classes. *Id.* at 167. In England, in contrast, the enforcement of the fornication statutes was concerned with the problem of fixing paternity and providing for the support of illegitimate children. *Id.* at 166-68.

46. Donohoe, *supra* note 37.

freakishly imposed,” that it was like being hit by lightning.⁴⁷ It is also reminiscent of the problems posed by overbroad statutes dealing with loitering and similar forms of behavior. As the Supreme Court recognized in *Papachristou v. City of Jacksonville*,⁴⁸ and reiterated in more recent cases such as *Kolender v. Lawson*⁴⁹ and *Morales v. City of Chicago*,⁵⁰ statutes that are vague and overbroad delegate so much discretion to the police and prosecutors that they invite arbitrary and discriminatory enforcement. Provisions that by their nature cannot or will not be generally enforced invite prosecutorial conduct that is at best arbitrary and at worst discriminatory.

The statutes also invite use as a pretext. For example, fornication can be charged along with other more serious forcible offenses. Charges of fornication and other prohibited sexual practices have been used as a backup in rape cases in which the proof of force or lack of consent may not be sufficient.⁵¹ This strategy works equally well whether the case is submitted to a jury⁵² or the defendant pleads guilty to the lesser offense.⁵³

47. *Furman v. Georgia*, 408 U.S. 238, 309-10 (1972) (Stewart, J., concurring). Similarly, Justice White added “that there is no meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not.” *Id.* at 313 (White, J., concurring).

48. 405 U.S. 156 (1972). The Court struck down a vagrancy ordinance as void for vagueness because it did not afford fair notice. *Id.* at 161.

49. 461 U.S. 352 (1983). The Court nullified a California loitering statute due to vagueness because the statute did not adequately define its identification requirements. *Id.* at 355.

50. 527 U.S. 41 (1999). The Court found a Chicago “Gang Congregation Ordinance” unconstitutional on vagueness grounds because it arbitrarily circumscribed loitering for innocent purposes. *Id.* at 53-56.

51. *See, e.g., State v. Smith*, 766 So. 2d 501 (La. 2000) (finding a defendant not guilty of rape but guilty of a crime against nature after the defendant denied victim’s allegation of forced vaginal and anal intercourse, but admitted consensual oral sex, which does not require proof of force or lack of consent); *State v. Houston*, 9 P.3d 188 (Utah Ct. App. 2000) (acquitting the defendant of rape, forcible sodomy, and burglary, but convicting of lesser-included offenses of fornication, sodomy, and trespass). *See generally Falco, supra* note 11, at 735-36 (recounting the use of fornication and sodomy laws to “obtain a legal advantage for the state”); Note, *Constitutional Barriers to Civil and Criminal Restrictions on Premarital and Extramarital Sex*, 104 HARV. L. REV. 1660, 1662 (1991) (providing examples of using fornication statutes to prosecute suspected rapists and prostitutes). For a particularly imaginative use of this technique, see *In re N.A.*, 539 S.E.2d 899 (Ga. Ct. App. 2000) (upholding a delinquency finding based upon a twelve-year-old girl’s commission of the offense of fornication with older teenage boys, and rejecting the claim that the girl’s status as a victim of statutory rape should preclude charging her with fornication in a delinquency proceeding).

52. *See, e.g., supra* note 51 and accompanying text (describing the pretextual use of statutes in *Smith* and *Houston* to obtain jury convictions on lesser charges where the juries found insufficient evidence to convict on more serious charges, such as rape); *State v. Spanbauer*, 322 N.W.2d 511, 512-13 (Wis. Ct. App. 1982) (affirming a jury’s conviction of a defendant—charged with sexual assault of two victims—of one count of a lesser degree of sexual assault, and one count of fornication).

53. *See* Richard Green, *Griswold’s Legacy: Fornication and Adultery As Crimes*, 16 OHIO N.U. L. REV. 545, 548 (1989) (quoting the commentary to the Alabama adultery statute, which states that the offense “may prove useful on occasions, as for example in

The impact of the addition of a fornication charge can be tremendous. If the defendant claims that intercourse occurred but was consensual, as National Basketball Association star Kobe Bryant did,⁵⁴ this defense to rape admits the lesser offense of fornication. Similarly, Army prosecutors charged Captain James Yee with the minor offenses of adultery, possessing pornography, and mishandling documents when they were unable to muster sufficient evidence in support of the original allegations of espionage and sedition, offenses punishable by death.⁵⁵ The adultery charge was a particularly potent weapon and potential bargaining chip because Yee is a Muslim chaplain and his lover was questioned extensively at a hearing attended by Yee's wife.⁵⁶

Finally, the morals statutes may be manipulated by third parties. In the Connecticut and Wisconsin cases noted above, prosecutors acted at the behest of the women's estranged husbands.⁵⁷ Moreover, the existence of the criminal statutes, even where they are not enforced, can have important secondary effects in the context of tort law, family law, and other civil contexts.⁵⁸ For example, one state court found its state law treatment of premarital sex as criminal fornication relevant in denying a tort action for herpes transmission.⁵⁹ In another state, the illegal nature of the sexual relations between unmarried persons was the basis for denying a parent custody rights.⁶⁰ The legislature in yet another state reportedly declined to repeal its law criminalizing adultery after hearing "compelling testimony

plea bargaining").

54. See Bryant: 'I Want to Apologize' to the Young Woman, CNN.COM (Sept. 1, 2004), at <http://www.cnn.com/2004/LAW/09/01/bryant.statement/index.html> (on file with the American University Law Review) (apologizing publicly for a sexual encounter with a hotel employee, which Bryant claimed was consensual, but which resulted in charges of sexual assault, later dropped by prosecutors).

55. See Mintz, *supra* note 42, at A2 (describing the military's subsequent decision to drop the charges of mishandling classified documents, possessing pornography, and engaging in adultery and the referral of the pornography and adultery charges to non-judicial administrative proceedings).

56. *Id.* See also *Military Injustice*, N.Y. TIMES, Mar. 24, 2004, at A1 (editorial criticizing military for its incompetent and mean-spirited prosecution and asking why embarrassing sexual allegations were included in a case that was purportedly about national security).

57. Donohoe, *supra* note 37, at E1.

58. On several of the points discussed, there are also state cases refusing to draw the inferences discussed in the text. For a discussion of the cases from various jurisdictions, see Hillary Greene, *Undead Laws: The Use of Historically Unenforced Criminal Statutes in Non-Criminal Litigation*, 16 YALE L. & POL'Y REV. 169, 174-80 (1997).

59. See *Zysk v. Zysk*, 404 S.E.2d 721, 722 (Va. 1990) (applying the common law rule that a person who freely engages in an illegal act may not recover damages from a co-participant on claims resulting from that act); see also Greene, *supra* note 58, at 174-76 (discussing *Zysk*).

60. *Jarrett v. Jarrett*, 400 N.E.2d 421, 423-24 (Ill. 1979); accord *Bottoms v. Bottoms*, 457 S.E.2d 102, 107-08 (Va. 1995) (affirming award of custody to grandmother based upon mother's felonious sodomy).

that it's useful in divorce cases."⁶¹ Other indirect consequences of unenforced morals statutes may include legitimating the refusal to rent to unmarried couples and providing a basis for the use of fornication or cohabitation as evidence of bad character in disciplinary proceedings in college or employment settings.⁶²

B. James McFarland, Andre Curtis, and Federalizing Everyday Crime

How does this compare to the problem of the expansion of federal criminal law? There are federal morals offenses, most notably the Mann Act,⁶³ which originally made it a federal crime to take a woman or girl across state lines for either prostitution or private sexual immorality.⁶⁴ There are also silly federal offenses covering conduct that probably should not be a crime, such as unauthorized use of the image of "Smokey Bear"⁶⁵ or the name or insignia "4-H Club."⁶⁶ But the far more serious problem is the extension of federal law to encompass offenses that are the staples of state criminal law enforcement. Federal criminal law now reaches not only

61. Donohoe, *supra* note 37, at E1 (quoting New Hampshire Senate Minority Leader Robert Preston).

62. Meinzer, *supra* note 38, at 173-74 (quoting in part DONAL MACNAMARA & EDWARD SAGARIN, *SEX, CRIME, AND THE LAW* 187 (1977)).

63. White-slave Traffic (Mann) Act, Pub. L. No. 61-277, 36 Stat. 825 (1910) (codified as amended at 18 U.S.C. §§ 2421-2424 (2005)).

64. For a discussion of the evolution of the Mann Act, and its use to prosecute non-commercial sex cases, see DAVID J. LANGUM, *CROSSING OVER THE LINE* (1994). The current version of the Mann Act makes it a federal crime to transport in interstate commerce (1) a minor, with the intent that the minor engage in prostitution or prohibited sexual conduct that will be commercially exploited, or (2) "any individual," with the intent that the individual engage in prostitution or "any sexual activity for which any person can be charged with a criminal offense." 18 U.S.C. §§ 2421, 2423 (2005). In states in which non-commercial sex is no longer an offense, the reach of the Mann Act is apparently limited to prostitution or other prohibited sexual conduct that is commercially exploited. Moreover, the United States Attorneys' Manual states that, except in cases in which "minors are victims," prosecutions under the Mann Act "should generally be limited to persons engaged in commercial prostitution activities." U.S. DEP'T OF JUSTICE, *THE UNITED STATES ATTORNEYS' MANUAL* 9-79.100 (2004) [hereinafter U.S. ATTORNEYS' MANUAL]. The provisions of the United States Attorneys' Manual are not intended to create rights, and are not enforceable. U.S. ATTORNEYS' MANUAL, *supra*, at 1-1.100 ("The Manual provides only internal Department of Justice guidance. It is not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal. Nor are any limitations hereby placed on otherwise lawful litigative prerogatives of the Department of Justice."). Courts have consistently upheld this position. *See, e.g.*, *Nichols v. Reno*, 931 F. Supp. 748, 751-52 (D. Colo. 1996), *aff'd*, 124 F.3d 1376 (10th Cir. 1997) (holding that procedures in the U.S. Attorneys' Manual's Death Penalty Protocol do not provide defendant with a protectable interest); *United States v. Lee*, 274 F.3d 485, 493 (8th Cir. 2001) (noting that the U.S. Attorneys' Manual's express statement that it does not create rights "puts criminal suspects and defendants on notice that they lack enforceable rights in DOJ policies and procedures").

65. 18 U.S.C. § 711 (2005) (punishing unauthorized use with fines and/or imprisonment not exceeding six months). It is also a crime to use the image of "Woody Owl" without authorization. 18 U.S.C. § 711a (2005).

66. *Id.* § 707.

offenses that involve an obvious federal nexus—like tax fraud and fraud that affects the sale of publicly traded securities—where federal prosecution is the norm, but also many crimes traditionally prosecuted at the state level. This includes crimes that at first blush seem exclusively local in nature.

For example, James McFarland committed four armed robberies in Ft. Worth, Texas, that netted him between \$1,795 and \$2,295.⁶⁷ Under Texas law (which is not known for leniency), his minimum sentence was five years; although the maximum sentence was ninety-nine years, he would have been eligible for parole after serving no more than thirty years.⁶⁸ But McFarland was not prosecuted under state law. Instead, he was prosecuted under federal law for violating the Hobbs Act, which criminalizes robbery or extortion affecting interstate commerce.⁶⁹ Did his robberies affect interstate commerce? Not much. None of the robberies were major, and, in fact, McFarland stole only fifty dollars during one.⁷⁰ But even a de minimis impact on interstate commerce is sufficient to violate the Hobbs Act. This de minimis impact can be shown by proving that the business affected by the crime received some of its merchandise from out of state, and that the crime caused a diminution of assets that resulted in the business' diminished ability to order additional out-of-state goods.⁷¹ McFarland's conduct was held to meet that standard,⁷² and his conviction was upheld after en banc review by the Fifth Circuit.⁷³ McFarland's sentence for four counts of Hobbs Act robbery and four counts of using a firearm in the commission of a robbery was 1,170 months, which is ninety-seven and one-half years.⁷⁴ Federal law has no provision for parole. Even if McFarland receives the maximum reduction for good behavior, he would

67. *United States v. McFarland*, 264 F.3d 557, 557-58 (5th Cir. 2001) (per curiam), *aff'd by an equally divided en banc court*, 311 F.3d 376 (5th Cir. 2002).

68. *Id.* at 558.

69. 18 U.S.C. § 1951(a) (2005).

70. *McFarland*, 264 F.3d at 558 (indicating that none of the four convenience store robberies involved any physical injury to the victims and that the greatest amount of money obtained from any one robbery was between \$1,500 and \$2,000).

71. See generally SARAH N. WELLING ET AL., 1 FEDERAL CRIMINAL LAW AND RELATED ACTIONS: CRIMES, FORFEITURE, THE FALSE CLAIMS ACT AND RICO § 15.3(B) (1998) (discussing the depletion of assets theory of jurisdiction in the context of the Hobbs Act).

72. *McFarland*, 264 F.3d at 558-59.

73. *McFarland*, 311 F.3d at 377 (affirming by an equally divided vote). In addition to a one paragraph per curiam statement that affirmed the district court's judgment of conviction and sentence, several dissenting opinions argued that the Hobbs Act, so interpreted, exceeds the scope of the Commerce Clause. *Id.* at 377 (Garwood, J., dissenting); *id.* at 410 (Higginbotham, J., dissenting). The Fifth Circuit was also evenly divided on the same issue in *United States v. Hickman*. 179 F.3d 230, 231 (5th Cir. 1999) (en banc). Unlike *McFarland* and the *Curtis* case discussed *infra*, Part II.B, *Hickman* involved a robbery that left one victim dead. *Id.* at 231 (Higginbotham, J., dissenting).

74. *McFarland*, 264 F.3d at 558.

have to serve eighty-five percent of that sentence.⁷⁵ As the court noted, this is in reality a life sentence without the possibility of parole.⁷⁶

Andre Curtis committed eight armed robberies in Tulsa, Oklahoma within a ten-day period (including robbing Mohawk Pizza two days in a row).⁷⁷ Almost all of the robberies were small time (one netted him twenty dollars or less),⁷⁸ but he did hit the jackpot twice, once at Fresh Kicks where the proceeds amounted to \$600, and once at an Express Mart where the proceeds were estimated between \$600 and \$700.⁷⁹ The total was no more than \$2,160, and the average per robbery was \$270.⁸⁰ No one was injured, and no shots were fired, though Curtis had a gun. His total sentence for eight counts of Hobbs Act robbery and eight counts of using a firearm was 2,271 months, which is more than 189 years.⁸¹ Like McFarland (and every other federal defendant), Curtis will have to serve at least eighty-five percent of that sentence, which is a little more than 160 years.

The majority of armed robbers are, and will continue to be, prosecuted under state rather than federal law,⁸² and accordingly their sentences are much less than those imposed on McFarland and Curtis. The disparity in treatment of McFarland and Curtis compared to others who committed

75. See 18 U.S.C. § 3624(b) (2005) (providing prisoners with a possible sentence reduction of fifty-four days per year, provided the prisoner meets specified standards of behavior).

76. *McFarland*, 264 F.3d at 558.

77. *United States v. Curtis*, 344 F.3d 1057, 1060, 1062 (10th Cir. 2003).

78. *Id.* at 1061-62.

79. *Id.* at 1061.

80. See *id.* at 1061-62 (accounting for \$100 at Convenient Food Mart, \$600 at Fresh Kicks, \$350 at Quik Pick, \$65 at Super Trip, up to \$700 at Express Mart, up to \$95 at Mohawk Pizza—in the course of two separate robberies—and up to \$250 from Mike's Grocery, including goods from several of the business valuing several hundred dollars).

81. *Id.* at 1061.

82. Compare SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS, Tables 5.44, 5.48 (Kathleen Maguire & Ann L. Pastore eds., 30th ed. 2002) (accounting for 36,800 felony robbery convictions in state courts in 2000, with a median incarceration sentence of eighty-two months and a median probation sentence of fifty-two months), available at <http://www.albany.edu/sourcebook/pdf/t544.pdf>, with 2000 U.S. SENTENCING COMM'N SOURCEBOOK FED. SENTENCING STATISTICS Tables 3, 13 (accounting for 1,721 robbery convictions in the federal courts in FY2000, with a mean federal incarceration sentence of 108.1 months and no probation), available at <http://www.ussc.gov/ANNRPT/2000/table3.pdf>, <http://www.ussc.gov/ANNRPT/2000/table13.pdf>.

As demonstrated by the *McFarland* and *Curtis* cases, the sentences in cases of multiple robbery counts with firearms escalate exponentially, because federal law provides for mandatory consecutive penalties for the use of weapons. 18 U.S.C. § 924(c)(1)(C) (2005). A second or subsequent offense of using a firearm in the commission of a violent felony is punishable by a mandatory sentence of twenty-five years, which must be imposed consecutively. 18 U.S.C. § 924(c)(1)(C)(i) (2005). See Sara Sun Beale, *The Unintended Consequences of Enhancing Gun Penalties: Shooting Down The Commerce Clause and Arming Federal Prosecutors*, 51 DUKE L.J. 1641, 1668 (2002) (discussing how Congress has repeatedly increased the penalties under 18 U.S.C. § 924(c) since 1968).

similar acts, like the disparity in treatment of the few individuals singled out for prosecution under morals offenses, is the inevitable result of overfederalization (or, in the terms of this symposium, overcriminalization). As noted above, there are an estimated 4,000 federal crimes,⁸³ many of which are very broad and cover conduct that is already a crime under state law. Given the relatively small size of the federal courts (which can prosecute only about five percent of the felonies in the United States),⁸⁴ the plethora of broad federal criminal laws cannot and will not be employed in the majority of cases that fall within their terms. Rather, the bulk of the cases that fall within the terms of most federal criminal statutes will be prosecuted under state laws that cover much of the same ground. For example, even in the case of drug offenses—which have been the focus of sustained federal enforcement—less than two percent of those arrested are prosecuted in federal court.⁸⁵ The differences between state law and federal law, however, are great. The Hobbs Act cases noted above exemplify one key difference: federal sentences are now generally harsher than state sentences for the same conduct. Accordingly, when only a few robbery (or bribery, or drug, or carjacking) cases are prosecuted in federal rather than state court, defendants prosecuted under federal law generally receive a much harsher sentence than others who committed precisely the same crimes but are prosecuted under state law.⁸⁶

This extreme sentencing disparity is not grounds for relief. The federal courts have repeatedly held that proof that many other defendants have not been prosecuted for the same conduct, or were prosecuted in state rather than federal court, or received very different sentences, provides no basis for relief—unless a defendant can prove unconstitutional motivation based on race, religion, or national origin.⁸⁷ Every federal circuit has ruled that

83. *See supra* text accompanying note 15.

84. Strazzella, *supra* note 4, at 19.

85. *See id.* at 20 (analyzing data from fiscal year 1997, when approximately 1.5% of the more than one million drug arrests led to federal prosecutions).

86. *See* Beale, *supra* note 4, at 998-99 (noting federal sentences are generally higher, and in some instances ten to twenty times higher than state sentences for the same conduct).

87. *See, e.g.*, *United States v. Snyder*, 136 F.3d 65, 66 (1st Cir. 1998) (stating that federal and state sentencing disparity does not justify downward departure); *United States v. Searcy*, 132 F.3d 1421, 1421 (11th Cir. 1998) (noting that a downward departure cannot be based on the fact that the defendant might have received a lower sentence if prosecuted in state court); *United States v. Haynes*, 985 F.2d 65, 69-70 (2d Cir. 1993) (rejecting an argument that departure could be based upon prosecutor's choice to bring charges in federal forum with harsher penalties, and noting that acceptance of such arguments would make federal sentences vary in different states and undermine Congress's intention to achieve uniformity in federal sentencing); *United States v. Sitton*, 968 F.2d 947, 961-62 (9th Cir. 1992) (asserting that departure is not justified by disparities between federal and state sentences). Although the federal courts have recognized that prosecutorial discretion is subject to judicial review if a defendant can demonstrate discrimination on the basis of race, religion, or some other suspect classification, the defendant bears a heavy burden in demonstrating that such discrimination occurred. *See United States v. Armstrong*, 517 U.S.

disparity is neither a basis for dismissal nor a basis for a challenge to a sentence that exceeds the sentences imposed on co-defendants or others who committed similar crimes.⁸⁸ This is true even in extreme cases, such as two brothers who were involved in the same cocaine transaction.⁸⁹ Federal prosecutors dismissed the charges against one defendant, who was prosecuted in state court and sentenced to probation plus the time he had already served while awaiting trial.⁹⁰ In light of that lenient sentence, the federal judge who sentenced his brother thought it would be appropriate to depart downward from the federal guidelines range of forty-one to fifty-one months; he reduced the federal defendant's sentence to thirteen months.⁹¹ The court of appeals vacated the judgment and remanded for resentencing, ruling that the trial court had no authority to reduce the federal defendant's sentence to bring it closer to the state sentence imposed on the other participant in the transaction.⁹²

It is important to note, however, that the Supreme Court's 2005 decision holding that the Sentencing Guidelines are advisory only⁹³ opens an avenue for defendants to reframe this issue, and seek sentences that are outside the Guidelines in cases in which co-defendants or others similarly situated have received more lenient sentences than those dictated by the guidelines. It is too soon to say how receptive courts will be to such arguments. The early cases indicate a wide range of approaches.⁹⁴

456, 465, 470 (1996) (holding that a defendant seeking discovery to help establish a claim of selective prosecution based upon race must produce credible evidence that similarly situated defendants of other races could have been prosecuted but were not, and finding the study proffered by defendant insufficient).

88. *E.g.*, *United States v. Buckendahl*, 251 F.3d 753, 759 (8th Cir. 2001); *United States v. Guzman-Landeros*, 207 F.3d 1034, 1035 (8th Cir. 2000) (per curiam); *United States v. Wong*, 127 F.3d 725 (8th Cir. 1997); *accord* *United States v. Martin*, 221 F.3d 52, 57 (1st Cir. 2000); *United States v. Rodriguez*, 162 F.3d 135, 153 (1st Cir. 1998); *United States v. Bonnet-Grullon*, 212 F.3d 692, 709-10 (2d Cir. 2000); *United States v. Perkins*, 108 F.3d 512 (4th Cir. 1997); *United States v. Ellis*, 975 F.2d 1061, 1066 (4th Cir. 1992); *United States v. Ives*, 984 F.2d 649 (5th Cir. 1993); *United States v. Epley*, 52 F.3d 571, 584 (6th Cir. 1995); *United States v. Meza*, 127 F.3d 545, 549 (7th Cir. 1996); *United States v. Banuelos-Rodriguez*, 215 F.3d 969, 978 (9th Cir. 2000) (en banc); *United States v. Armenta-Castro*, 227 F.3d 1255, 1257 (10th Cir. 2000); *United States v. Gallegos*, 129 F.3d 1140 (10th Cir. 1997); *United States v. Willis*, 139 F.3d 811, 812 (11th Cir. 1998); *United States v. Chotas*, 968 F.2d 1193 (11th Cir. 1992).

89. *Willis*, 139 F.3d at 811-12.

90. *Id.*

91. *Id.* at 811.

92. *Id.* at 812. The court apparently regarded the issue as an easy one: after placing the case on the non-argument calendar, it decided the case with a brief per curiam opinion. *Id.* at 811.

93. *United States v. Booker*, 125 S. Ct. 738 (2005) (holding that the mandatory guidelines increased a defendant's sentence beyond the range established by the jury's verdict or the defendant's guilty plea in violation of the right to trial by jury and proof beyond a reasonable doubt, and concluding that the statutory provisions making the guidelines mandatory would be excised, making the guidelines advisory).

94. *Compare* *United States v. Jaber*, 2005 WL 605787 (D. Mass. 2005) (concluding that an out-of-guidelines adjustment was justified in order to bring defendant Jaber's sentence

C. *The Common Vices of Both Morals Legislation and Overbroad Federal Criminal Law*

As these examples demonstrate, overbroad federal criminal laws—even those that deal with violent conduct that should certainly be a crime—share important characteristics with outdated morals laws. First and foremost, both give enforcement authorities far too much unchecked discretion to select those few cases that will actually be prosecuted. This problem arises in the case of morals legislation that covers something that (almost) everybody does. The relative ease of bringing such charges when the prosecutor (or a private party) has another agenda brings to mind the loitering statutes invalidated by the Supreme Court in *Papachristou*⁹⁵ and *Kolender*.⁹⁶ Those statutes were so broad that they were applicable to almost any conduct. Thus they allowed authorities to (in the words of Capt. Louis Renault in *Casablanca*) “round up the usual suspects” whenever they wished.⁹⁷ The suspects who are prosecuted for morals charges generally have no defense: they are guilty of the charged conduct, but so are many of their friends and neighbors. In the case of broad federal crimes that duplicate more widely enforced state laws, the problem is that the enforcement is, in effect, a mile wide and an inch deep. Only a few cases of the many can be chosen, and though these defendants deserve criminal punishment, they are singled out for much harsher treatment than others who have engaged in precisely the same conduct. Even assuming that the selection of cases is not tinged with any bias, prejudice, or other improper factor, the predictable and inevitable disparity in sentencing is deeply problematic. It is the rough equivalent of a penal lottery, where a few unlucky individuals “win” a far harsher term than their fellows.⁹⁸ This

into line with the sentences imposed on other more culpable participants in pseudoephedrine scheme), *with* United States v. Wilson, 350 F. Supp. 2d 910 (D. Utah 2005) (concluding that except in most exceptional cases district courts should sentence within the guidelines in order, *inter alia*, to prevent disparity); United States v. Wilson, 355 F. Supp. 2d 1269 (D. Utah 2005) (same).

95. See *supra* note 48 and accompanying text.

96. See *supra* note 49 and accompanying text.

97. See *Kolender v. Lawson*, 461 U.S. 352, 361 (1983) (rejecting a statute for failing to provide sufficient notice to citizens regarding how to avoid prosecution under the statute); *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972) (voiding a municipal vagrancy statute for vagueness because it promoted abuse of prosecutorial discretion).

98. Rudolph Giuliani=s policies when he was U.S. Attorney for the Southern District of New York provide an unusually clear example of such a random “lottery” effect. Giuliani instituted “federal day,” one day chosen at random each week in which all street-level drug dealers apprehended by local authorities would be prosecuted in federal court. Alexander Stille, *A Dynamic Prosecutor Captures the Headlines*, NAT’L L.J., June 17, 1985, at 48. The “federal day” program was initiated in 1983. See Stephen Labaton, *New Tactics in the War on Drugs Tilt Scales of Justice Off Balance*, N.Y. TIMES, Dec. 29, 1989, at A1. Giuliani stated that “[t]he idea was . . . ‘to create a Russian-roulette effect.’” Stille, *supra*, at 48. Giuliani referred frequently to this program in his later political campaigns, asserting that it kept drug dealers off balance because they never knew when they might be subject to the

predictable structural disparity is fundamentally incompatible with the underlying purpose of the Sentencing Reform Act of 1984,⁹⁹ which reformed federal sentencing to avoid disparity in sentencing that was not justified by differences in the offenders' criminal history or offensive conduct.¹⁰⁰

1. *Other values and rights threatened by morals offenses*

In addition to granting prosecutors enormous—even excessive—discretion and creating unjustified disparity among similarly situated defendants, overcriminalization undermines other significant values and evades a variety of procedural protections. The content of morals charges raises constitutional and policy questions. Laws regulating sexual practices may be challenged on the grounds that they conflict with aspects of constitutionally-protected liberty or violate equal protection.¹⁰¹ Laws regulating the propriety of speech, prohibiting blasphemy, swearing, and cursing,¹⁰² seem to be in direct conflict with the First Amendment. Moreover, morals charges, like other consensual offenses, encourage enforcement techniques that threaten privacy interests.¹⁰³ These techniques have included setting up surveillance of public restrooms and other sites where police anticipate that gay men might meet, and using undercover agents and informants to lure individuals into compromising situations.¹⁰⁴

higher penalties associated with federal prosecutions. William Glaberson, *Giuliani's Powerful Image Under Campaign Scrutiny*, N.Y. TIMES, July 11, 1989, at A1. Mayor Ed Koch identified another effect of this program: drug dealers who were arrested by local authorities asked whether this was "federal day" and, if so, tried to escape. Josh Barbanell, *Koch Recommends Stiffer Penalties and More Prisons*, N.Y. TIMES, Feb. 15, 1985, at A1.

99. Pub. L. No. 98-473, 98 Stat. 1987 (1984) (codified as amended in scattered sections of 18 U.S.C. (1984)). The Sentencing Reform Act of 1984 provides that one of the factors to be considered in imposing federal sentences is "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." § 212, 98 Stat. at 1990 (codified at 18 U.S.C. § 3553(a)(6) (1988)).

100. For a more extended discussion of the incompatibility between prosecutorial policies that single out a few cases for harsher penalties in the federal system than similar cases that remain in the state system, see Beale, *supra* note 4, at 1002-04.

101. Contemporary challenges would probably be based on *Lawrence v. Texas*, 539 U.S. 558 (2003), but it has been suggested that they could also be based upon the Eighth Amendment. See Falco, *supra* note 11, at 733-54 (asserting that challenges to imprisonment for violations of sexual practice regulations could be grounded on the Eighth Amendment prohibition against cruel and unusual punishment).

102. See *supra* note 6 (listing several state statutes regulating forms of speech).

103. Kadish, *supra* note 1, at 159-65.

104. The sting operation that led to the conviction of former D.C. mayor Marion Barry had a flavor of this kind of investigative technique. Working with the police and prosecutors, Barry's former lover lured him to a hotel room where he was filmed smoking cocaine. Critics charged that the lover turned informant played on Barry's sexual interest to convince him to use cocaine. See, e.g., Jill Nelson, *Barry's 'Delilah' Entralls Court With Details of Sex, Drugs*, WASH. POST, June 28, 1990, at A38; Michael York, *Moore Testifies She Exceeded FBI Rules; 'I Was There for a Purpose,' Informer Says*, WASH. POST, June 30, 1990, at A1; Tracy Thompson & Michael York, *Moore, Mundy Spar Over Barry's Intentions at Vista; Barry's Lawyer Hammers at Moore's Credibility, Behavior During*

Moreover, as noted above, the addition of morals charges, such as fornication, can effectively deprive the defendant of the ability to test the validity of more serious charges, such as rape.¹⁰⁵ The rights to a trial by jury and proof beyond a reasonable doubt mean little to a defendant whose defense that sex was consensual is an admission of the lesser included offense of fornication. Indeed, the wholly pretextual nature of fornication charges is clear from the fact that prosecutors never charge the rape “victim” with this offense.

2. *Other values and rights threatened by overfederalization*

Like morals offenses, the overbroad body of federal criminal laws threatens important substantive values and procedural protections, though in ways less obvious than the occasional or pretextual prosecution of vestigial morals offenses. One of the vices of overfederalization is that it tips the federal-state balance, allowing federal and state prosecutors to override state laws intended to protect state citizens and implement state policies in cases that normally fall within the ambit of state enforcement. This problem arises in a number of forms, including the nullification of both state procedural protections for criminal defendants and other laws expressing state policy. Overfederalization also increases the potential for duplicative prosecutions and penalties, reduces political accountability, and risks overwhelming the resources of the federal courts.

Federal laws provide defendants fewer procedural rights than the law in many states. Indeed, a recent federal publication recommends federal rather than state prosecution to evade a variety of protective state laws.¹⁰⁶ These include a more powerful federal grand jury system in which witnesses and potential defendants have fewer procedural rights, lower standards for the approval of search warrants, a lower burden of proof to justify a wire tap, and more restricted discovery of the government’s case.¹⁰⁷ Unlike state law, federal law also permits a conviction on the basis

Vista Sting, WASH. POST, July 3, 1990, at A1; Charles C. Lemley, Editorial, *The Barry Tape, Yes and No*, WASH. POST, July 4, 1990, at A18.

105. See *supra* text accompanying notes 51-54 (describing the reticence of some defendants charged with rape to assert that the encounter was consensual, where such an assertion effectively admits fornication).

106. See MALCOLM L. RUSSELL-EINHORN, FIGHTING URBAN CRIME: THE EVOLUTION OF FEDERAL-LOCAL COLLABORATION 3 (2003) (listing several aspects of prosecution that are less restrictive on the government in the federal system, including the grand jury, discovery, witness immunity, search warrants, preventive detention, electronic surveillance, and accomplice testimony), available at <http://www.ncjrs.org/pdffiles1/nij/197040.pdf>.

107. *Id.* In *United States v. Ucciferri*, 960 F.2d 953 (11th Cir. 1992), the district court dismissed an indictment charging narcotics offenses on the ground that the case had been the product of a state investigation, and had been prosecuted in federal court “solely to take advantage of less stringent federal rules concerning search warrants, wire surveillance, and informants. The court of appeals reversed, agreeing that the systematic transfer of “state cases to federal court is a legitimate source of concern for the courts, but holding

of an accomplice's uncorroborated testimony.¹⁰⁸ In effect, concurrent federal and state criminal jurisdiction enables prosecutorial forum shopping to get the most favorable procedural and substantive rules. This raises an issue of some importance. In a federal system, should federal law be used to give prosecutors an easy means of circumventing the policies reflected in state laws favorable to the defense? Some of these laws reflect values extrinsic to the truth seeking process (such as a respect for individual privacy). Others—such as the rules prohibiting convictions based solely on the testimony of an accomplice—reflect procedures deemed necessary to ensure the reliability of a finding of guilt. When federal law largely if not completely duplicates state law, these state policies can be overridden at the prosecutors' whim by pulling a case with no special federal characteristics out of the state system and into federal court.

Federal criminal laws also provide a way to override other state policy choices, such as the choice of the agency or program that receives the proceeds of forfeitures.¹⁰⁹ North Carolina, for example, provides that the proceeds of forfeitures go to support education.¹¹⁰ Federal law, in contrast, returns forfeited funds to the investigative and prosecutorial agencies that developed the case for forfeiture.¹¹¹ State and local investigators and prosecutors who develop a case for forfeiture can take it to federal officials. If the federal officials adopt the forfeiture, the state officials will receive the funds to support their budgets, bypassing the North Carolina legislature's preference that the funds go to education. This not only thwarts North Carolina's policy decision to prefer education, it also deprives the state of the most effective means of ensuring that financial motives do not distort criminal enforcement decisions.¹¹² Similarly,

that the courts have no authority to interfere with the executive's discretionary power to control criminal prosecutions. *Id.* at 954-55.

108. RUSSEL-EINHORN, *supra* note 106, at 3.

109. See Sara Sun Beale, *Federalizing Hate Crimes: Symbolic Politics, Expressive Law, or Tool for Criminal Enforcement?*, 80 B.U. L. REV. 1227, 1278 (2000) (observing that state officials often pass seized property to federal officials in an effort to circumvent the deliberate policy choices of state legislatures, and questioning whether this policy is consistent with the state officials' duties under state law); see also Karen Dillon, *Taking Cash Into Custody: A Special Report on Police and Drug Money Seizures*, KAN. CITY STAR, May 21-22, 2000, at A1 (detailing, in a series of articles published over two days, the evasion of state law by federal forfeiture statutes), available at <http://www.kcstar.com/projects/drugforfeit/index.html>.

110. See N.C. CONST. art. IX, § 7 (requiring the proceeds of forfeitures to be "used exclusively for maintaining free public schools").

111. See 18 U.S.C. § 981(e) (2005) (permitting the Attorney General the authority to transfer forfeited property to, among other options, "any State or local law enforcement agency which participated directly in any of the acts which led to the seizure or forfeiture of the property").

112. For a powerful argument that the actual and potential revenues from forfeiture create economic incentives that are distorting law enforcement and producing self financing, unaccountable law enforcement agencies divorced from meaningful legislative oversight,

employing federal rather than state forfeiture can be a means of evading state laws intended to protect certain kinds of property from forfeiture.¹¹³

Federal criminal laws provide a way to override state laws that do not authorize capital punishment.¹¹⁴ Moreover, the decision whether to ask for the death penalty is not made by the prosecutors in the local U.S. Attorney's Office but instead by a committee in Main Justice.¹¹⁵ Although this procedure is intended to ensure that federal law is enforced according to the same standards nationwide, it has the effect of overriding the choice of voters in states that have not authorized capital punishment. This is, of course, more problematic the more attenuated the federal nexus, and the more infrequent federal prosecutions for similar behavior.

The expanding overlap of federal and state law also increases the potential for duplicative prosecutions and penalties for the same conduct, which are not prohibited by the Double Jeopardy clause.¹¹⁶ Even an acquittal on the same allegations in state court will not prevent a subsequent federal prosecution.¹¹⁷ Although the availability of a later

see Eric Blumenson & Eva Nilsen, *Policing for Profit: The Drug War's Hidden Economic Agenda*, 65 U. CHI. L. REV. 35, 40-41 (1998).

113. State laws generally exempt one's residence, and many states exempt other property, such as the tools of the trade necessary to earn one's living. See Karen Dillon, *Many States Have Put Safeguards in Place to Protect Residents from Loss of Homes*, KAN. CITY STAR, May 21, 2000, at A14 (observing the practice in several states of avoiding state laws that generally exempt one's residence and other property from forfeiture by handing the property over to the federal authorities).

114. Congress extended the federal death penalty to forty offenses in 1994, and subsequently added others. See Rory K. Little, *The Federal Death Penalty: History and Some Thoughts About the Department of Justice's Role*, 26 FORDHAM URB. L.J. 347, 349-50 (1999).

115. See *id.* at 407-31 (providing an overview of how the Capital Case Review Committee should work, as well as a personal account from a former member of that committee on how it operates in practice).

116. See generally NORMAN ABRAMS & SARA SUN BEALE, *FEDERAL CRIMINAL LAW AND ITS ENFORCEMENT* 663-65 (3d ed. 2000) (discussing the relationship between the expansion of concurrent jurisdiction and Double Jeopardy); William Van Alstyne, *Dual Sovereignty, Federalism and National Criminal Law: Modernist Constitutional Doctrine and the Nonrole of the Supreme Court*, 26 AM. CRIM. L. REV. 1740 (1989) (discussing tension between the expansion of federal criminal jurisdiction and the values of the Double Jeopardy clause).

117. The Double Jeopardy clause is subject to the "dual sovereignty" limitation, which treats the states and federal government as separate sovereigns for Double Jeopardy purposes. Accordingly, the prior prosecution by a different sovereign does not constitute Double Jeopardy. The Supreme Court laid the foundation for this doctrine in *Bartkus v. Illinois*, 359 U.S. 121 (1959), and *Abbate v. United States*, 359 U.S. 187 (1959), and it reiterated and extended it in *Heath v. Alabama*, 474 U.S. 82 (1985). In general, scholars have been critical of the doctrine. See, e.g., Daniel A. Braun, *Praying to False Sovereigns: The Rule Permitting Successive Prosecutions in the Age of Cooperative Federalism*, 20 AM. J. CRIM. L. 1, 10 (1992) (contending that the dual sovereignty doctrine is no longer viable, because now state and federal law enforcement officials work together and cooperate in dealing with crime—they are not two independent sovereigns pursuing independent goals); Michael A. Dawson, Note, *Popular Sovereignty, Double Jeopardy, and the Dual Sovereignty Doctrine*, 102 YALE L.J. 281, 282 (1992) (arguing that the dual sovereignty doctrine undermines the sovereignty of the people since the Double Jeopardy Clause should

federal prosecution might be desirable in the case of civil rights offenses (where there has always been some suspicion about the zeal with which the states may prosecute),¹¹⁸ should it be possible for federal prosecutors to have a second bite of the apple in routine cases?¹¹⁹

Another troubling consequence of the expansion of federal law is a decrease in accountability for criminal justice policies. For example, the 2004 election included a hotly contested California referendum on the state's harsh three strikes law.¹²⁰ It is far less likely, however, that voters nationwide could or would focus on the possibility of occasional Hobbs Act prosecutions like those in *McFarland* and *Curtis*.

The increasing number of federal prosecutions also threatens to overwhelm the capacity of the relatively small federal court system,

be viewed as implementing the principal of popular sovereignty); Susan N. Herman, *Double Jeopardy All Over Again: Dual Sovereignty, Rodney King, and the ACLU*, 41 UCLA L. REV. 609, 618-19 n.32 (1994) (collecting and digesting a dozen articles which illustrate that the commentators on the dual sovereignty doctrine are nearly uniform in their criticism for the doctrine); Akhil Reed Amar & Jonathan L. Marcus, *Double Jeopardy Law After Rodney King*, 95 COLUM. L. REV. 1, 2-3 (1995) (examining the Double Jeopardy issues surrounding the Rodney King case and proposing a new way to look at the dual sovereignty doctrine so that it will only be used to provide a check on state governments when prosecuting state officials or when state juries are manipulated through race-based peremptory challenges); Kevin J. Hellman, Note, *The Fallacy of Dueling Sovereignities: Why the Supreme Court Refuses to Eliminate the Dual Sovereignty Doctrine*, 2 J.L. & POL'Y 149, 153-55 (1994) (arguing that the dual sovereignty doctrine is poor public policy because it encourages vindictive prosecutions, diminishes public faith in the judicial system, and denigrates defendants' rights).

118. The federal civil rights prosecution of the highway patrolmen who beat motorist Rodney King has been justified on this basis. For a discussion of a civil rights exception to dual sovereignty, see Herman, *supra* note 117, at 632-39; Paul Hoffman, *Double Jeopardy Wars: The Case for a Civil Rights "Exception"*, 41 UCLA L. REV. 649, 661-66, 669-71 (1994); Robert Matz, Note, *Dual Sovereignty and the Double Jeopardy Clause: If At First You Don't Convict, Try, Try Again*, 24 FORDHAM URB. L.J. 353, 376 (1997).

119. Since the Supreme Court's articulation of the dual sovereignty doctrine, the Department of Justice has carefully limited the cases in which it brings successive prosecutions, requiring each case to meet a list of criteria and to be approved by a senior department official. See U.S. ATTORNEYS' MANUAL, *supra* note 64, at 9-2.031 (codifying the criteria for the U.S. Attorneys Office to decide when to bring successive prosecutions under a policy called the "Petite Policy"); see also Harry Litman & Mark D. Greenberg, *Dual Prosecutions: A Model For Concurrent Federal Jurisdiction*, 543 ANNALS AM. ACAD. POL. & SOC. SCI. 72, 75-77 (1996) (outlining the Petite Policy, how it functions, and how it is enforced). *But see* Ellen S. Podgor, *Department of Justice Guidelines: Balancing "Discretionary Justice"*, 13 CORNELL J.L. & PUB. POL'Y 167, 177-81 (2004) (concluding that Petite Policy's usefulness is limited because Department of Justice often fails to abide by the policy and courts have consistently refused to enforce the policy).

120. See Joe Mathews, *How Prospects for Prop. 66 Fell So Far, So Fast: Three-Strikes Revamp Looked Likely Till Pete Wilson, the Governor and a Billionaire Joined to Defeat It*, L.A. TIMES, Nov. 7, 2004, at B1 (discussing the critical role of Governor Schwarzenegger and former Governor Wilson in narrowly defeating this amendment, which was supported by sixty-two percent of voters only two weeks before the two men joined forces); Dan Walters, *Voter Turnaround on Proposition 66 was a Dramatic Campaign Event*, SACRAMENTO BEE, Nov. 16, 2004, at A3 (describing the heavy campaigning, media blitz, and massive campaign funding that led to defeat of a measure that would have weakened the state's tough three-strikes law that originally was favored by three quarters of state voters).

endangering its capacity to fulfill its other functions, such as the enforcement of federal constitutional and statutory rights.¹²¹ Because of the Speedy Trial Act,¹²² criminal cases go to the front of the queue for trial,¹²³ making it difficult in many districts to bring civil cases to trial. Despite increases in the total number of cases filed,¹²⁴ the number of civil trials in the federal system has been plummeting, declining from more than 12,000 in 1988 to less than 6,000 in 2003.¹²⁵ In contrast, the number of criminal trials has held roughly steady.¹²⁶ Indeed, since 2001 the number of criminal trials has exceeded the number of civil trials each year.¹²⁷ Although these statistics doubtless reflect other factors as well, the expansion of the criminal docket clearly consumes resources that would otherwise be available for civil cases.

3. *Why politics leads to retaining morals offenses and adding new federal crimes*

Morals and overbroad and unnecessary federal crimes share one other common feature. They exist and persist, at least in part, because of weaknesses in the political process. The following paragraphs help explain why outdated morals statutes stay on the books and the scope of federal criminal jurisdiction has expanded so dramatically, with no end in sight, and why both pose a real danger.

Cognitive errors and biases tend to support a one way ratchet toward the enactment of additional crimes and harsher penalties. These include overgeneralization, availability, overconfidence, and biased processing of information. These errors and biases lead people to recall media accounts of serious crimes, to overestimate their frequency, and to jump to the conclusion that additional harsher laws are needed.¹²⁸ These flames are

121. See Sara Sun Beale, *Federalizing Crime: Assessing the Impact on the Federal Courts*, 543 ANNALS AM. ACAD. POL. & SOC. SCI. 39, 46-48 (1996) (explaining the increase in federal caseload and the shifting of resources from civil to criminal cases).

122. Pub. L. No. 93-619, 88 Stat. 2076 (1975) (codified as amended at 18 U.S.C. §§ 3152-3174 (2004)). See 18 U.S.C. § 3161(c)(1) (2004) (requiring that criminal trials to begin within seventy days of an indictment or initial appearance if there is a not guilty plea).

123. Indeed, FED. R. CRIM. P. 50 provides that “[s]cheduling preference must be given to criminal proceedings as far as practicable.”

124. See Judicial Facts and Figures, *Table 4.1: Total Civil and Criminal Cases Filed, Terminated, Pending (Includes Transfers)* (listing the total number of criminal and civil cases filed in U.S. District Courts on an annual basis from 1960-2003), available at <http://www.uscourts.gov/judicialfactsfigures/table4.01.pdf>.

125. See Judicial Facts and Figures, *Table 4.3: Civil and Criminal Trials Completed* (showing the total number of completed federal civil cases plummet from 12,388 in 1988 to 5,830 in 2003), available at <http://www.uscourts.gov/judicialfactsfigures/table4.03.pdf>.

126. *Id.* (showing that the total number of completed federal criminal cases stayed fairly stable with 7,576 in 1988 and 7,118 in 2003).

127. *Id.*

128. See 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)*

fanned by the news media, which has an economic incentive to portray violent crime in news programming as well as entertainment programming.¹²⁹ In short, there is a “fear factor” affecting criminal justice policy.

Vestigial morals legislation also reflects the difficulty of getting something out of the criminal code once it is in. Legislators are concerned (and rightly so) that the public may conflate their support of decriminalization with support for the conduct in question.¹³⁰ No one wants to run against an opponent who can point to a vote that seems to endorse adultery or fornication, especially at a time when moral values can dominate an election.¹³¹ Ironically, this problem is especially great when the provision in question is seldom used. In that situation, repeal is not a high priority for anyone, so there is little to be gained in supporting it.¹³²

Overfederalization may reflect a bit of inertia, but it also reflects the problem of a (relatively) free lunch. It sounds good to voters to pass new criminal laws or harsher sentences,¹³³ but at the state level eventually you

Criminal Law, 1 BUFF. CRIM. L. REV. 23, 57-60 (1997) (outlining cognitive errors and describing generally how these errors alter and bias public perceptions).

129. See Sara Sun Beale, *Selling Fear: The News Media's Coverage of Crime and Why It Matters* (manuscript on file with author).

130. See Donohoe, *supra* note 37, at E8 (noting that some state legislators, considering repealing laws that are no longer necessary for preventing criminal conduct, such as laws criminalizing adultery, are “fearful that repeal would paint them as condoning immorality”). One prosecution may not be enough to get people’s attention. After the Wisconsin prosecution showed that adultery charges could, and might be brought, a state legislator, who sought to repeal the provisions, was unable to get co-sponsors for his bill. *Id.*

131. Based upon polling data, some analysts and commentators concluded that moral values played a large role in George W. Bush’s reelection in 2004. See, e.g., Dana Milbank, *Deeply Divided Country Is United in Anxiety*, WASH. POST, Nov. 4, 2004, at A28 (citing a Republican pollster who suggested that the number of voters listing “moral values” as a top issue in voting and “the passage of ballot initiatives against same-sex marriage, proved that values have replaced pocketbook issues ‘as the primary political cleavage’ splitting secular Democrats from churchgoing Republicans”); Kelley Beaucar Vlahos, “Values” Help Shape Bush Re-Election, FOXNEWS.COM (Nov. 4, 2004), at <http://www.foxnews.com/story/0,2933,137535,00.html> (on file with the American University Law Review) (concluding that, based on different polling results, it was “Bush’s strong grip on the issue of morality and faith, and his outreach to religious voters” that helped him to win the 2004 election). But see, e.g., Alan Cooperman, *Liberal Christians Challenge “Values Vote,”* WASH. POST, Nov. 10, 2004, at A10 (challenging the idea that support for “moral values” on Election Day was a nod toward only conservative or Republican issues by citing a post-election poll that showed sixty-four percent of voters think the most urgent moral problems are more traditionally Democrat issues such as “greed and materialism” and “poverty and economic justice”); MEDIA MATTERS FOR AMERICA, MEDIA OVERPLAYED “MORAL VALUES” AS “DECISIVE” ELECTION ISSUE (Nov. 10, 2004), at <http://mediamatters.org/items/200411100010> (on file with the American University Law Review) (contrasting the statements of different major news media commentators and concluding that the idea of “moral values” was too vague and “inept” to provide any kind of useful information).

132. See Donohoe, *supra* note 37, at E8 (noting that state legislators are loathe to alienate constituents for whom morality is an important issue when they think that no one is being prosecuted).

133. For a general discussion of the political forces driving punitive crime policies, see

must pay for them. Most states are required to balance their budgets,¹³⁴ and criminal justice is such a large budgetary chunk that it competes in a real sense with other high priorities (education, roads, salaries for state employees, etc.).¹³⁵ The budget crises many states have faced in recent years have led some state legislators to rethink punitive policies.¹³⁶ At the federal level, however, deficit spending is a way of life,¹³⁷ and the criminal justice budget is just a drop in a very large federal budgetary bucket.¹³⁸ So

Sara Sun Beale, *Still Tough on Crime? Prospects for Restorative Justice in the United States*, 2003 UTAH L. REV. 413 (2003); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 510 (2001).

134. See RICHARD BRIFFAULT, *BALANCING ACTS: THE REALITY BEHIND STATE BALANCED BUDGET REQUIREMENTS 7-9* (1996) (arguing that the claims that forty-nine of the states have some constitutional or statutory requirement for balanced budgets is too simplistic since the enforcement mechanisms vary considerably between them). Only thirty-one states actually require legislatures to pass a balanced budget, as opposed to requiring the governor to submit one to the legislature, and some of these provisions have no enforcement mechanisms. *Id.* at 10. At least twenty states allow budget deficits to carry over year to year or allow deficit borrowing. *Id.*

135. See Beale, *supra* note 133, at 435-36 (concluding that budget shortfalls have forced states to think about cutting the punitive criminal justice policies because of the high cost of the criminal justice system in light of the rising incarceration numbers).

136. In the broader context of criminal justice, state budgetary pressures are now creating pressures to rethink punitive approaches. By the midpoint of 2002, many states were in serious financial difficulty; estimates of the total state budget shortfall for fiscal year 2002 ranged from \$27 billion to \$38 billion. Daniel F. Wilhelm & Nicholas R. Turner, *Is the Budget Crisis Changing the Way We Look at Sentencing and Incarceration?*, 15 FED. SENT. REP. 41, 41 (2002). One response to the budget shortfalls has been to reduce sentences and to repeal or limit mandatory minimum sentencing laws, which are now perceived as unnecessarily harsh and fiscally onerous. As one state correctional official observed, "budget problems are making people ask fundamental questions about whether we can afford to keep doing what we've been doing." Fox Butterfield, *Tight Budgets Force States to Reconsider Crime and Penalties*, N.Y. TIMES, Jan. 21, 2002, at A1, A11; Wilhelm and Turner identify thirteen states that modified their harsh sentencing laws in 2001 and 2002, and others with similar proposals under consideration. *Id.* at 6 Fig. 2. Many of the legislative changes occurred in states led by Republicans, and Republican governors in other states closed prisons as a cost-cutting measure. Judith Greene & Vincent Schiraldi, *Cutting Prison Costs is Tempting In a Time of Fiscal Crisis*, SAN DIEGO UNION & TRIB., Feb. 27, 2002, at B9. Some states that once led the way on harsh sentencing laws are now seeking ways to cut their costs by measures that include reducing incarceration. For example, Louisiana, which has the highest per capita incarceration rate in the nation, enacted legislation cutting many drug sentences in half and eliminating mandatory sentences for certain non-violent crimes. *Id.* at 5. The legislature also limited the application of the state three strikes law. *Id.* It was estimated that the state will save \$60 million in prison operating funds. *Id.* See also Rachel Barkow, *Federalism and the Politics of Sentencing*, forthcoming 105 COLUM. L. REV., available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=698563 (analyzing effect of state budget problems on willingness to reconsider harsh sentencing laws); Sara Sun Beale, *Still Tough on Crime? Prospects for Restorative Justice in the United States*, 2003 UTAH L. REV. 413.

137. According to the Office of Management and Budget, since 1900, there have been seventy-one years in which the federal government has run at a deficit. See Office of Mgmt. and Budget, Historical Tables, *Table 1-1: Summary of Receipts, Outlays, and Surpluses or Deficits (-): 1789-2010*, available at http://www.whitehouse.gov/omb/budget/fy2006/sheets/hist01_z1.xls (count of years in which combined on and off budget accounts are in balance or surplus). In fact, since 1950, there have been only nine years in which the government has not run a deficit. *Id.*

138. See OFFICE OF MGMT. AND BUDGET, *BUDGET OF THE U.S. GOVERNMENT: FISCAL*

there is virtually no real fiscal incentive to rein in federal legislators who capitalize on the public's fear of crime.

D. The Proper Scope of the Federal System: Breadth Versus Depth and the Disparity Critique

The inevitable severe disparity that results from federal prosecution is most troubling when federal law is thinly enforced, leaving the vast majority of cases for state prosecution. Moreover, federal prosecution is troubling when there is no clear line differentiating the cases chosen for federal prosecution from those chosen for state prosecution. Although concerns regarding the propriety of overriding various state policy choices still remain, many of the vices of overfederalization will be reduced or eliminated if federal enforcement becomes the norm for a category of cases, even if that category is one that has not traditionally been treated as a federal crime.

How does this play out in the context of violent crimes, like the armed robberies in *McFarland* and *Curtis*? There is considerable popular support for the federal government playing an important role in the response to violent crime, and one of the Department of Justice's most important goals as stated in its fiscal year 2004 strategic plan is reducing the threat, incidence and prevalence of violent crime, especially as it stems from illegal use of guns or from organized criminal enterprises.¹³⁹ The Department's Project Safe Neighborhoods program seeks to implement this goal by requiring each United States Attorney to develop a comprehensive gun violence program, drawing together federal, state, and local agencies.¹⁴⁰ To some degree the propriety of that policy depends on an assessment of the outer limits of the Commerce Clause power,¹⁴¹ a topic

YEAR 2004, 195, 311 (showing that the federal prison system in 2002 accounted for only \$4,617 million of the \$2,011 billion federal budget and was estimated to account for only \$4,492 million of the projected \$2,229 billion budget in 2004), at <http://www.gpoaccess.gov/usbudget/fy04/pdf/budget.pdf> (on file with the American University Law Review).

139. See U.S. DEPARTMENT OF JUSTICE, FISCAL YEAR 2002 PERFORMANCE REPORT & FISCAL YEAR 2003 REVISED FINAL PERFORMANCE PLAN, FISCAL YEAR 2004 PERFORMANCE PLAN (identifying the Department's first strategic goal as protecting the U.S. against terrorism, and the second goal as enforcing federal criminal laws, including as goal 2.1 reducing violent crime), available at <http://www.usdoj.gov/ag/annualreports/pr2002/TableofContents.htm>.

140. See U.S. DEPARTMENT OF JUSTICE, ABOUT PROJECT SAFE NEIGHBORHOODS, at <http://www.projectsafeneighborhoods.gov/about.asp> (last visited Apr. 2, 2005) (on file with the American University Law Review) (providing an overview of the purpose and essential elements of Project Safe Neighborhood as well as a portal for its extensive website describing all of the project's elements).

141. In the case of the Hobbs Act and other existing legislation, this is a debatable assumption. See *supra* note 73 (discussing the *Hickman* and *McFarland* cases and noting that the Fifth Circuit was evenly divided on the constitutionality of the Hobbs Act), and John S. Baker, Jr., *Jurisdictional and Separation of Powers Strategies to Limit the*

beyond the scope of this Essay. Assuming *arguendo* that any legislation being enforced rests on a sufficient basis in the Commerce Clause or other delegated powers, the disparity concerns noted above could be addressed by defining—administratively or by statute—the criteria for federal prosecution,¹⁴² and by *more* rather than fewer federal prosecutions of some kinds of cases. A general norm of prosecution for a class of cases that falls within the federal government's delegated powers means that all offenders within that class will be treated consistently, both in terms of sentencing and in terms of various procedural rights. Within the ambit of the national government's constitutional powers, the policy choice of designating the classes of cases that call for such a commitment of federal resources—which would effectively supplant state enforcement—is committed to Congress and the executive branch. However, given the severely limited resources of both federal prosecutors and the federal courts, the strategy of criminalizing nearly everything and leaving enforcement to case-by-case decision-making produces the problems described in this Essay. Moreover, assuming that all federal prosecutions continue to be brought in the federal courts, the small size of the federal court system means that for the foreseeable future the number of federal prosecutions is subject to severe limitations. It would simply not be possible, for example, to bring all of the current drug prosecutions arising from more than one million arrests each year throughout the United States into the federal courts.¹⁴³

Present and former prosecutors defend the present concurrent system as one that provides a federal backstop for particular cases in which federal resources are necessary for an effective prosecution of conduct in the interests of public safety. They argue that prosecutorial discretion—channeled by the priorities set by the Department of Justice and adapted to the conditions in different judicial districts—is the best means of protecting the public.¹⁴⁴ A general policy of prosecuting violent offenders whenever

Expansion of Federal Crimes, 54 AM. U. L. REV. 545, 563 (2005).

142. See Steven D. Clymer, *Unequal Justice: The Federalization of Criminal Law*, 70 SO. CAL. L. REV. 643, 707-18 (1997) (proposing adoption of administrative guidelines, subject to judicial review, requiring each U.S. Attorney's office to develop and consistently apply internal classification schemes using characteristics of offenders and crimes to determine which cases will be prosecuted as federal crimes).

143. See *supra* note 85 (discussing drug arrests for fiscal year 1997 of which less than two percent were prosecuted in federal courts).

144. See, e.g., Jamie S. Gorelik & Harry Litman, *Prosecutorial Discretion and the Federalization Debate*, 46 HASTINGS L.J. 967, 976 (1995) (arguing that prosecutorial discretion at the federal level can effectively address Congress's intent in federalizing crimes by only taking those cases where federal prosecution has some degree of comparative advantage to local or state prosecution); Elizabeth Glazer, *Thinking Strategically: How Federal Prosecutors Can Reduce Violent Crime*, 26 FORDHAM URB. L.J. 573, 575-76 (1999) (arguing that federal prosecutors are uniquely positioned where they can use their prosecutorial discretion to choose cases not just for the particular cases, but rather in a strategic effort to effectively reduce crime); Litman & Greenberg, *supra* note 119, at

they fall within the reach of the federal gun laws—like the earlier Triggerlock program and Project Safe Neighborhoods—can be defended on this ground. Such a general policy of federal prosecution responds to the disparity critique as long as the basis for federal jurisdiction maps well enough onto the offense conduct that the prosecutorial initiative captures most of the cases, rather than a random few.¹⁴⁵ But there is a practical problem. The number of crimes involving handguns far exceeds the capacity of the federal courts now and in the foreseeable future.¹⁴⁶

Cases like *McFarland* and *Curtis*, however, suggest that prosecutorial discretion as presently administered does not solve many of the issues raised in this Essay. Indeed, neither case seems consistent with the United States Attorneys' Manual, which instructs federal prosecutors that Hobbs Act robbery "is to be utilized only in instances involving organized crime, gang activity, or wide-ranging schemes."¹⁴⁷ It does not appear that either case represented a general policy or bringing all similar cases within the federal system, even within those judicial districts.

E. What Does This Have To Do With Mattress Tags?

Does the preceding analysis of these two forms of overcriminalization have any bearing on the issue of what might be called "mattress tag" offenses, the regulatory offenses that many have argued are the paradigm

81-83 (contending that it was in fact the intent of Congress to expand federal criminal jurisdiction so that federal resources will be available in those few cases where a national interest is at stake or where there is a need from the state, and to allow federal prosecutors to use their discretion in choosing which cases to prosecute at the federal level).

145. In comparison, whether a telegram transmission between two points within a state happens to get routed through an out of state connection is a chance occurrence that will single out only a few randomly chosen cases. See ABRAMS & BEALE, *supra* note 116, at 22-23, 185 (discussing cases based on such jurisdictional accidents); see also Franklin E. Zimring & Gordon Hawkins, *Toward a Principled Basis for Federal Criminal Legislation*, 543 ANNALS AM. ACAD. POL. & SOC. SCI. 15, 22-23 (1996) (outlining a set of guidelines for Congress to use when creating federal criminal statutes that would put criminal conduct under federal jurisdiction). These guidelines would require a significant nexus between the federal government and the criminal threat itself. *Id.* at 23. Under these principles, it would be improper for chance occurrences such as carjacking or the above referenced telegram transmission, both rather trivial connections to federal power, to provide an appropriate basis for federal criminal jurisdiction. *Id.* at 25.

146. In 1994, critics estimated that the number of federal judges would have to be quadrupled if Congress passed a bill extending federal jurisdiction to all crimes committed with a gun that had crossed state lines. Beale, *supra* note 82, at 1649. Indeed, concern that the federal courts would be swamped with high volume low prestige prosecutions for local crimes of violence may have been one of the factors motivating the Supreme Court's decision in *United States v. Lopez*, 514 U.S. 549 (1995). See Beale, *supra* note 82, at 1650-60. By holding that Congress had exceeded its authority in enacting the Gun Free School Zone Act of 1990, 18 U.S.C. § 922(q)(1)(A) (1998 & Supp. V 1993), *Lopez* revived the understanding that there is a judicially enforceable limit on Congress's power to enact criminal legislation based upon the Commerce Clause.

147. U.S. ATTORNEYS' MANUAL, *supra* note 64, at 9-131.040.

of overcriminalization?¹⁴⁸ This is an issue that affects both the federal and state systems. Indeed, there is evidence that many states are enacting more public welfare/strict liability offenses, and other laws intended to make it easier to prosecute corporations and/or corporate officers and employees.¹⁴⁹ Also, existing laws have been employed to obtain convictions for relatively minor conduct involving no more than negligence.¹⁵⁰

The common themes noted above—excessive prosecutorial discretion, disparity, potential for abuse and likelihood that other values will be sacrificed—do not suggest an easy answer to the question whether some (or most) regulatory offenses should be repealed, leaving the field for civil law or good judgment. But these themes do suggest a series of additional questions that would illuminate the debate about regulatory criminal offenses, and might help to determine whether and when regulatory offenses should be prosecuted. Here are some of the questions about regulatory offenses that I would like to see explored.

Excessive prosecutorial discretion can clearly play a role in the case of the most broadly worded statutes, especially those that allow strict liability prosecutions. How big a part of the problem is this with regulatory offenses? Was Arthur Anderson, for example, prosecuted criminally for conduct that was relatively common? Two distinctive elements of regulatory crime are (1) administrative regulations that supplement the statutory regimes, defining with greater precision the meaning of the statutory provisions, and the conduct that is proscribed and permitted, and (2) administrative agencies that enforce the relevant laws and regulations. The administrative regulations and the agencies enforcing them have the potential to circumscribe prosecutorial discretion and reduce or largely eliminate disparity. How successful are the various regulatory agencies, such as the Securities and Exchange Commission and the Food and Drug Administration, in clarifying their statutory regimes, reducing areas of

148. See generally ROSENZWEIG, *supra* note 3 (contending that the enormous expansion of the number of crimes through legislative action has led to punishment for actions that are not in themselves wrong, but rather are prohibited only because of legislative decree), available at <http://www.heritage.org/Research/LegalIssues/loader.cfm?url=/commonspot/security/getfile.cfm&PageID=44674>.

149. See generally STATESIDE ASSOCIATES, 50 STATE CRIMINALIZATION ASSESSMENT (Nov. 7, 2003) (on file with author) (finding that between 2000 and 2003, twenty-three states have enacted or pending statutes creating new crimes, and twenty-six states have expanded corporate criminal liability or exposure).

150. See, e.g., ROSENZWEIG, *supra* note 3, at 1-2 (describing *United States v. Hanousek*, 176 F.3d 1102 (8th Cir. 2000), a case where a railroad manager was sentenced to six months in prison for discharging pollutants due to the actions of an employee who accidentally struck and ruptured an oil pipeline with construction equipment). But see Kathleen F. Brickey, *Charging Practices in Hazardous Waste Prosecutions*, 62 OHIO ST. L.J. 1077 (2001) (reviewing 140 hazardous waste prosecutions and concluding that contrary to claims in the literature, prosecutions involved obviously illegal and often pervasive criminal conduct, not isolated or inadvertent technical violations).

uncertainty, and limiting the potential for prosecution? How does this compare to state regulatory regimes (both the statutory and administrative aspects)?

Much of my analysis hinges on disparity as a result of thin enforcement. Are the statutes in question generally enforced? My impression is that the answer is yes in at least some areas, such as the enforcement of the securities laws by the Securities and Exchange Commission. Perhaps in some contexts agency discretion can provide an important degree of uniformity not present when prosecutorial discretion is exercised directly in the dispersed offices of the United States Attorneys. Does the regulatory aspect here mean that prosecutorial discretion is necessarily more regulated and rational?

What about the potential for abuse and undermining other values? Here the most significant issue may be the efforts to use Department of Justice prosecutorial guidelines and the federal sentencing guidelines to limit attorney client privilege, which are discussed by John Hasnas in *Ethics and the Problem of White Collar Crime*.¹⁵¹

Unlike morals offenses and overfederalization, there seems to be no real impediment in the political process related to regulatory offenses, or at least not one biased toward overcriminalization. The potential defendants in regulatory cases—corporate and business interests, regulated industries, and individuals who run major corporations—have the resources and sophistication to lobby effectively to protect their interests.¹⁵² Moreover, a good deal of this conduct is very much below the political radar. This might lend to support the view that regulatory offenses are not likely to be subject to overcriminalization. Indeed, recent events suggest that we have *too little* white collar crime enforcement, rather than too much. The wide-scale accounting scandals affecting major corporations such as Enron and WorldCom are just the tip of the iceberg.¹⁵³ Scandals involving a range of criminal activity from fraud to health and safety violations have wracked many industries, including energy, technology, health care, pharmaceuticals, cruise lines, and insurance.¹⁵⁴ However, the existence of

151. John Hasnas, *Ethics and the Problem of White Collar Crime*, 54 AM. U. L. REV. 579, 624-30 (2005).

152. Indeed, a public choice perspective begins from the premise that corporate interests are so politically powerful that they will be able to avoid the forms of liability to which they are most opposed. See Sara Sun Beale & Adam G. Safwat, *What Developments in Western Europe Tell Us About American Critiques of Corporate Criminal Liability*, 8 BUFF. CRIM. L. REV. 89, 101-03 (2005). A comparative analysis suggests that corporate and business interests (and other interest groups) are more politically powerful in the United States than in Western Europe at the present time. *Id.* at 147-54 (exploring the influence of interest groups in the U.S. and Europe in general and on the adoption of corporate criminal liability).

153. See *id.* at 90-96. Enron lost \$100 billion in shareholder equity, and more than 6,500 employees lost their jobs and pensions. *Id.* at 91 & n.7.

154. *Id.*

serious forms of white collar or regulatory crime that have gone largely unchecked does not mean that some of the laws are not written too broadly, nor does it mean all of the defendants who have been charged are properly the subject of criminal sanctions. It does, however, suggest caution in accepting at face value the claims of interest groups seeking to cut back on the scope of criminal law and criminal enforcement in this context.

CONCLUSION

When someone says “overcriminalization,” the first thought that comes to mind for many people is either morals legislation or a morass of unnecessary laws regulating trivial everyday conduct. I have tried to show that morals offenses continue to be a source of genuine concern, and that they share many similarities with overfederalization, which, I argue, should also be seen as a problem of overcriminalization. As the descriptions of some individual cases indicate, it is easy to see the unfairness of both forms of overcriminalization. I have also tried to show that there are more subtle ways that both forms of overcriminalization conflict with other values and eviscerate a variety of laws intended to provide procedural and substantive protections. Although these problems are relatively easy to demonstrate, they are far more difficult to remedy. There are structural features of our psyches and our political system that tend to promote and entrench such laws.

I would like to close this Essay by drawing attention to another pressing problem in the United States that is related to but distinct from the phenomenon of overcriminalization: our alarming rates of incarceration. Figures from 2003 indicate that the U.S. rate of 714 incarcerated persons per 100,000 is not merely the highest in the world, but it is orders of magnitude higher than any other country to which we compare ourselves.¹⁵⁵ Our rate is *five times* as high as any of the Western European democracies,¹⁵⁶ and greatly exceeds even our closest competitors, Belarus and Russia.¹⁵⁷ In the United States we impose incarceration more frequently for the same offenses as do other Western nations, and we impose longer terms of incarceration for the same offenses.¹⁵⁸ Tragically,

155. See THE SENTENCING PROJECT, NEW INCARCERATION FIGURES: RISING POPULATION DESPITE FALLING CRIME RATES 4 (illustrating how, among the ten countries with the highest incarceration rate, Russia is the only country that the United States would compare itself with and their rate is 160 per 100,000 less), *available at* <http://www.sentencingproject.org/pdfs/1044.pdf>.

156. See *id.* at 5 (providing examples of incarceration rates in some countries commonly thought of as peers with the United States such as the United Kingdom, Canada, Australia, Germany, France, Japan, Sweden, and India; these countries have incarceration rates ranging from 29 per 100,000 to 141 per 100,000).

157. *Id.* at 4. The rates in Belarus and Russia per 100,000 are 554 and 548. *Id.*

158. See *generally* Beale, *supra* note 129 (manuscript on file with author).

the same political, psychological, and media forces that promote overcriminalization also promote excessive incarceration.