THE SENTENCING PROJECT

Over-Federalization: Federal Intrusion Into State Criminal Law

A broad and growing number of crimes are criminalized at both the state and federal levels. This means that either state or federal authorities, or both, can prosecute these offenses. Long-standing political pressure for federal lawmakers to demonstrate their responsiveness to constituent concerns about crime,[1] even if the crimes in question are already subject to local prosecution, has led to a federal criminal code that encompasses a wide array of local conduct. That broad reach comes at a significant cost.

The expanding encroachment of federal criminal law on traditionally local offenses threatens justice, equity, and local democracy. This brief provides an overview of the longstanding bipartisan concerns regarding over-federalization, the limited constitutional restraints on the federal government's authority to criminalize conduct, the risks inherent in over-federalization, and how federal lawmakers can respond more meaningfully to constituent concerns about crime.

Given the higher penalties often associated with federal offenses, individuals charged with traditionally local offenses in federal court may face needlessly higher sentences than they would in state court. Steep mandatory minimums capture individuals with varying levels of culpability[2] in their net — most infamously demonstrated by the historic mandatory minimums set for simple possession and the sale of small quantities of crack cocaine.[3] Given that federal prosecutions of traditionally local offenses are focused disproportionately on Black urban neighborhoods, over-federalization also deepens racial disparities in sentencing. Federal authorities may also employ the long arm of federal criminal law to prosecute traditionally local offenses if they disagree with local charging decisions or policy, a potentially serious attack on federalism and local democracy.[4] As former Reagan administration U.S. Attorney General Edwin Meese wrote, the federalization of crime "contradicts constitutional principles, undermines the state-federal fabric, and disrupts the important balance between the federal and state systems of justice."[5]

In recent sessions of Congress, members have introduced legislation that would expand federal jurisdiction over carjacking offenses,[6] shoplifting and catalytic converter thefts,[7] and assaults or attempted assaults on local law enforcement officers.[8] Rather than federally criminalizing conduct that is already prosecuted and punished at state and local levels, this brief suggests that federal lawmakers and leaders should:

- Respond to constituent concerns about crime by investing in community-based solutions, rather than with duplicative federal criminal statutes. Investment in evidence-based interventions like gun violence prevention and programs focusing on preventing youth crime and overdose reduction can respond to the underlying concerns of constituents.[9]
- Limit interventions by federal prosecutors in traditionally local offenses, particularly in the context of successive prosecutions (prosecutions in which individuals are prosecuted by both the local and federal authorities), or when there is conflict regarding a duly elected local prosecutor's lawful exercise of discretion.[10]
- Abolish federal mandatory minimums. Federalizing local offenses tends ultimately to lengthen sentences because of the longer mandatory minimums at play in the federal system.[11]
- Improve the federal criminal legislative drafting process by requiring judiciary committee oversight of every bill proposing criminal offenses or penalties.[12]

- Repair the past harms of over-federalization through retroactive sentencing reforms. Some federal mandatory minimums, such as those involving crack cocaine or unlawful possession of a firearm, have played an outsize role in deepening racial disparities and lengthening sentences.[13] Retroactive resentencing laws, which would build on the success of the First Step Act,[14] are a means of addressing these harms, reducing excess incarceration, and strengthening communities.

Collectively, these reforms could halt the expansion of over-federalization and begin to undo some of its greatest injustices.

Longstanding Bipartisan Concerns

For decades, scholars, advocates, and lawmakers have expressed concerns about a growing federalization of local offenses. In 1998, for instance, the American Bar Association convened a blue-ribbon Task Force on the Federalization of Criminal Law to review the potential effects of the ever-expanding federal criminal code. The Task Force articulated numerous concerns, including that federalization could result in an "unhealthy concentration of policing power at the national level," as well as in duplicative prosecutions that violate "the spirit of the Constitution's double jeopardy protection" and overburden the judiciary.[15]

Congress members from both parties have also expressed strong concerns regarding the harms of over-federalization for decades. In 2009, the House Judiciary Crime Subcommittee, then led by Crime Subcommittee Chair Bobby Scott (D-VA) and Ranking Member Louie Gohmert (R-TX) heard testimony from experts on the risks of over-federalization and over-criminalization.[16] Rep. Gohmert then reflected:

> Over the past three decades, Congress has averaged 500 new crimes per decade, this despite the fact that the Federal Government lacks a general police power.…Yet Congress' continuous enactment of new Federal crimes has systematically overturned this principle, securing a de facto Federal police power under which virtually all criminal conduct can be federally regulated. Many of these laws overlap with existing State laws and blur the lines between traditional Federal and State jurisdiction.[17]

In May 2013, the Judiciary Committee of the U.S. House of Representatives created an Overcriminalization Task Force, led by then Crime Subcommittee Chair Jim Sensenbrenner (R-WI) and Ranking Member Bobby Scott (D-VA), which held ten congressional hearings.[18] As John Malcolm, then a Senior Legal Fellow at the Heritage Foundation, testified, "If something is already a state crime, unless there is some unique federal interest or expertise involved, there should be no reason to make the same conduct a federal offense just because a horrific crime is committed that leads to sensationalistic headlines."[19] Democratic members of the Task Force ultimately released a report with their extensive recommendations, including the repeal of all mandatory minimum sentences.[20]

Over-federalization is a bipartisan fault and bipartisan concern. All states impose increased penalties for assaulting an officer[21] and in nearly all states intentionally killing an officer already carries the heaviest penalty permissible under state law.[22] However, in 2023, bipartisan members of Congress introduced the Protect & Serve Act, which would have created a new federal criminal offense applicable to most individuals who knowingly assaulted a law enforcement officer causing serious bodily injury, or who attempted to do so.[23] Individuals would have faced a maximum of 10 years in prison, unless death resulted or a kidnapping was involved in which case they would have faced up to life. The bill ultimately failed to advance after Rep. Chip Roy (R-TX) highlighted in a floor speech the fundamental tension between over-federalization and conservative principles, remarking "...I will be damned if I am going to empower a government to extend beyond its constitutional limits using the same bastardized use of the Commerce

Clause that we have decried for decades because it has expanded a government that is now tyrannically using its power to go after the American people, go after former politicians, including the former President, that is spending money we don't have, that is using that power to regulate us to death on virtually every bill that virtually every Republican on this side of the aisle who claims to be a limited government conservative votes for."[24] The Protect and Serve Act was reintroduced with bipartisan support in 2025.[25]

Meager Limits on Federal Criminalization

Limited constitutional restraints

In theory, Congress may not criminalize conduct with the same latitude as is given to state and local governments. However, in practice there are only limited restraints.[26] Criminal laws passed by Congress must reflect one of Congress's enumerated powers, such as its ability to impose taxes, spend federal funds, or regulate commerce.[27] Over the past 50 years, however, broadening interpretations of the Constitution's Commerce Clause have offered Congress an ever-expanding ability to make traditionally state and local offenses federal crimes as well.

The Commerce Clause empowers Congress to regulate: (1) the use of the channels of interstate commerce, (2) the instrumentalities of interstate commerce, and (3) those activities having a substantial relation to interstate commerce.[28] These criteria encompass a wide range of traditionally local offenses, and the jurisdictional limits imposed by courts are few.[29] For example, carjacking is traditionally a local offense handled by local prosecutors under state law. However, 18 U.S.C. § 2119 also criminalizes carjacking federally, given that cars are instrumentalities of interstate commerce, even if an actual carjacking offense does not involve crossing state lines. As a result, federal prosecutors have the option to charge nearly every carjacking offense as a federal crime.

The federalization of traditionally local criminal offenses is also not constrained by the Double Jeopardy Clause of the Fifth Amendment to the U.S. Constitution. In relevant part, the Fifth Amendment states that "No person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb…"[30] The Supreme Court has repeatedly interpreted the Double Jeopardy Clause to protect individuals from being prosecuted twice for the same offense by the *same* government entity, but not from successive prosecutions by "separate sovereigns."[31] As such, the Fifth Amendment does not prevent federal authorities from prosecuting individuals for the same conduct that has already been prosecuted by a state or local prosecutor, or vice versa.[32] However, widespread criticism has prompted some states to place statutory limits on successive state prosecutions following federal prosecutions[33] or to find that such successive prosecutions violate state constitution Double Jeopardy Clauses.[34] Such limits, however, do not restrain federal prosecutors from pressing charges after an offense has been prosecuted at the state level or declined by a local prosecutor for insufficient evidence. Although repeat prosecutions arising from the same conduct are limited, their infrequency reflects a voluntary policy of restraint adopted by federal prosecutors and limited resources—not federal legal barriers to double prosecutions.[35]

The Petite Policy

Adopted in 1959, the Petite Policy of the Department of Justice (DOJ) limits the circumstances in which the Department will federally prosecute conduct already prosecuted by a state or local authority, in theory; in practice, however, the policy is only a weak and voluntary restraint.[36] The Petite Policy bars DOJ from prosecuting an offense following a prior state prosecution for the same conduct (a successive prosecution) unless certain conditions are met. To engage in a successive prosecution, federal authorities must establish that the case involves a substantial federal interest and the prior prosecution left that interest "demonstrably unvindicated."[37] The prosecution must be approved by the appropriate assistant attorney general. The Petite Policy, however, is

purely a voluntary internal DOJ policy; it cannot be enforced against the DOJ by defendants or courts who believe that a given case violates the policy and should be dismissed.[38] It offers no protection to defendants when it has been unjustly applied and poses no barrier should DOJ leadership choose to ignore it.

One circumstance in which a substantial federal interest may be demonstrably unvindicated is when federal prosecutors are able to bring a type of charge unavailable to local prosecutors—a situation common in civil rights cases. In 1992, federal prosecutors brought civil rights charges against four Los Angeles police officers for the beating of Rodney King, following their acquittal by a local jury.[39] In recent years, the Department has similarly played a significant role in holding law enforcement officers accountable for biased and excessive uses of force—offenses that are often criminal under state law, yet under prosecuted or challenging to prosecute under traditional criminal statutes. For example, in 2020 after Breonna Taylor was killed by police during the attempted execution of an unlawful no-knock warrant, local prosecutors deemed the use of force justified and declined to present homicide charges to the grand jury, sparking public outrage.[40] The Department responded by bringing civil rights charges against the officers.[41] Such civil rights prosecutions represent a vital and unique federal law enforcement function.

However, not all successive prosecutions reflect such compelling interests. For example, in *U.S. v. Ng*, DOJ argued that a successive prosecution was justified under the Petite Policy simply because the prosecutor wanted to secure a sentence that was a year or two longer than the individual faced in state court.[42] In short, the Petite policy offers no legal protections to individuals accused of crimes and minimal restrictions on the exercise of prosecutorial discretion.

The Consequences of Over-Federalization

Given the tendency of federal sentences to be longer and carry higher mandatory minimums than their state counterparts, over-federalization can lengthen sentences and increase incarceration.[43] Furthermore, over-federalization may also result in arbitrary and racially disparate sentencing outcomes for similarly situated defendants given the discretionary nature of decisions to pursue state, federal, or both charges. Finally, overly broad federal laws can be wielded by federal authorities to usurp the power of locally elected officials or to suppress protest, a significant infringement on democracy.

Longer sentences

Over-federalization increases the lengths of sentences as well as the population of federal prisons. Federal sentences typically exceed those available under state law, often by ten- or twenty-fold; the higher sentences are typically a product of higher mandatory minimums and the U.S. Sentencing Guidelines.[44] In the context of drug offenses, this sentencing differential is particularly stark: for example, under North Carolina law, an individual charged with trafficking 50 grams of methamphetamine would face a minimum sentence of 70 months and a maximum of 93 months,[45] but under federal law the same amount of methamphetamine would incur a sentence from 120 months to life imprisonment.[46] Similarly, federal mandatory minimums for gun offenses, including added charges and sentencing "enhancements" for "felon-in-possession" or "armed career criminal" cases can result in sentences far exceeding those at the state level.[47]

This differential is such a hallmark of federal sentencing that it is a central feature of cooperative prosecution initiatives. In these exercises of "cooperative federalism," as Professor William Partlett of Melbourne Law School writes, state and federal authorities collaborate, potentially from the inception of an investigation, to share resources and "'leverage' federal law to avoid state-level criminal law and procedures which they perceive to be too lenient."[48] Joint state and federal task forces often target drug and gun trafficking, such as in Project Safe Neighborhoods (PSN).[49]

Lengthening prison terms does not have a significant deterrent effect on crime because most people do not expect to be apprehended for a crime, are not familiar with relevant legal penalties, or commit crimes with their judgment compromised by substance use or mental health problems.[50] Long sentences do, however, divert resources from effective investments in public safety, namely preventative interventions like violence interruption programs.[51] Additionally, sentences that result from cooperative federalism programs such as PSN can be particularly disproportionate, given that prosecutors may intentionally seek the harshest available sentence.

PROJECT SAFE NEIGHBORHOODS

First instituted under President George W. Bush, Project Safe Neighborhoods remains a core component of federal crime control policy. Project Safe Neighborhoods was modeled on Richmond, Virginia's Project Exile in which the United States Attorney, the Commonwealth's Attorney, and the chief of police collaborated to charge most felon-in-possession firearm narcotics cases and firearm domestic violence cases as federal offenses. The goal of this federal partnership was to impose harsher mandatory minimum sentences and incapacitate individuals for as long as possible.[52] PSN strove to replicate this model across the country. As then-President Bush wrote in a letter in a toolkit for PSN partners, the goal of PSN was to "increase accountability within our system and…send a clear message to criminals—you will do hard time for gun crime."[53] In turn, federal authorities dramatically increased federal gun possession prosecutions in the early 2000s despite a decrease in national rates of gun homicide.[54]

Today, Project Safe Neighborhoods is a funding program administered by the Bureau of Justice Assistance within the DOJ. Initially funded at levels of $550 million over its first two years (2001-2002),[55] PSN funding is now more modest—$17.5 million was allocated across all federal judicial districts in fiscal year 2023.[56] PSN directs funds to U.S. Attorneys and PSN task forces (which include local law enforcement) in each judicial district to "identify the most pressing violent crime problems in a community and develop comprehensive solutions to address them."[57] PSN grant recipients have wide latitude in determining which solutions to prioritize (including preventative interventions), but seeking higher federal sentences for traditionally local gun and drug offenses remains a standard component.[58]

Under Rochester's replication of Project Exile, Juma Sampson received a 25-year mandatory minimum sentence for selling more than 50 grams of crack cocaine to an undercover officer while having access to a gun stored at his girlfriend's house. He had no history of violence and began selling drugs in high school in order to buy clothes. As his mother said, "You can kill somebody here and get less time than my baby got… And that is the God-in-heaven truth. This boy got 25 years for what?"[59]

Perpetuating racial disparities

The burden of these higher federal sentences tends to fall disproportionately on Black and Latino men.[60] For example, Project Safe Neighborhoods, which focuses on gun and drug enforcement, predominantly targets communities in which Black people live,[61] with this targeted enforcement likely playing a role in the disproportionate rate at which Black men are convicted of federal firearm offenses.[62] For example, in fiscal year 2023, 59% of those convicted under the federal "felon-in-possession" statute (which criminalizes unlawfully possessing a firearm with a felony record) were Black men.[63] Likewise, Black men make up over half of those sentenced under 18 U.S.C. § 924(c), which imposes a 5- to 10-year mandatory minimum penalty on individuals who possess, brandish, or discharge a firearm during a drug offense. These firearm offense disparities contribute to the disparities that characterize the federal prison population: Black individuals constitute 14% of the country's population, but 38% of the federal prison population.[64]

Similarly, in 2022 and 2023, Congress considered legislation that would have lengthened sentences and expanded who could be charged with a federal carjacking crime, another offense traditionally prosecuted at the local level.[65] The burden of that expansion would have fallen almost exclusively on young Black and Latino men. According to U.S. Sentencing Commission data, between 2016 and 2020, most of those federally convicted of carjacking were young men; 54% were Black, and a total of 85% were non-white.[66]

Meanwhile, numerous preventative interventions have the potential to reduce carjacking by youth and young adults without deepening racial disparities in incarceration.[67] For example, among those convicted of carjacking between 2016 and 2020, nearly half did not graduate from high school. Interventions that keep youth in school, improve education quality, and increase summer employment can reduce involvement in violent crime.[68] Lawmakers can remain responsive to the safety concerns of their constituents by directing funds to such interventions, rather than federalizing conduct already criminalized by state law.

Intruding on local democracy

Over-federalization also presents a growing threat to federalism—the constitutional principle that power is divided between federal and state authorities—as well as threatening local democracy. Across the country, over 2,300 jurisdictions elect their local prosecutors—often a district attorney, county attorney, or state's attorney. An increasing number of these races are contested, especially in the 147 largest prosecutor districts that hold over half of the U.S. population.[69] From declining to charge low-level violations associated with homelessness, to creating diversion courts, to prioritizing certain violent offenses, to zealously prosecuting police misconduct, there are myriad ways that local prosecutors can exercise their discretion to decrease incarceration and respond to voter demands for a fairer criminal legal system. Prosecutor elections are often a referendum on how such discretion should be exercised.

Ever-expanding federal criminal jurisdiction, however, permits federal authorities to intervene when they disagree with such use of discretion, even absent a compelling federal interest. As the National Sheriffs Association stated in 1996, "We're getting closer to a federal police state. That's what we fought against 200 years ago—this massive federal government involved in the lives of people on the local level.'"[70] In 1999, the National District Attorneys Association similarly expressed concerns that this trend "not only places an intolerable burden on the federal criminal justice system, but is changing the very nature of that system by intruding on cases that by every standard should be handled by local prosecutors."[71]

For example, Terance Gamble was convicted by Alabama for possessing a firearm with a felony record and sentenced to a year in prison, then prosecuted by the U.S. Attorney for the Southern District of Alabama under the federal felon-in-possession law for the same con-

duct, receiving an additional sentence of nearly three more years in prison.[72] As Justice Ruth Bader Ginsburg wrote in her dissent in his appeal challenging his prosecution on double jeopardy grounds, "The run-of-the-mill felon-in-possession charges Gamble encountered indicate that, in practice, successive prosecutions are not limited to exceptional circumstances."[73]

Advocates for expanded federal police powers and more punitive criminal legal policies have articulated how the broad reach of federal criminal jurisdiction could be wielded against local communities who elect reform-oriented law enforcement leaders.[74] At their most extreme, these plans call for charging local prosecutors for civil rights violations if they fail to wield their discretion in the manner preferred by federal authorities, a fairly untested proposition.[75] More realistically, the playbook also urges federal authorities to step in and prosecute local crimes they believe to be undercharged or wrongfully declined.[76]

During the first Trump Administration, some U.S. Attorneys embraced this tactic. Following Portland District Attorney Mike Schmidt's decision to dismiss hundreds of charges against individuals who protested George Floyd's murder, the FBI and Oregon's U.S. Attorney began charging protesters with federal offenses, despite the absence of a traditional federal interest. Federal authorities pursued civil disorder charges against protesters whose actions did not take place on federal property or involve threats to federal law enforcement.[77] Over 100 Portland area local law enforcement officers were also deputized by the U.S. Marshals, giving the officers the option to bypass the locally elected district attorney and present cases directly to federal prosecutors.[78] This intervention represented a significant federal intrusion on the discretion of duly elected local law enforcement leaders. In the context of growing political polarization around how local law enforcement leaders should wield their discretion,[79] any expansion of federal criminal jurisdiction means expanded opportunities for federal authorities to override the will of local voters.

Recommendations

The over-federalization of the criminal code carries significant harms—including increasing racial disparities, lengthening sentences, and intruding on local democracy. To address these concerns and the harms of over-incarceration, policymakers can take five steps:

Instead of federally criminalizing more conduct, fund community-based solutions

Federal lawmakers should be responsive to constituents' concerns about crime, but lengthening sentences by federally criminalizing more conduct has not proven to be an effective answer. Instead, federal lawmakers should increase funding for promising community-based intervention. For example, interventions such as violence interruption programs and changes to the built environment have the potential to decrease violence without increasing incarceration. Interventions for youth such as summer employment programs and Nurse-Family Partnerships can keep youth from engaging in crime.[80]

Too often, these interventions are only deployed on a smaller scale within specific neighborhoods, rather than within entire cities or entire areas of concentrated disadvantage, constraining their impact. Additional federal funding can change that. The federal Bipartisan Safer Communities Act of 2022 included a landmark $250 million in funding for community-based violence prevention initiatives, a meaningful figure although still inadequate to bring community-based interventions to scale.[81] Congress members should work to ensure that federal community safety funding programs are adequately resourced and focused on interventions that will interrupt cycles of harm, disinvestment, and criminalization. Federal prosecutors and local leaders can also work together to ensure that PSN funds are invested in such effective community-based interventions.

Limit federal prosecutions of traditionally local offenses

The current Petite Policy is only a weak restraint on federal prosecutors. To reduce the harms associated with over-federalization, DOJ should amend the policy to impose additional limits. For example, the policy could specify that in the context of traditionally local offenses, in order to respect the will of the states as to appropriate sentence lengths, the desire to seek a longer federal sentence alone is insufficient to constitute a substantial federal interest that justifies a successive prosecution. This principle should hold true not only in the context of small disparities in sentencing, such as in *U.S. v. Ng*,[82] but also when there are substantial differences in the sentences available at the state and federal levels, such as when a young adolescent may not be charged as an adult in their state, but may in the federal system.

The Petite Policy is also currently limited to successive *prosecutions*—it explicitly does not apply to prior state *investigations* that resulted in a decision to decline to bring charges, or to circumstances in which a local prosecutor has a blanket non-prosecution policy for certain types of offenses. This means that if a local prosecutor declines to prosecute a case (whether following an investigation or as a matter of policy), federal prosecutors are free to wield their discretion differently and investigate and charge the same offense. To protect the will of local voters, the Petite Policy could be expanded by adding a rebuttable presumption: In the context of traditionally local offenses, absent a substantial federal interest, the local prosecutor's decision to decline to bring charges should not be overridden.

Reduce the harm of over-federalization by abolishing mandatory minimums

Mandatory minimum sentences are responsible for much of the harm of over-federalization, given their role in driving longer federal sentences and racial disparities in federal prisons. There is little to recommend mandatory minimums: They do not improve public safety;[83] instead, mandatory minimums widen racial disparities,[84] increase incarceration rates,[85] and elicit more coercive plea bargains.[86] Public sentiment is growing against mandatory minimums,[87] and there are bipartisan calls for their repeal.[88] The Judicial Conference of the United States, the American Law Institute's Model Penal Code, and the American Bar Association are among the many organizations that have called for their elimination.[89] Preventing the creation of new mandatory minimums and repealing the ones that exist will restore discretion to judges and mitigate some of the most egregious injustices of over-federalization.

Improve the federal criminal legislative drafting process

Congress's judiciary committees have special expertise in drafting criminal statutes, yet many federal criminal bills originate outside the judiciary committees and provisions expanding criminal penalties may never receive judiciary committee consideration. As recommended by The Heritage Foundation and the National Association for Criminal Defense Lawyers, Congress should mandate "adequate judiciary committee oversight of every bill proposing criminal offenses or penalties." Requiring sequential referral of criminal bills, or bills with criminal provisions, to the judiciary committees would hopefully reduce poorly drafted and duplicative legislation and at minimum provide more time for feedback from the defense bar, state and federal prosecutors, and civil rights community.[90] Similarly, as NACDL and The Heritage Foundation proposed, Congress should be required to "provide detailed written justification for and analysis of all new federal criminalization" in order to encourage a more measured and thoughtful approach to legislating.[91]

Repair the harms of over-federalization through retroactive sentencing reforms

Some offenses have played an outsize role in the history of over-federalization. In the 1980s and 1990s, for example, the aggressive federal prosecution of crack cocaine transactions played a disproportionate role in the growth of the federal prison population and in devastat-

ing Black communities.[92] Under the Anti-Drug Abuse Act of 1986, distribution of just five grams of crack carried a minimum five-year federal prison sentence, while for powder cocaine, distribution of 500 grams—100 times the amount of crack cocaine—carried the same sentence. The Fair Sentencing Act of 2010, which was made retroactive by the First Step Act, reduced the disparity in sentencing for crack cocaine and powder cocaine offenses from 100:1 to 18:1—an improvement, but still an unscientific and racially biased distinction. Passage of the Eliminating a Quantifiably Unjust Application of the Law (EQUAL) Act would unwind some of that harm by prospectively and retroactively ending the sentencing disparity between crack and powder cocaine offenses.[93]

Similarly, charges of knowingly possessing a firearm in furtherance of a drug-trafficking crime or crime of violence under 18 U.S.C. § 924(c) are a common tool in Project Safe Neighborhood prosecutions.[94] Until the passage of the First Step Act, prosecutors could "stack" multiple violations of § 924(c) within one indictment for purposes of sentencing, triggering extreme mandatory minimums.[95] In response to widespread judicial criticism of this practice, the bipartisan First Step Act prospectively limited the application of 924(c) stacking, but offered no relief to those still incarcerated because their sentences had been unjustly stacked.[96] The First Step Implementation Act would remedy those occurrences by, among other measures, making reforms to the First Step Act's 924(c) retroactive.[97]

Finally, universal "second look" resentencing offers individuals who may be serving needlessly extreme sentences an opportunity for relief if they have demonstrated their rehabilitation and proven that they are ready to reenter the community.[98] In 2024, U.S. Senator Cory Booker and Representative Sydney Kamlager-Dove reintroduced the Second Look Act, a bill which would offer all individuals incarcerated for federal crimes a second look after 10 years.[99] The Second Look Act would be a valuable check on the excesses of over-federalization, as are other retroactive sentencing reforms that offer relief to those serving needlessly long federal sentences.

For further resources on how Congress can build on the First Step Act and practical guidance on how individuals can advocate for these bills, consult The Sentencing Project's Toolkit for Fighting Mass Incarceration in the 119th Congress.

Conclusion

The growing encroachment of federal criminal law on traditionally local offenses threatens justice, equity, and local democracy. Federal lawmakers, however, can readily halt over-federalization and reverse some of its greatest harms. By responding to constituent safety concerns with funding for promising community-based solutions, lawmakers can deliver the security that communities need. Abolishing mandatory minimums would reduce future injustices and retroactive sentencing reforms would offer relief to those suffering from over-federalization's excesses in federal prisons. And improving the process by which Congress considers criminal bills can protect against future excesses. Ultimately, by embracing these reforms, lawmakers can improve safety, protect federalism, and foster a more just and equitable federal criminal legal system.

Endnotes

[1] "As we saw then and continue to see today, Congress reacts to media sensationalism of a graphic crime story by passing new laws that impose harsh criminal penalties in an understandable rush to 'do something' politically. The intellectually easiest solution that holds the greatest public appeal and appeases fear and retribution is to fill up the nation's prisons." Scott, R. (2014, December 16). *Democratic views on criminal justice reforms raised before the Over-Criminalization Task Force & the Subcommittee on Crime, Terrorism, Homeland Security, and Investigations*. Over-Criminalization Task Force. Subcommittee on Crime, Terrorism, And Homeland Security of the Committee on the Judiciary.

[2] Of a sample of individuals sentenced for federal methamphetamine offenses in fiscal year 2022, the U.S. Sentencing Commission found that 24% of individuals were "couriers" and 12% were performing the function of "street level dealers." In a sample of individuals sentenced for federal fentanyl offenses in fiscal year 2019, the U.S. Sentencing Commission found that 39% of individuals performed the function of "street-level dealer" and 12% performed the function of "courier." Dezember, A. (2025). *Data briefing transcript: 2025 Proposed amendments on drug offenses*. U.S. Sentencing Commission. U.S. Sentencing Commission (2025).

[3] For example, the U.S. Sentencing Commission found that in 2005 the majority of the lowest level powder cocaine and crack trafficking defendants, described as "street-level dealers", "couriers/mules", and similar roles, received five or ten-year mandatory prison sentences. U.S. Sentencing Commission. (2007). *Report to Congress: Cocaine and federal sentencing policy.*

[4] *See, e.g.,* Hamilton, G. (2023). The Department of Justice. In *Mandate for Leadership: The conservative promise (Chap. 17).* The Heritage Foundation.

[5] Meese, E. (1999, July 30). *The dangerous federalization of crime*. Hoover Institute.

[6] Office of Senator Chuck Grassley. (2023, April 20). *Grassley, colleagues reintroduce package to bolster, clarify violent crime statutes* [Press release]*;* Combating Violent and Dangerous Crime Act, S. 4628, 117th Cong. (2022).

[7] Combating Organized Retail Crime Act of 2023, S. 140, 118th Cong. (2023); PART Act, H.R. 621, 118th Cong. (2023).

[8] Protect and Serve Act of 2023, H.R.743. 118th Cong. (2023).

[9] Research and Evaluation Center, John Jay College of Criminal Justice, City University of New York (2020). *Reducing violence without police: A review of research evidence.*

[10] *See U.S. v. Ng*, 699 F.2d 63 (1983); *Gamble v. United States*, 587 U.S. 678 (2019).

[11] *See* Beale, S.S. (1995). Too many and yet too few: New principles to define the proper limits of federal criminal jurisdiction. *Hastings Law Journal, 46.(4),* 979, 998-99.

[12] Walsh, B. & Joslyn, T. (2010, May 5). *Without intent: How Congress is eroding the criminal intent requirement in federal law*. National Association of Criminal Defense Lawyers and The Heritage Foundation.

[13] *See* Vagins, D. & McCurdy, J. (2006). *Cracks in the system: 20 years of the unjust federal crack cocaine law.* American Civil Liberties Union; U.S. Sentencing Commission. (2011). *2011 report to the Congress: Mandatory minimum penalties in the federal criminal justice system*.

[14] First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194.; Nellis, A., & Komar, L. (2023, August 22). *The First Step Act: Ending mass incarceration in federal prisons*. The Sentencing Project.

[15] Task Force on the Federalization of Criminal Law. (1998). *The federalization of criminal law*. American Bar Association, Criminal Justice Section. The Task Force and academics also expressed strong concerns that over-federalization would eventually overwhelm federal dockets. This concern did not come to fruition. Following years of increases, starting at 30,000 filings in 1980 and growing roughly 1,500 cases per year until the federal criminal filings reached over 100,000 per year in 2011, the number of federal criminal filings has declined over the last decade, dropping to roughly 70,000 cases in 2023. Klein, S. R. & Grobey, I. B. (2012). *Debunking claims of over-federalization of criminal law*. *Emory Law Journal, 62*(1).; O'Sullivan, J. O. (2014). *The federal criminal "code": Return of over federalization. Harvard Journal of Law & Public Policy 37*(1); United States Courts. (2023). Federal judicial caseload statistics 2023. U.S. Courts.

[16] House of Representatives (2009, July 22). *Over-criminalization of conduct/ Over-federalization of criminal law* [Hearing before the Subcommittee on Crime, Terrorism, And Homeland Security of the Committee on the Judiciary].

[17] Gohmert, L. (2009, July 22). Opening Remarks. In *Over-criminalization of conduct/ Over-federalization of criminal law*. [Hearing before the Subcommittee on Crime, Terrorism, And Homeland Security of the Committee on the Judiciary, U.S. House of Representatives].

[18] National Association of Criminal Defense Lawyers. *Congressional task force on overcriminalization*. Accessed on May 1, 2025.

[19] Malcolm, J. (2013, June 14). Testimony before the Committee on the Judiciary Over-criminalization Task Force. Subcommittee on Crime, Terrorism, And Homeland Security of the Committee on the Judiciary of the U.S. House of Representatives.

[20] Scott, R. (2014, December 16). *Democratic views on criminal justice reforms raised before the Over-Criminalization Task Force & the Subcommittee on Crime, Terrorism, Homeland Security, and Investigations*. Over-Criminalization Task Force. Subcommittee on Crime, Terrorism, And Homeland Security of the Committee on the Judiciary.

[21] Leadership Conference on Civil and Human Rights (2023, May 2023). *Civil rights organizations urge opposition to the Protect and Serve Act of 2023.*

[22] Olson, L. (2017). *Blue lives have always mattered: The usurping of hate crime laws for an unintended and unnecessary purpose*. The Scholar: St. Mary's Law Review on Race and Social. Justice, 20(1) 13, 26–27.

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[35] A rare exception to this statement are offenses for which Congress has expressly stated that a state conviction or acquittal for an offense arising from the same act or acts bars federal prosecution. *See* 18 U.S.C. §§ 659, 660, 1992, 2101, 2117; *see also* 15 U.S.C. §§ 80a-36, 1282.

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